GETTING EXTRA FROM THE ORDINARY

Maximizing Damages Trying the Smaller Case

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Before beginning the practice of law, Dan graduated from the University of Iowa earning his B.B.A. with distinction and honors in Finance. He then acquired his J.D., with distinction, also from the University of Iowa. During his final year, Dan was Editor-in-Chief of the JOURNAL OF CORPORATION LAW.

Upon graduation, Dan served as a prosecutor and defense counsel in the U.S. Army Judge Advocate General's Corps (JAG). He then joined The Carlson Law Firm, P.C., and has tried cases involving negligent security, commercial trucking collisions, product defects, highway design, medical malpractice, FTCA, premises liability, and car wrecks. Dan also contributes substantial time to writing articles for local and national publications, speaking to groups on various legal topics, and serving as an Adjunct Professor at The University of Texas School of Law.

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I. SCOPE.

It is my intent that this paper be a brief, very informal, discussion of some of the methods plaintiff's lawyers can use to increase the verdicts they receive on their average or smaller cases. It is not meant to be a comprehensive study of any one area of trial practice, but rather, a general overview of some strategies and techniques that have worked well in the past for this particular lawyer.

If you are in need of a thorough, heavily annotated, treatise on the subject, this is not your resource. On the other hand, if you are interested in a casual, practical and realistic discussion about how to maximize verdicts on smaller cases, it is my hope this paper will benefit you.

II. NO-LEGALESE DISCLAIMER.

I have stolen most, if not all, of my ideas and strategies from various authors, lawyers, friends and clients over several years. If I can recall who taught me a specific method or gave me an idea, I will credit them appropriately. If you are one of the people who gave me an idea and I fail to properly credit you, you have my word that I will share all the royalties I earn from this paper with you.

III. INTRODUCTION.

The question is how can we, as trial lawyers, motivate six or 12 completely disinterested persons to care enough about our client and our case to award more than nominal damages on a small case? As we all know, there is no one answer to this question. There is no single formula that, whenever employed, is universally successful in extracting substantial verdicts from all juries. Therefore, my goal in this paper is simply to present a number of ideas that have proven successful with some juries some of the time.

Before we can discuss how to persuade these jurors to award damages in smaller cases, we first need to examine how jurors think. Once we know how jurors think and make decisions, we can evaluate the most common motivations jurors have for awarding or not awarding damages. Lastly, we will explore how we can use these juror motivations and beliefs to our advantage at trial in achieving higher damage awards.

IV. TYPES OF JUROR BIAS.

A. Fundamental attribution error and defensive attribution.

Personal injury trials often involve situations where someone's life has been significantly and irreversibly harmed in an instant due to no fault of the person. One moment, the plaintiff is enjoying life with a loving family, a successful career, and a future filled with hope and promise. One moment later, everything is lost and the only thing the plaintiff knows now is that he will have

a future filled with excruciating pain every day.

When tragedy like this strikes, it can often seem very random and arbitrary. People do not like such uncertainty in their lives; it makes them uncomfortable. They want to believe that good things happen to good people and bad things only happen to those who deserve it. People want to believe that they have control over their lives. They want to know that if they go to work every day, be a good person, and take care of their family, everything will be fine.

Jurors in personal injury cases are forced to reconcile the plaintiff's story with their notion of a just world. The thought that this tragedy arbitrarily happened to the plaintiff makes jurors uncomfortable. If jurors accepted the notion that this terrible thing just randomly happened to the plaintiff, then they would have to make room for the idea that it could happen to them.

To avoid this anxious feeling, jurors look for a reason why it happened. This tendency to assume that if a person has suffered an injury, there is someone to blame is referred to as "fundamental attribution bias." Psychologists and jury consultants used to believe that this bias would generally work in favor of plaintiffs by causing jurors to lean toward finding against the defendant. If they blamed the defendant for the plaintiff's harm, then they could reject the notion that awful things randomly befall innocent people for no reason at all.

More recent studies, however, seem to indicate that jurors will more often look to the plaintiff's conduct as a way to separate themselves from the plaintiff's plight and resolve their discomfort.[1] This phenomenon is termed "defensive attribution."[2] Jurors will compare the plaintiff's conduct with what jurors believe they would have done in the same position. When making the comparison, jurors seem not to ask whether they have ever acted the same as the plaintiff did, but rather, whether hypothetically they would have acted the same way under the same circumstances. For example, if the plaintiff was on his cellular telephone at the time of the collision, jurors are less likely to ask themselves whether they have ever driven while talking on the phone, but rather, whether hypothetically they would have been on the telephone in that situation. If the juror can conclude that the plaintiff was irresponsible in some way and brought the harm on himself, then the juror can maintain their belief that life is fair.

Studies have also shown that the strength of jurors' defensive attribution is correlated to the severity of the harm suffered by the plaintiff.[3] In other words, the more severely the plaintiff is injured, the more uncomfortable jurors

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[1] N. Feigenson, et al., *Effects of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 1(6) LAW & HUM. BEHAV. 597 (Dec. 1997); V. Hans, *The Contested Role of the Civil Jury and Business Litigation*, 79(5) JUDICATURE 242-48 (Mar.-Apr. 1996).

[2] K. Shaver, *Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident*, 14 J. PERSONALITY & SOC. PSYCHOL. 101-13 (1970).

[3] M. Lerner & H. Goldbeg, *When Do Decent People Blame Victims?*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY, ch. 31 (S. Chaiken & Y. Trope eds., Guilford Press 1999).

feel, and hence, the stronger their urge to relieve their discomfort by finding a way the plaintiff brought this harm on himself.

B. Availability bias

People have the tendency to make decisions in accordance with the availability of information. If one side of an issue or story is presented well, but the other side is presented poorly or not at all, people will have the tendency to focus on the side that has the most available information.[4] If a trial focuses on the plaintiff's opportunity to avoid the harm he suffered, the jury is likely to focus on the same thing.

"Tort reform" propaganda has been so successful, in part, due to this availability bias. A large majority of people believe that there are too many lawsuits today, when in fact there are fewer lawsuits per capita today than in decades past. People believe juries award unreasonably high amounts of money to plaintiffs, when in fact the average jury verdict in a civil case today is smaller in inflation-indexed dollars than in years past. People believe these things because that is what the available information they have says.

C. Confirmation bias and belief perseverance bias

The confirmation bias describes people's tendency to search and recall facts that confirm their beliefs and either criticize, reject, or forget facts that do not support their beliefs. This bias also causes people to interpret ambiguous or neutral facts in a manner that supports their beliefs.[5] The closely-related belief perseverance bias describes a person's tendency to refuse to abandon their theory of what happened, even in the face of conflicting evidence.[6]

Research has shown that jurors develop a theory of the case early in the trial. The theory chosen is determined, in part, on the value beliefs the juror possesses when they come to jury selection. For example, a juror who believes teenage drivers driving sports cars routinely speed and drive recklessly will quickly adopt a theory that is consistent with that belief. If a party's theory is inconsistent with that belief, it will likely not succeed with that juror, regardless of the facts. The juror will filter the evidence they hear, picking out those facts that support their theory and closely scrutinizing, rejecting, or forgetting those inconsistent facts.

V. HOW JURORS THINK ABOUT PERSONAL INJURY LAWSUITS.

While every case and every venire is different, there are generally five attitude areas that people have

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[4] Kahneman & Tversky, *The Simulation Heuristic, in* Daniel Kahneman & Amos Tversky, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 201-08 (1982).

[5] Ditto & Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568 (1982); Lord, *Bias Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); Ross, et al., *Perseverance and Self Perception and Social Perception; Bias Attribution Processes of the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880-92 (1975).

[6] Nisbett & Ross, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 167, ch. 8 (1980).

pertaining to personal injury lawsuits.[7] They are the following:

A. The relative importance attributed to personal responsibility.

Some people believe that a person should take responsibility for everything that occurs to them in their life. These people will be more inclined to hold a plaintiff responsible for taking care of themselves and overcoming any hardship that may have befallen plaintiff. At the other end of the spectrum, people believe that a person's life is affected by their environment and various social factors. These people will be more inclined to look to external forces and actions of others as an explanation for the plaintiff's plight. Most people will fit somewhere in between these two extremes.

B. Tolerance for ambiguity and ability to appreciate complexity.

People have different amounts of patience and willingness to sift through voluminous facts and complex issues when determining liability in a case. While some folks are less detailed and have a desire to come to a quick conclusion, others are willing and able to meticulously pick through the facts presented and thoroughly evaluate all issues before reaching a conclusion. This attitude is very related to a person's attitude regarding personal responsibility mentioned above. Therefore, people "who seek simple answers to complex problems or who rush to closure find it difficult to hold named defendants liable when there is involvement by other unnamed defendants or even a tenuous basis to conclude that there was comparative negligence."[8] So, in the case of a low speed collision, if there will be extensive discussion about biomechanical, accident reconstruction, epidemiological, or injury causation issues, plaintiff's counsel will want to make sure the jurors have a high tolerance for ambiguity and ability to understand complex matters.

C. Respect for the law and the legal system.

Attitudes about whether and how the legal system should be used to resolve disputes can also affect how a juror will decide a case. Some people believe that people should not bring lawsuits regardless of the reason. Others recognize that it is a tool that society has employed for years to resolve disputes. Similarly, while some people will follow the judge's instructions regardless of their personal beliefs, others will vote according to their value system, whether or not they are complying with the judge's instructions. Counsel will have to evaluate the facts and issues in their case to determine what type of attitude is unfavorable and then strike those jurors.

D. Ability to empathize with one of the parties.

Many attorneys and consultants used to advise that one method of defining the "juror profile" was to pick those characteristics that were common

[7] National Jury Project, *Jurywork: Systematic Techniques*, §19.01 (West 1999).

[8] *Id.* at p. 19-10. See also, Vidmar, et. al., *Damage Awards and Jurors' Responsibility Ascriptions in Medical Versus Automobile Negligence Cases*, 12 BEHAVIORAL SCIENCES AND THE LAW 151 (1994).

to the plaintiff. The thought was that if the jury was filled with people having similar demographic facts and experiences to the plaintiff, the more they would identify with the plaintiff and the better chance they would vote in his favor. The theory of defensive attribution, however, has shown that often times, jurors with similar experiences as the plaintiff will actually impose a higher standard of conduct on the plaintiff and eventually vote against him.

If a juror has similar experiences as the plaintiff, they may display very different reactions. Firstly, the juror may empathize with the plaintiff because the juror has lived through the same sort of ordeal. Secondly, the juror may impose a higher standard of conduct on the plaintiff because the juror has had the same experience and they either did not receive any compensation or are physically okay now. Lastly, the juror may, as a function of defensive attribution, distinguish their experience from the plaintiff's and focus on something that the plaintiff did or did not do that brought the tragedy on them.

E. Views about financial compensation as a way of solving problems.

Jurors are generally concerned with three things regarding damages when they deliberate: (1) how responsible was everyone, (2) the purpose of awarding damages, and (3) the effect awarding damages will have on the defendant, them, or the public in general.[9]

Regardless of whether comparative responsibility was an issue in the case, studies have shown that juries will examine plaintiff's conduct both while determining liability and damages.[10] Therefore, the weaker the liability case in a juror's mind, the lower the amount of damages they will support.[11]

Because jurors are concerned with the purpose of awarding damages, plaintiff's counsel needs to demonstrate during trial that the plaintiff and/or the plaintiff's family will benefit from a large damage award. If a juror believes that an award for pain and suffering or for someone's death will not improve the plaintiff or his family's situation, the juror will not be inclined to support a large damage award.

Jurors may also be concerned with the effect a large damage award will have on the defendant or others. Jurors may believe that if they award a large sum of money to this plaintiff, that it will affect the cost of goods and services in their community. Or, their concern may be more of a systematic concern that if they deliver a large verdict, that it will only exacerbate the existing problem of large verdicts and drive up prices of insurance across the country. At the other end of the spectrum, some jurors may assume that

[9] *Id*. at p. 19-17.

[10] Vidmar, et. al., *Damage Awards and Jurors' Responsibility Ascriptions in Medical Versus Automobile Negligence Cases*, 12 BEHAVIORAL SCIENCES AND THE LAW 151 (1994); Bovbjerg, et. al., *Valuing Life and Limb in Tort: Scheduling 'Pain and Suffering,'* 83 NORTHWESTERN U. L. REV. 963 (1989); Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO STATE L. J. 172 (1958).

[11] Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 754 (1959).

higher prices are inevitable anyway, and concentrate more on the extent of the defendant's conduct.

VI. HOW JURORS DECIDE.[12]

Generally, jurors employ two different types of reasoning: inductive and deductive. Inductive reasoning is when a juror objectively weighs the facts on one side against the facts on the other side and comes to a conclusion. Deductive reasoning is when a juror forms opinions about the general issue presented and then looks to the specific facts to find support for the opinion.

Research has shown that many jurors reason deductively and the opinions they form are largely controlled by the values and beliefs they posses when they enter the courtroom.[13] In other words, jurors will typically apply their understanding of the ways of the world to the facts of the case, accepting some facts and rejecting others, and will make a decision that comports with their values on the general subject at issue.

Which method of reasoning a juror employs is related, in part, to whether they are affective or cognitive thinkers. Affective jurors make decisions more quickly on an emotional basis (deductive reasoning) and cognitive jurors are more likely to carefully and methodically weigh the evidence before deciding (inductive reasoning). Affective jurors are more likely to be religious or philosophical people. They tend to be more creative and to conduct their lives based upon their feelings or beliefs. Cognitive jurors are often described as very structured, detailed, and organized.

Regardless of what type of reasoning a juror employs, however, studies have shown that (1) jurors think in pictures, not in words, and (2) jurors will reach a conclusion that they feel good about in the end. In other words, **regardless of whether they are affective or cognitive thinkers employing deductive or inductive reasoning, their decision is driven by their emotions and their emotions are created by the pictures in their mind. Therefore, the party who can create the most vivid mental pictures in the jurors' minds will win, as long as those pictures comport with the jurors' general understanding of the ways of the world and allow the jurors to feel good about their decision.**

<u>Persuasion Formula</u>

- **Jurors make decisions using emotion**
- **Emotions are triggered by pictures**
- **Pictures are best created by stories**
- **Stories are better shown than spoken**

(See Appendix A)

[12] For a more complete discussion of juror psychology and decision making, I suggestion you read Richard Waites, *Courtroom Psychology and Trial Advocacy*, ALM Publishing, New York (2003) and Eric Oliver, *Facts Can't Speak for Themselves*, NITA (2005).

[13] Donald Vinson, Jury Persuasion: Psychological Strategies & Trial Techniques, 13 (1993).

VII. JUROR MOTIVATIONS TO AWARD DAMAGES.

Considering the above discussion about the ways jurors think and make decisions, we can make a list of the most common motivations for jurors to award damages in personal injury cases.

A. To punish the defendant.

A jury that is angry at a defendant will be motivated to punish the defendant. This is true regardless of whether you plead gross negligence and seek exemplary damages or not. It seems juries will often award more damages out of anger toward a defendant than empathy toward an injured victim. This can be true even if the plaintiff is not especially likable. As long as the lawyer has successfully pinned the defendant into the role of the villain, the jury will often award large damages even on a small case. The case becomes less about how to compensate to plaintiff, and more about how to get revenge against the defendant.

B. To correct an injustice.

The second major motivator for juries to award large damages is their motivation to correct an injustice. Jurors, even if they often appear disinterested, generally have a desire to discharge their duty fairly and render justice. The trial lawyer will want to provide the jury with the opportunity to satisfy their desire to stop a wrongdoing, "even the score," or enforce their personal belief that people should take responsibility for their wrongs.

Along this same line of logic, jurors will also sometimes have a desire to feel important or make a social statement with their verdict. This motivation goes beyond the case and parties at hand, but relates to jurors' sense of social responsibility. The lawyer will want to align a large damage award with the "greater social good" so that the jury will be motivated to find in his favor in order to make the world a better place.

C. To help the plaintiff.

Jurors are also motivated to award damages if they believe it will help a likeable plaintiff. Jurors will not typically give money for the sake of giving money, therefore, it is critical for the trial lawyer to explain how a large damage award would fix the plaintiff's problems or help them deal with issues that can't be fixed.

VIII. JUROR BELIEFS THAT CAUSE THEM TO NOT AWARD DAMAGES.

As trial lawyers, we not only have to be mindful of what motivates jurors to award damages, but we also have to know what causes them to not award damages. Three common causes of low or no damage awards are the following:

A. It was just a simple mistake.

If a juror believes that the defendant unintentionally made a simple mistake, they are less likely to support a large damage award. It is true that a simple mistake can constitute negligence, however, jurors do not

typically see it that way. Jurors see it more on a sliding scale where the larger the mistake, the more the defendant should be held responsible and the more likely the plaintiff was severely damaged.

This makes perfect sense when one compares this to the above discussion of what motivates a juror to award damages. If the defendant made just a simple mistake, then there is less of a desire to punish him, less of a perceived need to right an injustice, and less probability that the plaintiff is in need of significant aid.

B. Money will not help.

If jurors believe that the money will do no good, they are less likely to award damages. In order to give large damage awards, jurors want to know that it will make a difference in the plaintiff's life. If they believe it will have no effect, they view it as a windfall and award less damages. Therefore, it is critical for the trial lawyer to supply the jurors with ample evidence of the positive effect a large damage award would have on the plaintiff's life and future.

C. A large damage award will hurt everyone.

Over the last two decades or more, jurors have been told that the cost of goods and services, as well as the availability of medical care, have all been negatively affected by the number of lawsuits and high damage awards. It is not surprising, therefore, that most jurors come to trial pre-loaded with that belief. Unless their motivation to punish the defendant, correct the injustice or help the plaintiff outweighs this belief, the juror's damage award will likely be very small.

IX. USING JUROR BELIEFS TO OBTAIN A LARGE DAMAGE AWARD.

It is true that some cases simply cannot command a large jury verdict regardless of how skilled the lawyer or how likeable the client. If there is literally no visible property damage in an automobile collision, or the case has other extremely bad facts, it can create an invisible ceiling on the amount of damages a jury will likely award. Going back to the juror beliefs discussed above, it is difficult, if not impossible, to get a jury motivated to punish the defendant, correct an injustice or help the plaintiff if there really is no apparent or significant harm.

We can, however, create extraordinary results from our "ordinary" cases by doing, or not doing, certain things during the presentation of our case. I have noticed that when I have been fortunate enough to have received extraordinary results on ordinary cases, I have employed certain techniques and followed certain processes. Set forth below is a collection of these techniques and processes. Use them, improve upon them, and hopefully, you will receive truly extraordinary results on even your ordinary cases.

A. Create your mindset.

In approaching a "small" case, you have to convince yourself that your client's cause is just, worthy of significant time and effort, and deserving

of a large damage award. If you cannot get yourself to that place mentally, you have little chance of getting a jury there. This cannot just be another "little car wreck."

Maximizing damages in small cases is very difficult and time consuming. It is no different in that respect than maximizing damages in larger cases. Some lawyers find it difficult to spend the time necessary to properly work up smaller cases because of the chance they will not receive a large verdict. It is important for you to recognize, however, that the case is not just important to the client, it is also important you. You are not just trying this case, but you are essentially trying all the future cases you will have with this particular defense counsel, insurance adjuster, and judge. How well you do in this case will leave them all with an impression that will affect the value or respect you receive in future cases.

Your client's mindset is also very important. Some client's are very aware that the event upon which their case is based has had a significant impact on their lives. While no one likes a whiner, it is important that the client can feel and explain to the jury the injustice that exists in the case. If a client is viewing the case as just a "little car wreck", it will be treated as such by the jury. This is true even if the plaintiff's lawyer honestly believes the case warrants a substantial verdict.

B. Develop your theme.

A trial, like a good play or story, must have scenes, characters, to include a villain and a hero, a conflict, and a solution. It must also have a theme or morale that can be expressed very simply. **Try to identify the following things in each case and include them in your story:**

- **Villain**
- **Hero**
- **Injustice**
- **Struggle**
- **Hope**

To develop a theme that will resonate and be supported by the evidence, you first have to learn the case inside and out. This is not to say you need to evaluate it with your legal mind to identify all the potential evidentiary or procedural issues present. While that certainly must be done at some point, it is not necessary now while you are developing your theme. When you are learning the case to develop a theme, you must shelf your "legal" mind and stay in your "human" mind.

Knowing the facts of the case is important, but jurors are less concerned with "what happened," than with "why it happened." That is why our story to the jury must not just be a collection of facts in a certain order, but rather, a seamless blend of characters, motives, feelings, facts and vivid scenes that create pictures and evoke emotions that are supportive of our case.

To learn the "why" in the case, you must discover the characters involved. This will require you to figuratively, and sometimes literally, reverse roles with your client, the witnesses, the judge, the defendant, opposing counsel and the jurors.[14] If

[14] Role reversal is one of the most elementary forms of psychodrama and can be extremely

you can climb into their skin and feel what they feel, you will discover why they did what they did or didn't do what they didn't do. You will be much better equipped to tell your client's story and convince the jury that your case is true and worth everything you say its worth.

Once you have learned the facts and discovered the characters through role reversal, you are sufficiently equipped to develop your theme. A theme should be thought of like a movie poster in the window of a theater. This is the image, the feeling, the slogan you want the jury to keep with them at all times. It should be short and sweet. Examples might be, "It was the worst thing that could have happened" "It's time to make it right" "Life can change in an instant" "If he would have just taken a second to look" or "Things will never be the same."

There is no requirement that your case have only one theme. While you should avoid having too many messages jumbled in the same case or messages that are inconsistent, it might be helpful to have a couple of overarching themes depending on the case.

effective at allowing a lawyer to mentally and emotionally discover his case, learn his characters and develop his theme. One cannot master role reversal and other forms of psychodrama solely by reading. However, to simply learn what psychodrama is and how it can be employed in a trial lawyer's work, I would encourage you to read "The Psychodrama Papers" by John Nolte of the National Psychodrama Training Center. It can be ordered by going to www.lulu.com/content/2138446. I would also strongly suggest that you attend a regional seminar put on by the staff of Gerry Spence's Trial Lawyer's College. It will unquestionably be the most valuable experience you have had in your career.

C. Defendant's deposition.

The above-described steps should be done before you depose the defendant so that you can ask the appropriate questions at the defendant's deposition to develop your theme. For example, in a car wreck case, your theme may be that the defendant is refusing to accept responsibility for his actions, in spite of the wreck clearly being his fault. Keeping in mind what motivates jurors to award, and not award, damages, you might have the following objectives:

1. Create the villain.

In cases where the defendant has acted particularly egregiously, as in a drunk driver case, this may not be very difficult. But, in the "ordinary" case, it sometimes is challenging to get a jury angry at a defendant who accidentally ran into the plaintiff. Sometimes, the only way to do it is to contrast the defendant's actions with our jurors' accepted values. For example, you may want to ask the defendant questions on the following issues:

- His belief about whether someone should accept responsibility if they did something wrong.

- Whether he thinks people nowadays are more or less likely to accept responsibility for their actions.

- Whether he would be willing to accept responsibility if the jury found that he was at fault.

- Whether he recognizes the difference between accepting responsibility and being accountable.

- Whether someone should have to be forced to pay for their own medical expenses if they are injured because someone else was negligent.

In this first step, you are attempting to establish that the defendant believes in the same values we all do. If he denies these commonly held values, then he loses credibility with the jury. Typically, defendants will agree with the above-stated notions.

At this point, you can contrast his self-professed values with his actions. You might consider asking questions about the following:

- What did he do at the scene? Did he get out and render aid? Who did he call first? Did he call 911 at all?

- What did he do the next day? Did he ever call to find out if the plaintiff got her vehicle fixed? Did he ever call to make sure she was okay after seeing her injured at the scene?

- Did he ever know whether the plaintiff was incurring medical expenses? Did he ever know whether she was having difficulty getting medical care because he was denying fault?

Many if not most of these questions will often not be relevant to any material fact in the case. They still, however, should be asked at deposition and, if the judge permits, presented at trial. Often, the defense stipulates to liability in an attempt to exclude facts like the above. You can avoid this tactic by refusing to stipulate or explaining that the defendant's actions after the collision have increased your client's damages by preventing her from getting necessary medical care, increasing her pain and anxiety, increasing her impairment, etc.

2. Expose the injustice.

Again, in a case involving severe loss and/or egregious conduct by the defendant, it is much easier to expose the jury to the injustice that needs correcting. In the "ordinary" case, however, this can be more challenging. Often times, the injustice in the case is simply the unfair result that has befallen the plaintiff, and avoided by the defendant. To follow our example above, one could ask the defendant about the following:

- Did the defendant think about this collision at all after the day it happened until now?

- How has his life changed, if at all, as a result of the collision?

- Did he get his vehicle repaired immediately? Was he able to go and buy a new car? What did he get?

- How has his job gone since the collision? Has he been promoted or gotten raises?

- If he was hurt, did he get all the medical care he needed? Did he have to incur the expense? Did he fall behind on his bills?

The above is merely a partial example in a car wreck case, but these

same objectives can be accomplished in any case. When the trial lawyer reverses roles with the defendant, he clearly sees what choices the defendant made that were inconsistent with the jurors' values.

3. Defang defensive issues.

The defendant's deposition can also be a good time to take away some of the defense counsel's arguments for trial. These defensive issues go straight to those juror beliefs discussed above that limit their damage awards – simple mistake; money will do no good; and large award will hurt everyone.

In our example, some typical defensive issues might be the following:

- **Simple mistake.** Usually a defendant will have to admit that he, like the rest of us, has been held accountable for simple mistakes, whether it be at home with parents or spouse, or at work with his boss. Driving on the road should be no different.

- **Subjective injury.** A defendant who has been injured or felt pain but didn't have any objective signs of injury will be hard pressed to claim the plaintiff is not feeling pain simply because he can't see the injury.

- **Malingering or exaggerating**. If the defendant admits he has no reason to believe the plaintiff is lying, it makes it more difficult for the defense counsel to say otherwise. If the defendant attempts to claim that he thinks the plaintiff is lying, flush out the fact he has no basis for it and he will lose credibility with the jury.

- **Chiropractic treatment.** If the defendant has gone to chiropractors, then defense counsel will have a hard time saying such treatment is illegitimate.

- **Gap or delay in treatment.** If the defendant has waited to go to the doctor after being injured before, then it will be more difficult for defense counsel to blame the plaintiff for not going to the doctor immediately.

- **Pre-existing condition.** A defendant who has also suffered from a back injury knows such injury is easily exacerbated, potentially even in a low speed collision.

These are just a few examples of how the defendant's own testimony can be used to limit the arguments available to defense counsel at trial. Always video your defendant's deposition and have the ability to present it at trial.

D. Plaintiff's deposition.

1. It's all in the delivery.

The plaintiff's testimony is one of the most important factors as to whether you obtain a large damage award or not. While you should work with your client numerous times during the case so that they fully understand what you are trying to accomplish, you do not want to overdo it to where their testimony comes off rehearsed.

Numerous jury studies have shown that <u>what</u> is said by a witness is of less importance than <u>how</u> it is said. Approximately 93% of communication is nonverbal. Of that, 58% is nonverbal actions, and 35% is the way we talk or

the sound of the words. Therefore, only 7% of communication is composed of the actual words we say.[15]

In other words, the feelings or pictures the jury forms during the testimony is what they will recall later when evaluating a witness's credibility. Therefore, do not worry as much about what specific wording the client uses, as much as getting the client to be comfortable enough to testify with sincerity and feeling.

That being said, it is still critical that you spend sufficient time preparing your client for deposition and trial testimony. I find an outline helpful in preparing the client for their deposition. (See Appendix B). I suggest spending no less than three hours preparing a client for their deposition even in the simplest case. The more difficult the case or the less experienced or intelligent the client, the more time will be required.

2. Do no harm.

Because the plaintiff's deposition is usually all cross-examination, it is very difficult for the plaintiff to paint elaborate pictures or evoke significant emotion. Instead, the goal at the plaintiff's deposition is usually to just get it done without the plaintiff hurting her case.

It is important that you prepare your client so that they are aware of all of the potential defensive issues that will likely be explored by defense counsel. For example, some of the more common issues in smaller cases are:

- plaintiff exercising faulty evasive action in an auto collision.
- a premises condition so obvious the plaintiff should have seen and avoided it.
- a premises condition so small or inconspicuous that it is not unreasonably dangerous.
- a premises condition so small or inconspicuous that the defendant could not have reasonably noticed it.
- unanticipated road condition creating an unavoidable accident.
- unanticipated event or responsible third party creating a sudden emergency.
- lack of prompt or consistent treatment being a failure to mitigate.
- pre-existing condition being the true cause of extended or future treatment.
- plaintiff went to lawyer before doctor.
- lawyer referred plaintiff to doctor.
- location and intensity of plaintiff's symptoms changing over time.

Educating the plaintiff about these defensive issues may prevent her from delivering damaging responses to defense counsel's questions. While we always have the ability to go back and modify our responses when we review

[15] Presentation by Rex Parris, faculty, Trial Lawyer's College, 2006.

the transcript, that is not the ideal situation as many judges will allow both the original and amended response to come in front of the jury.

3. Share some of the story.

While our guidance to clients is typically to not volunteer anything during the deposition, this may not be appropriate in response to questions about noneconomic damages. Because most cases settle, you might consider showing your hand a little and have the plaintiff elaborate when explaining how the incident in question has affected her life and her family's lives. This is best done in the form of stories. Work with your client so they can offer a couple of intimate, sincere examples of how the event has significantly changed their life.

E. Group Formation.[16]

Group Formation is what most people refer to as jury selection or *voir dire.* Jury selection is a misleading term because, as the trial lawyer, we don't select anyone. Instead, we exclude those we do not want. Furthermore, I don't speak latin, so I don't know for sure what *voir dire* means. Judging from the number of definitions offered by various authors and speakers I've heard, I know that I am not alone in my ignorance. I prefer to call the process of jury de-selection "Group Formation."

Group Formation more accurately describes what we should be trying to accomplish when we are speaking to the venire. While certainly we want to identify and strike those jurors who have exposed themselves as adverse to our interests, that should not be our overriding mission or sole focus. Our primary objectives are to establish credibility with the venire and form a group who will work together with us to find justice for our client.

1. Identify the issues.

To identify what issues you should address with the venire in your case, simply ask yourself why you will lose the case, if you lose. Pick the top three reasons a juror would have to either find for the defendant or award little or no damages. These are the issues that you need to discuss with the venire.

While every case is different, many smaller cases have similar issues. I will limit my discussion solely to issues surrounding damages. A list of common issues affecting damages might include the following:

- Damage caps
- Runaway juries
- Frivolous lawsuits
- Insurance
- Cost of goods and services
- Non-economic damages
- Preponderance
- Subjective injuries
- Chiropractors
- Gap or delay in treatment
- Pre-existing condition

It can be a little frightening to spend your valuable time during group formation talking about all the worse parts of your case. The temptation is to

[16] This is a term I first heard used at Gerry Spence's Trial Lawyer College in 2006. This is the method taught at the College for selecting a jury.

persuade the panel and explain how you are going to overcome each of these issues. Doing so, however, will quash any chance you have of flushing out any unfavorable jurors.

Additionally, attempting to persuade the jurors is exactly what they expect you to do. Regardless of your amazing charisma and advocacy skills, you are not likely going to be able to cause a complete stranger to change the values they have possessed their entire life time. The better approach is to introduce the troubling issues in your case and watch how the jurors treat them. In essence, you can preview how deliberations would go with those particular jurors.

For each issue present in your case, determine whether you want an affective thinker or cognitive thinker? Do you want someone more likely to employ deductive reasoning or inductive reasoning? What sort of responses do you think you will hear and what do they mean? It is important that you play out the questioning in your mind before you address the venire. You must know what you are looking for before you can know how to treat a certain response when it arises in trial.

2. Opening comments.

There are lots of ways to open the session prior to group formation. The following is an example of some opening comments:

> Folks, I have some good news and bad news. First the good news. Like Judge Sleepy just said, this case is only going to take three days, which is pretty short for a civil trial. The bad news: not likely going to be a book deal for anyone at the end of this trial.
>
> More good news. You people in the back, less of a chance you will end up on this jury. So, you know that if we are not asking you as many questions, it is not because we don't like you or want to hear what you have to say. As you people in the front might have already guessed, the bad news is that there is a greater chance y'all will end up on this jury. So, we will probably be talking to you more.
>
> Lastly, the bad news first. I will likely take longer than Mr. Sneaky. The good news is that, while I am asking my questions, he is going to be writing down y'all's responses so he won't have to ask those same questions over again.
>
> While we are going to do our best to be as efficient as possible, because this case is so important, we want to take be sure to take our time to get it right.
>
> I would like to start by talking a little about how we all got here. Back on February 2, 2007, Sally was sitting at a stop light at the intersection of Smith and 1st Street when, suddenly, she was stuck from behind by a car driven by the defendant, Mr. Tortfeasor.

> Sally was in shock, she had never been in a wreck before. So, she went to the doctor and tried to get better. She was not familiar with how the whole claims process worked, so she came to me. That's how I got here. I tried to help her out, but when we were unable to get things taken care of, we were forced to file this lawsuit.
>
> And, that's how Mr. Sneaky got here. Mr. Sneaky is a defense counsel and he represents Mr. Tortfeasor. They filed an answer to the lawsuit and requested a jury, and that is how y'all got here.[17]

There are many effective ways to open your group formation. The above example attempts to achieve a few things:

- Sets a friendly, light-hearted tone that is non-threatening.

- Lets the panel know what to expect. This lowers their anxiety level. It also prevents jurors in the back from becoming upset that no one is paying attention to them. It prevents jurors in the front from feeling picked on. It prevents the jurors from thinking you are wasting their time because you took longer than defense counsel.

- It informs the jury that the plaintiff has not been involved in a collision before.

- It informs the jury that the plaintiff hired a lawyer simply because she was unfamiliar with the process, not because she wanted to strike it rich.

- It implies there was an attempt at settlement negotiations and the plaintiff was forced to file suit when that didn't work.

- It informs the jury that the defense counsel and the defendant are the reason the jury is here on this case.

As with anything else in trial, how effective this or any opening is depends, in large part, on the delivery. You must be natural and real, not slick, polished, confused or overly nervous.

I would suggest not divulging any more facts about the case than are absolutely necessary. In most smaller cases, you should be able to simply state the general nature of the case. If there are "hot button" issues in the case such as leaving the scene, drunkenness, criminal history, etc., then you may have to go into a little more detail.

3. Question the panel.

There are numerous ways to bring an issue up with the venire. One way is to simply describe the two sides of the issue and ask which side more closely describes the juror. For example,

> Chiropractors. Some people swear by them. Some people swear at them. Some folks believe chiropractors are great and then other folks believe they are not real doctors and would

[17] I got some of the ideas behind parts of this introduction from an ATLA presentation by Janice Kim, a lawyer in Hawaii.

not go to them. Juror 7, which best describes you?[18]

Another good example of this is from David Ball in his book, *Ball on Damages*, where he suggests asking potential jurors the following question:

> One of the questions on our verdict form will be how much money Sally should get. When figuring this out, some folks feel you should consider only the amount of harm. Other folks feel it's important to consider other things, such as how sorry they might feel for the plaintiff, or the fact that money cannot make the pain go away, or the fact that enough money to equal the harm might make prices go up for things or services we have to buy, or how much you like the plaintiff, or whether enough money to equal the harm would be too much money for one person, or seem like a windfall – or any other considerations other than the amount of harm. Mr. Juror, do you think you might be a little closer to folks who'd base their verdict amount only on the amount of harm? Or a little closer to folks who think it's important to take those other things into account at least a little?

When delivering the two alternatives, phrasing can be important. Make the alternative that is favorable to you more extreme than the alternative that is adverse to you. Remember, you are trying to lower the resistance for an adverse juror to admit their bias. If you make the adverse alternative more radical, you will reduce your chance of getting an adverse juror to volunteer.

Additionally, make the adverse alternative the second of the two options given in the question. This is especially important for longer questions that could potentially lose jurors.

When we phrase the adverse option in a more accepting way or deliver it in an encouraging manner, this is not to trick jurors into admitting a bias they don't have. We are simply delivering the questions in a way that will make it most likely that someone with a genuine bias will respond.

Another way to present an issue to the venire is to first tell them why you are concerned with the issue. This is a method taught by Gerry Spence. He advises lawyers to "show them yours, and they will show you theirs."[19] This method requires you to be very honest with yourself about your case. Why does this issue concern you? You might find that the issue concerns you because you are insecure about your ability to

[18] This example is similar to one given to me by Robert Swafford, a jury consultant practicing in Austin, Texas.

[19] Gerry Spence has broken the group formation process down into seven steps. They are:

- Identify those matters that trouble you the most about the case.
- Explore your personal feelings about the matters that trouble you.
- Determine why you are troubled.
- Share your feelings about the matters with the jury.
- Invite the jury to share their feelings about the matter with you.
- Accept and honor the gifts the jury gives you.
- Continue to share your feelings and invite the jury to share theirs.

educate the jury on the issue. An example of how you could introduce an issue using this method could be:

> Sally has a condition called fibromyalgia. Now, when she first came to me, she didn't know what her injury was. I didn't either. Her doctors ran test after test and everything came back negative. And, I haven't told Sally this before today, but I really started to wonder if there was anything wrong. I mean, all the tests came back normal. She said she was in pain, but I had no proof. I felt like I wanted something, like a scan or film or test or something, that showed what was wrong. Do any of you feel that same way?

This method can be very effective at lowering jurors' resistance to volunteer bias, however, it must be done in a very sincere manner. It should not be delivered as if it is just part of your routine. You should speak slower, make eye contact, and be sincere about your revelation to the jury.

Regardless of how you introduce the issue to the venire, once you get a positive response, flush it out with open-ended questions. "Tell me more." "Help me understand." "Why do you feel that way." Truly listen to their response and make sure you watch for any non-verbal cues from the responding juror or others listening to the discussion. Do not interrupt, nod quickly, or affirm the responses over and over with "yes" or "okay." These things can cause the juror's response to be incomplete.

If the open-ended questions reveal a genuine bias, then shift to closed-ended questions and see if you can establish the basis for a causal challenge. First, get the juror to agree that their feelings on the issue are firmly held. "It sounds like you feel pretty strongly that you could not award damages for something intangible like pain and suffering."

After the juror admits his feelings on the issue are firmly held, clarify that the juror had these strong feelings before they came to court today. "It is fair to say these feelings come largely from you having been a defendant in a lawsuit just last year. So, obviously, you felt this way before you came to court today."

You can lock them into a causal challenge by simply saying, "So, it is fair to say that, regardless of the facts, law or instructions *(said quickly)*, you just could not consider giving money to someone for something intangible like pain and suffering."

If you want, you can also protect the juror from rehabilitation by the defense by saying, "I appreciate your candor. The answers you have just given me were, obviously, the truth, right. And if anyone else were to ask you the same questions, the judge, the defense counsel, your answers would be the same, right."

Some defense counsel like to object during group formation on the basis that your questions are not aimed at a disqualifying bias, therefore, they are improper. Remember that you are entitled to question jurors not only about issues which could form the basis for a

causal challenge, but you are also entitled to inquire about issues which would be useful in exercising your peremptory challenges. So, if a juror has an inflexible attitude about an issue in the case, you are entitled to discover that regardless of whether it would every rise to the level of a causal challenge.

F. Plaintiff's case.

1. Examinations.

Your witness examinations serve as your opportunity to tell your story to the jury through others. Before trial, during your theme development, you should have picked a few scenes that best describe your story. Prior to trial, you should have worked with your client and the other witnesses and prepared them for telling their stories in present tense.

During your examinations, you will want to take the time to set those scenes with vivid detail. Take the witness there in present tense and have them describe the scene using all of their senses. For example, do not ask the witness, "what did you see?" Instead, ask the witness, "Take me there on that day. What do you see?"

Also, take the time to have the witness explain what they are thinking at the time. This provides the "why" that the jury is interested in. Recall from the previous discussion above, jurors are less concerned with what happened, and more interested in why it happened.

Having the witnesses, especially the plaintiff, describe what they are thinking as the scene is unfolding also provides a great opportunity for the jury to actually feel what the plaintiff felt at the time. Even if it was a mundane, routine collision in your world, odds are it was not that way for the plaintiff. The plaintiff should describe what she was thinking at the moment of impact and shortly thereafter.

With the plaintiff, spend more time discussing what life was like before the collision than what she has been through since the collision. What were her and her families' plans for the future? What was she looking forward to in life? Studies have shown that jurors are more motivated to award damages for the loss of hope and a bright future (deprivation of a positive) than past pain (suffering of a negative).

Create the action in present tense as well. For example, do not ask, "What happened next?" or "What did the defendant do then?" Instead, ask "What is happening when…." You can speed up the examination to emphasize how quickly something occurred or slow it down to achieve the opposite.

In appropriate situations where it would be helpful, you can have the witness leave the stand and re-enact the scene in front of the jury. If done correctly, this can be a powerful way to place the image you want in the jurors' minds. And, as discussed above, **when a juror adopts a version of the facts that is consistent with his value beliefs and understanding of the ways of the world, he will filter the remaining evidence he hears. He will accept that evidence that is consistent with his theory of what happened and reject evidence that contradicts his theory. By being able to present our case first,**

the plaintiff has a tremendous advantage in this respect.

2. Things to include.

There are some common characteristics of ordinary cases that result in extraordinary damage awards. Some of them are the following (in no particular order):

● **Likeable plaintiff.** As discussed above, one of the motivations for a jury to award large damages to a plaintiff is if they are inspired to want to help the plaintiff. For the jury to like the plaintiff, you have to first. If you are having difficulty finding a way to like your client, practice role reversing with the client until you can better understand who they are and empathize with where they have found themselves today. Unattractive personality traits often originate in a person's past. By investigating the client's history and upbringing, you may find a whole new theme or part of the story.

● **Defendant is an evil doer.** One of the, if not the, strongest motivators for a juror to award large damages is if the defendant is revealed as a bad person or bad actor. By proving this, you can also tap into jurors' desire to correct an injustice. This is not to say you should attack the defendant on the stand or during argument, but simply show the jury how his values and actions diverge from what we all find acceptable.

One of the best ways to case the defendant in a poor light is to start your case by either calling him live to the witness stand or by playing excerpts from his videotaped deposition. This focuses the jury on the defendant's conduct immediately. Also, a well presented selection of video clips showing defendant's most damning testimony can have a devastating affect on the defendant's case. By the time the defendant takes the stand during his case, his credibility has already been determined by the jury.

● **"Piss off" factor.** As discussed above, it can be difficult to get a jury emotionally charged about an accidental collision or an event resulting in seemingly moderate harm. Many times, however, the "piss off" factor will lie in the defendant's acts or omissions either before or after the actual event. Facts about where he was going at the time of the collision, what he did immediately after, what efforts he made to avoid responsibility, or other such facts can mean a lot to the jury even though they may not go to any of the elements of the cause of action.

A relatively common strategy by defense counsel is to stipulate to liability shortly before, or the day of, trial. This can provide an opportunity for you. Contrast for the jury the legal strategy by defense counsel to stipulate with the prior refusal to take responsibility by the defendant. Explain to the jury how defendant's 11th hour stipulation just adds insult to injury. The defendant denied responsibility all this time, preventing plaintiff from getting necessary medical care, etc. and then, as if the whole thing is just a game, comes in the day of trial and stipulates to liability.

● **Credible plaintiff's lawyer.** Earning credibility during group formation is one of your primary

objectives. Once earned, it can determine the result of the trial. It can, however, be lost in an instant if the jury senses you are bolstering, not sincere, or overreaching. Many of the characteristics discussed in this section can be absent and a large damage award still result. Such is not the case for this factor. If the trial lawyer losses credibility with the jury, he is almost certain to lose the case as well.

● **Evidence of insurance.** Introduction of evidence of defendant's liability insurance to prove he is negligent is prohibited. TRE 411. Introduction of evidence of defendant's liability insurance for any other reason is not prohibited. While I do not encourage affirmative use of evidence of insurance, you can count on overzealous (most) defense counsel opening the door at some point during trial. So, when defense counsel asks your client why they went to a lawyer before a doctor, or why they filed suit, or other such irrelevant inquiries, they have to live with the response.

● **Implication of settlement negotiations.** Similar to the above discussion about insurance, many defense counsel simply cannot help themselves when they are trial. They will invariably ask the client when they hired a lawyer or why they didn't go to the doctor sooner. While you typically will move *in limine* to prevent such irrelevant inquiries, often that serves as little deterrent. When defense counsel inquires, do not object, and again, they will have to live with the response.

● **Objective injury.** "Objective" can mean a lot of things. Higher damage awards are more probable when the plaintiff has fractures, scars, herniations, etc. But, even with simple "soft tissue" injuries, you can objectify those injuries through the well-prepared testimony of a treating doctor or therapist. X-ray films showing loss of lordotic curve, positive findings on orthopaedic tests, muscle spasms, etc. can serve as the basis for "objective" findings indicating injury.

● **Future damages.** Large damage awards are more likely if the plaintiff has the potential for future damages. While you never want to overreach, through testimony of the plaintiff and her doctors or therapists, you can establish some future damages at a minimum. Remember the discussion above: jurors are more likely to award damages if they believe it will make a difference or help the plaintiff in the long run.

3. Things to avoid or explain.

There are a number of issues common to smaller cases that result in minimal damage awards. It is important to remove them from the case early on if at all possible. If the issues are present in your case, then you have to figure out a way to explain or address them with the jury. The following is a list of some of the common issues that drive damage awards down and some suggested ways to deal with them if you find them in your case.

● **No visible property damage.** This is a difficult issue that tends to place in invisible ceiling on your damage award. Ways to deal with this issue include having a mechanic testify about the damage to the interior of the vehicle such as the impact absorbers. Testimony

from the vehicle owner about how the vehicle handled after the collision. Also, a discussion during group formation about jurors' experiences sometimes will defang the defense's argument that low impact equals no injury.

Finally, you can file a motion to exclude evidence of property damage or description of the impact unless the defense presents qualified expert testimony. These motions, unfortunately, are rarely successful.

- **Lawyer referral to doctor.** If this issue is present in your case, the best way to deal with it is to start during group formation and talk about it. Explain your dilemma: a client, someone you care about, needs a doctor. Do you tell your client who they might try, knowing that a defense lawyer someday will try to make it look like some insidious relationship? Or, do you just let your client suffer or end up in the care of someone not knowledgeable? Does the jury think that you, as their lawyer, have a duty to help them?

You should also call the doctor live to have him testify that there is no improper relationship between you and him and to give him an opportunity to bolster his credentials and credibility with the jury.

- **Letter of protection.** The same danger exists with letters of protection where the doctor agrees to collect his bill once the case has resolved. The defense can sometimes make these look like improper relationships between lawyers and doctors. The defense can also imply the doctor's testimony is biased because he still needs to be paid. A proper direct and re-direct can take care of most of these issues, however, is still something to avoid if you can.

G. Argument.

1. Opening statement.

Similar to other areas of trial, there is no one formula for making an opening argument. One method is outlined below: [20]

- Step 1: Intro and Story
  - > Part A: state a rule no one can disagree with.[21]
  - > Part B: go to the story. Present tense. Don't mention Plaintiff until the end.
- Step 2: Right and Wrong
  - > Part A: why are you suing? Defendant did something
  - > Part B: what is wrong with what Defendant did
  - > Part C: How did what Def did cause harm and who will say it did?
  - > Part D: What should Defendant had done instead?
  - > Part E: How would it have helped?
- Step 3: Undermine the opposition. Before we came to trial, it had to be determined XYZ, so we talked to Persons 123 and they told us…
- Step 4: Damages. Should account for 1/3 of the time.

[20] This example is taken, in large part, from a speech given by David Ball.

[21] Stating a "Rule" that everyone agrees with is a technique advocated by Rick Friedman and Patrick Malone in their book *Rules of the Road*.

- > Part A: mechanism of harm.
- > Part B: step by step, tie mechanism to injury.
- > Part C: what does something like that do to a "person"?
- > Part D: what did it do to Plaintiff?
- > Part E: treatment.
- > Part F: who was the client before the injury?

This is just one way to organize your opening argument. Regardless of how you organize your argument, it is important that you tell a story that is compelling and continues the theme you revealed during your group formation.

In a compelling story, "good triumphs over evil, virtue is always rewarded, the lie cannot live forever, people who work hard and follow the rules will be rewarded."[22] Gerry Spence says, "A story needs to have a hero and a villain, right and wrong, pain and retribution, and a struggle for which the jury can grant the plaintiff the ability to overcome."

Tell your story in present tense whenever possible. It is much easier for the listener to create mental pictures from your story if it is told as though it is happening as you speak.

Also, focus on the defendant's acts and omissions, rather than telling the story from your client's vantage point. Jury studies have shown that if the juries are more likely to find fault with the defendant when the story is told from his vantage point and is focused on what he did or didn't do.

When you are telling the plaintiff's story in opening, keep your sentences factual, without descriptive language or words that embellish or characterize the actions you are describing. Remember, in opening, you are still earning credibility with the jury. They expect a lawyer to try to sell them something or trick them, so it is better to not raise their suspicion. Tell them what happened and let them come to the inescapable conclusion that the defendant was negligent. They will be much more likely to hold on to that position if it is something they came to on their own.

2. Closing Argument.

Similar to opening statement, there is no one magic formula for closing argument. The general guidelines of staying in present tense and including the elements of a compelling story mentioned above remain the same. What you say and how you say it, however, largely depends on you, your client, and your case.

Know that the jury just wants you to be honest. It is more important to be real than to be perfect, so memorizing someone else's tricks and phrases is not as effective as telling your client's story from the heart. If you do not reveal yourself to the jury, someone else will.

Set forth below are just a handful of tips or arguments that have been well-received in the past. I would encourage you, however, not to adopt these arguments as your own, but rather, simply use them to spawn your own

[22] Jim Perdue, *Winning with Stories*, 6, State Bar of Texas, Austin, 2006.

stories, ideas, and themes, personalized for your client.

I would also encourage you to deliver your story in your own way; a way that is true to yourself and your case. Many of us have made the mistake of trying to mimic someone else in trial.

3. It is not about who pays, it is about whether the plaintiff is the only one who pays.

Normally, this argument starts out something like the following:

> Ladies and Gentlemen, this case is not about who pays. We talked about that during voir dire, do you remember? Whether this verdict will be paid someday or whether this defendant will be the one who pays it is not your concern. The court and the parties will take care of that.
>
> This case, rather, is about whether Sally will be the ***only one*** who pays. You see, up until now, Sally has been the only person who has paid anything in this case. She has paid in money, pain and emotional suffering. Let's look at what has transpired in this case since the collision and see who had paid the price thus far.

This argument is helpful in a few of ways.[23] First, it allows you to reinforce the fact that whether a verdict is paid or who pays the verdict is not the jury's concern.

Secondly, this argument allows you to tap into one of the motivations that jurors have to award damages: to correct an injustice. Essentially, you want to create a timeline and paint two drastically different pictures; one of your client's life since the collision, and the other of the defendant's. I normally do this graphically on butcher paper or in a powerpoint slide. (See Appendix C).

While doing this, you can briefly mention the fact that the client had to go to the time and expense of hiring a lawyer and preparing for trial. It is not that you are asking the jury for attorney's fees or expenses, but simply discussing the effect these facts had on the plaintiff's mental anxiety.

Lastly, this argument characterizes the damage award in terms of reimbursement for costs already incurred. Jurors are more willing to award damages if they belief the plaintiff will not receive a windfall.

4. It is about choices.

Another method that can be helpful is to contrast the choices the defendant made with the choices the plaintiff had taken away from her.

For example, the following is an excerpt from a closing argument I recently gave in a case (have changed the names):

> Ladies and Gentlemen, I'd like to talk to you briefly about what I think this case is about.

[23] I first heard an argument like this during a lecture by Janice Kim.

It's about the choices that Charles Smith made and it's about the choices that Sam Bennett didn't have an opportunity to make. The choices that were taken from him.

Charles Smith on February 19, 2003, he's the one who chose to drink at the barbecue. He's the one who chose to drive all the way across town to try to – as he put it – "hang out" with a college co-ed living on the north side. He's the one who chose to do that. He's the one who chose to drive on the wrong side of the road into oncoming traffic in the middle of the night. That's a choice, that's not an "opps." We talked about that in *voir dire*.

* * * *

But he didn't have to continue to make bad choices. I mean, he could of at that point maybe started to rectify things. But he continued to make choices, didn't he? We know what he did. He chose to leave the scene that night. That's his choice.

And, then he chose to go to Taco Cabana and run into somebody else. That was his choice. He chose to order a burrito instead of calling the authorities. That was a conscious decision.

* * * *

And then, the next day when – when maybe he might could have made it right. At the last second he made another choice, didn't he? And that choice was what? He called up his representatives. He talked to everybody he knew and made up this amazing story about how he, actually, was the victim of a hit and run. And that's why his car was damaged and that's why he needed to get it fixed. Those are all choices that he made.

He also made a choice to add insult to injury. He continued to deny and avoid responsibility in this case for four years while Mr. Bennett struggled to put his life back together.

* * * *

What effect did those choices have on Mr. Bennett? Think about the choices that he didn't get to make. He didn't get to choose when he was going to lose his vehicle and have to go looking for another one. Right? That was dealt to him. He didn't choose to go to St. David's that evening and incur those bills and incur bills with the EMS truck. He didn't choose that. He didn't choose to be injured – his knee and back – he didn't choose to have that sort of thing. He didn't choose to spend the next two months going to the doctor. He didn't choose to lose his job. He didn't choose to get into complete financial dire straits because of this. That was all a choice that was dealt to him by

> Mr. Smith. And that's why I think this case is about choices.
>
> And at the end of this case, y'all are going to have a choice aren't you? You're going to have to choose what to do with this case.
>
> * * * *

Another way to argue this point is to graphically illustrate the choices the defendant made and contrast them with the choices that he should have made. Then, tell the jury their verdict represents the difference between what happened and what should have happened. See Appendix D for an example of a demonstrative aid to use with this argument.

5. Method for calculating noneconomic damages.

Many times during group formation, you will hear comments from jurors that they would have difficulty awarding noneconomic damages because they don't know how to put a dollar value on something as intangible as pain or suffering. To deal with that, David Ball suggests promising the jurors that you will show them how to do that by the time the case is done. Then, in closing argument, reveal to them the formula to use in computing noneconomic damages.

When I use this approach, I have used the demonstrative aid attached as Appendix E. This gives the jury a graphical depiction of the method they should use in determining noneconomic damages. This method is helpful for those jurors who like a step-by-step process for reaching a conclusion.

When explaining the chart, you can say that cases in a certain category are worth $X, and cases in another category would typically be worth $Y. The purpose is to give the jury a frame of reference advantageous to your case.

It is important to note that when using charts and arguments like David Ball's example above, you do not lose the story. Remember that, ultimately, the jury must be emotionally invested in the case enough to cause them to support a large damage award. The best way to create that emotion is through stories.

6. Lemonade out of lemons.

Rebuttal argument is a prime opportunity for you to take the defense's arguments and turn them around. For example, if the defense is implying that your client is exaggerating his symptoms or trying to use the incident as an opportunity to profit, you can respond with something like the following:

> If Sally was trying to make something out of nothing, like the defense wants you to believe, then she really did a poor job at it. If Sally is faking and just trying to get rich, why didn't she grab her neck at the scene and demand that EMS be summoned? Why didn't she go to the ER and have numerous scans and diagnostic testing done to run up her medical expenses? Sally did the same thing the rest of us

would have done; she tried to get along the best she could. She had to miss some of her appointments because that is the only way she could keep her job and support her family. I guess if she wanted to build her case, she would have just sat home and watched TV and claimed a bunch of lost wages. That's not who she is. She is a fighter, doing the best she can in spite of what the defendant did to her.

In this example, you can take the defense's argument and (1) point out its absurdity, but also, (2) weave it into your theme that Sally is a fighter, the underdog, the victim struggling to survive. Jurors want good to triumph over evil, they want hardworking people who follow the rules to win in life, and they want to feel good about being able to help someone in need.

7. Call a spade a spade.

Do not be afraid to characterize the defense's position accurately and frankly.[24] Often in small cases, the defense's entire case is simply to come in and try to cast doubt on (1) the cause of the injury and (2) the extent or existence of the injury. They rarely have any expert testimony. Defense counsel simply stands up and offers expert medical and engineering conclusions for which he is not qualified. They point out completely extraneous facts such as when the plaintiff saw the doctor and when she saw the lawyer. Or, they bring up the fact that the treating therapist has a letter of protection with the lawyer and imply that the treatment is manufactured.

Their *modus operandi* is so predictable that you can give the jury some foreshadowing during your initial closing argument. For example:

> Mr. Sneaky has done a fine job in this case, but the fact of the matter is, he has no case. I've been there in that chair before and I know what it is like. What can you do? You don't have a doctor who will say that the plaintiff is not injured, so all you can do is stand up and argue it yourself. Just take pot shots at the medical records and argue she's not injured. You don't have an engineer who will say that this collision could not have resulted in injury, so all you can do is stand up, point at the photographs and argue.
>
> And that is what he will do. Throw it all up against the wall and hope something sticks.
>
> At the beginning of this case, y'all took an oath to follow the judge's instructions, to follow the law. The judge has instructed you to base your decision in this case on the *evidence* and *only* on the evidence presented in this room. So, when Mr. Sneaky stands up and makes those arguments, ask him in your mind, where is the evidence? Demand from him that he shows you the evidence.

When the defense makes these sort of arguments, tell the jury truly what

[24] For a more thorough discussion of this method, see Rick Friedman's book entitled, *Polarizing the Case*, Trial Guides (2007).

they are doing. Do not allow defense counsel to dress their argument up in politically correct terms to make it less offensive. When the defense argues that the wreck didn't cause the plaintiff's injuries, they are saying the plaintiff is lying. When the defense argues that the plaintiff didn't need the medical care she received, they are saying the plaintiff is lying. So, call it what it is. You might consider trying something like the following:

> The defense has added insult to injury in this case. It was not enough that the defendant wrecked Sally's car. It was not enough that he hurt her and caused her to go into debt with medical expenses. It was not enough that he didn't care even so much as to call and check on her once over the last three years. It was not enough that he caused her to loose two months of work. It was not enough that, in spite of being faulted by the responding officer, he refused to own up to his mistake.
>
> No, none of that was enough. He had to also have his lawyer call her a liar in open court and take away Sally's good name. Now, he may not have used that word, but don't kid yourself. That is exactly what he means. On public record for everyone to see, they came in here and said she is not injured, she didn't need all that treatment. The one thing that they had not taken from Sally before today, now they have taken. And for someone proud like Sally, this hurts as much as all of the other harms combined.
>
> Unlike Sally's back, you can fix this harm. Through your verdict, you can tell the defense, you can tell the community, that Sally is not a liar. With a full and fair verdict, you can give back Sally her good name.

Another argument is to focus on the efforts by the defendant to avoid responsibility for the incident. For example, "they devoted not one piece of paper toward training their drivers on safety, but look at all the paper (pointing at the defense counsel's table) they have wasted coming up with excuses for running into Sally…." Another example might be the following:

> She kisses Bill goodbye in the driveway that morning as he leaves for work. She turns and starts to walk inside. There is a letter on the step by the door. It is from Acme Company. She opens it.
>
> Sally,
>
> That is the last time you will see Bill pain free. I am going to get in my truck. I will be too tired to drive because I have been working double shifts for a week. I will not be paying attention and I will slam into the rear of Bill's vehicle. You won't ever really get to know what happened or why – not unless you go hire lawyers and sue me.
>
> And even then I will try to avoid responsibility. I will make excuses, and my lawyers will try

> to blame the collision on Bill. I will never take full responsibility for my actions. My lawyers will take Bill's life apart, and yours too. They will focus on the ugly and the bad. They will expose every part of Bill's life that they can to make the jury think poorly of Bill. My lawyers will make you and Bill go to depositions, they will hire experts, and they will spend whatever it takes to try to buy my way out of having to be accountable for what I did. They will subject you and your family to trial if they have to, and they will do everything in their power to convince a jury that Bill's pain is worth nothing.
> Sincerely,
> John Driver
> Acme Company
>
> Now, we are in trial. We are still trying to make them admit that they are responsible and to be accountable for their actions. They don't get to set the price they will pay. You do. What will justice look like?[25]

Be careful that when you attack defense counsel's arguments, you do not also attack defense counsel. In spite of the potential ethical violations, personal attacks on the defense counsel or the defendant are usually not received well by the jury.

8. Valuing pain.

As discussed above, juries award larger damages when they believe it will do some good. Many jurors believe that compensation for pain and suffering achieves nothing. The pain is still there whether the plaintiff has money or not. So, the best way to get a jury to award damages for pain is to (1) get them to truly understand the importance of valuing pain and (2) characterize the award as paying the plaintiff for a debt owed to her by the defendant, rather than just money for pain.

To get jurors to recognize the importance of considering awarding damages for pain, you might try the following:

> Placing a value on Sally's pain is a tough question. But, just because it is tough doesn't mean we don't do it. Regardless of our personal or political beliefs, we took an oath at the beginning of this case. An oath that we would follow the law in this case and the law requires us to award damages for each harm that you find Sally suffered as a result of the defendant's negligence. If you find Sally has suffered and continues to suffer pain, then your oath requires you to value that pain and award damages accordingly.

Or, you could try something like the following:

> Some folks say, "Why award any money for pain, it's not gonna take the pain away." We talked about that during *voir dire*. The only question for you is, "what is the value of the harm?" That's it. Nothing else. It doesn't matter whether you like the plaintiff or like the defendant.

[25] This example was taken from a lecture given by J. Jude Basile at the Trial Lawyer's College.

> It doesn't matter whether the verdict is paid or who pays it. It doesn't matter that money can't make the pain go away. So, if during deliberations someone brings up these things that we can't consider, be sure to remind them that the only question is, "what is the value of the harm?"

After emphasizing to the jury the importance of them following their oath and awarding damages for pain, try to get them to appreciate the significance of pain as part of your client's total damages. You might try one of the following examples:

> Determining what pain is worth is a difficult task, but really, when you think about it, we place a value on pain all the time. As a society, we pay billions of dollars each year on over-the-counter pain medication to avoid pain. We will gladly spend $100 or more for a shot of Novocain or thousands of dollars for anesthesia to avoid pain during surgery. If you read the Bible, you know that the Bible describes hell as unrelenting pain. When we punish our worst criminals, we put them to death. We don't subject them to pain. That would be cruel. So, for centuries, we have valued pain. And we know it is something we will do almost anything to avoid.[26]

Or, you might try this:

> I'd like you to take a moment right now and think for me. Think of someone you love very dearly. You are scheduled to spend some time with them and you are at home waiting for them to come over. They are late. It is not a big deal as they have been late before, but yet, you are worried a little. Your phone rings and you suspect it is them telling you they are on their way. You answer the phone, but it is not them. It is a voice you don't recognize. It is a police officer and you have just gotten the call we all dread getting. The person you love so much has been involved in a wreck.
>
> What is the first thing that goes through your mind when you get that call? "Oh my God, I hope they are okay. I hope they are not in pain." That is what you are worried about. That is what makes your heart race and your hands sweat. You aren't thinking, "Oh my God, I hope they don't have to miss work." Or, "I hope they aren't incurring medical expenses they can't afford." While those things are real, are not nearly as important as whether the person is in pain. So, you see, we can and do value pain and we know it is worth a lot more than simple medical expenses and lost wages. The same is true in Sally's case….

After you have established with the jury the importance and value of damages for pain, you can try to illustrate for the jury that these damages

[26] This example is based in large part from Jack McGehee's book, "The Plaintiff's Case," Texas Trial Lawyer's Association (1997).

are a debt owed to the plaintiff by the defendant. For example:

> Sally didn't ask for this in her life. She was doing just fine until the defendant injured her and now she feels pain every day. This was not her fault, but she has had to pay the price every day since, and will continue to pay every day from now on. Well, now is your chance to reimburse her for that cost – the price she pays every day.

9. Empower the jury.

At the conclusion of your rebuttal argument, you should empower the jury to deliver justice for your client. This can be done numerous ways, but the objective is to create within them a sense of responsibility for your client and your client's future. The following are some examples:

> Sally needs your help. She does not need your sympathy. She has gotten plenty of that over these last three years. She needs justice and you are the only ones who can provide it.

Or,

> This is Sally's one chance at justice. If your verdict does not provide for Sally's future, she cannot come back and ask the judge for more.

Or,

> For the last three years, I have tried to take care of Sally. But, in just a couple of minutes, my job will be done and I will turn Sally and her future over to you.

Or,

> You have the power to make things right for Sally. No one else does. Obviously, I was not able to force the defendant to take responsibility. No one could before today. Today, you have all the power. Only you have the power to force this defendant to take responsibility and be accountable for his actions.

Or,

> Picture yourself next week walking down the sidewalk and you run into someone you know really well. Y'all are talking and it comes up that you were on this jury. They ask you, "Well, what did y'all decide?" What will you say? Will you say that you made things right for Sally? Will you say that you forced the defendant to reimburse Sally for everything that she had been through so far? Will you say that you made sure that Sally was taken care of in the future? How you are able to answer that question is up to you.

Or,

> Come with me for a moment. Come with me to the top of a large mountain. We are standing at the top looking out over everything. When we look over in this direction, we see Sally's future as it looks right now. It

> doesn't look so good. No money for the care she needs. Can't do the job she loves. Sitting at home because she can't do the things she used to do like waterskiing, tennis and golf. She's in pain. But, look the other way, over here. This is the future you can provide. We see Sally, healthy, happy and pain free, with her family out on the lake. We see her back at the job she loves. We see her able to get the medical treatment she needs….[27]

Or,

> A young boy was going to play a trick on the wise old man of the town. He would catch a bird, cup it in his hands and ask the old man, "Old man, what do I have in my hands?" When the old man answered, "A bird," the boy would then ask him, "Old man, is the bird alive or is it dead?" If the old man answered it was dead, the boy would open his hands and let the bird fly free. If the old man answered it was alive, he would crush it and open his hands to show the old man it was dead.
>
> So, the boy caught the bird, found the old man and asked him, "Old man, what do I have in my hands?" The old man answered, "You have a bird, my son." The boy then asked, "Old man, is it alive or is it dead?" The old man paused and then answered, "The bird is in your hands."[28]

[27] This example is based on an example included by David Ball in his book Ball on Damages of an argument by Don Keenan.

[28] This example was taken from a lecture given by Gerry Spence at the Trial Lawyer's College.

APPENDIX

A

Persuasion Formula

- **Jurors make decisions using emotion**
- **Emotions are triggered by pictures**
- **Pictures are best created by stories**
- **Stories are better shown than spoken**

APPENDIX

B

Preparing the Client for Their Deposition

I. What is a Deposition?

A. Under oath
B. Transcribed
C. Other attorney
D. Other people present

II. Special Rules

A. If don't understand, say so
B. If don't know answer, say so
C. Only verbal responses
D. Talk one at a time
E. Objections
F. If I ask you if you want a break . . .

III. Purposes of a Deposition

A. Discovery of facts and documents
B. Preserve testimony
    i. they can use later for trial
    ii. you can review testimony and change answers
C. Evaluate witness
    i. what to wear
    ii. demeanor during testimony and breaks
D. For us – get out without hurting our case. We still have trial.

IV. Bottom Line Up Front

A. Tell the truth
B. Listen to the question
C. Be yourself

V. How Lawyers Ask Questions

A. Leading questions
B. Compound questions
C. Questions that assume facts
D. Questions in the alternative
E. Paraphrasing

VI. General Suggestions

A. Listen closely to the question…make sure you understand…then answer
B. Answer only the question…then stop
C. Don't guess
D. Talk only about things of which you have personal knowledge
E. Be polite and professional. Don't be defensive or argumentative
F. Dress and act professional – deposition may be videotaped

VII. Facts of This Case

A. Personal facts
   i. general - personal and family
   ii. jobs
   iii. tickets and arrests
   iv. previous accidents

B. Liability facts
   i. begin with narrative
   ii. negligence (elements)
   iii. contributory negligence
   iv. unavoidable accident
   v. third party responsibility
   vi. Defendant's and plaintiff's statements to others

C. Damage facts
   i. lost wages
   ii. lost earning capacity
   iii. medical expenses
   iv. future meds
   v. physical impairment
   vi. permanent disfigurement
   vii. pain and suffering
   viii. mental anxiety
   ix. loss of consortium
   x. bystander
   xi. pre-existing injuries
   xii. property damage

VIII. Tough Questions

A. Don't you agree that you were in the best position to care for yourself?
B. Pleadings/demands – what do you mean when you state in this pleading…?
C. How much do you think you deserve; How much are you asking from jury?
D. Estimations of distances, time of day, duration of time, speed, lighting
E. Did you prepare for this deposition and, if so, how?
F. What did your doctor say? - no win
G. Listing your injuries - no win; is that all? – all that I can recall at this time
H. Where exactly is your [neck] pain?
I. On a scale of 1 to 10, what would you rank the pain?
J. When did your pain go from ___ to ___? When did it start/stop?
K. What should defendant have done?
L. Sketching scene diagram – less detail better.
M. Will you provide documents, agree to an exam, fill in the blank, etc.?
N. Do you have a diary/journal?
O. Why did you go to X doctor? (go thru w/ each provider)
P. When did you hire an attorney? How did you find them?
Q. What trips have you gone on since the incident?

IX. Opportunities

A. Insurance
   1. why did you bring suit – D's rep would not call back
   2. why didn't you sue others – they were uninsured; or I did and their insurance paid.

B. Settlement Negotiations
   1. why did you bring suit – D's rep would not even pay PD/med exps
   2. why did you hire a lawyer – D's rep was giving me a hard time/rude
   3. when did you hire a lawyer – after D's rep wouldn't call back, etc.
   4. why didn't you go to the doctor sooner – I was waiting on D's rep

X. Recap

A. Tell the truth
B. Listen to the question
C. Be yourself

APPENDIX

C

Who Has Paid?

Sally	Mr. Torfeasor
2-2-07 – Car wrecked EMS, ER 2-8-07 – MD, therapy Lost wages 3-10-07 – Forced to hire attny 4-1-07 – MRI, specialist 5-10-07 – Pain injections 6-15-07 – Fired from job 9-3-07 – Surgery recommended Can't get 12-9-07 – Forced to file suit 3-2-08 – Deposition	2-2-07 – car damaged 2-20-07 – car fixed

APPENDIX

D

NORMAL	MR. DEFENDANT
1. Exchange Info 2. Render aid 3. Call authorities 4. Get medical treatment 5. Get property fixed/replaced 6. Reimburse lost wages 7. Recover physically, mentally and financially.	1. No idea who hit them 2. Hire a lawyer to investigate 3. Denial of responsibility 4. Don't know if can fix property 5. Don't know if can pay for med exps 6. Lose job 7. Look for job without a car 8. Must discontinue med treatment 9. Don't recover physically, remain in debt, and continue to suffer stress and anxiety about future.

Your verdict should be the difference between what should have been and what is.

APPENDIX

E

CALCULATING DAMAGES

	MILD	MEDIUM	SEVERE
HOW BAD IS THE HARM?	• Mild pain or impairment • Occurs occasionally • Easily controlled by medication • Easily controlled by home exercise	• Moderate pain or impairment • Occurs at least weekly • Not easily controlled by medication • Not easily controlled by home exercise	• Severe pain or impairment • Occurs daily or constant • Cannot be controlled by medication or requires almost constant massive dosages • Therapy or home exercise is not effective or possible
HOW LONG DOES IT LAST?	• Resolved within days/weeks of event	• Lasts months/years of event	• Permanent condition
HOW INTERFERING IS IT?	• Affects some activities some of the time • Quality of life somewhat affected	• Affects many physical activities much of the time • Quality of life affected	• Affects most activities most of the time • Quality of life significantly affected or eliminated