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# The Problem Having Really Good Plaintiff Cases

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If you handle plaintiff cases your dreams are of what I call the "Holy Trinity" cases: Great Liability, Big Damages & a Well Insured Deep Pocket Defendant. And, even better you would think, is one after another of those cases. But, as they say, in every silver lining there is a black cloud.

A recent three week trial provides lessons for long term career development for trial lawyers handling principally cases for plaintiffs. Since my practice consists of two thirds defense and one third plaintiffs (including one nine figure verdict for a plaintiff) I can give you a view from both sides of the "v". In this case I happened to be defending.

The injuries were initially catastrophic with the plaintiff having "died" (a bit of exaggeration by plaintiff's counsel in opening statement but nonetheless she did have a very low pulse and respiration rate) in the ambulance to the hospital. She had been crushed between my client's semi-tractor trailer and a stopped car in a sorority car wash taking place in a shopping center parking lot. "Squished" was plaintiff's counsel favorite word in the trial.

There is no question but that in the mere description of semi-tractor trailer vs. attractive energetic blonde 22 year old female college student that the plaintiff starts off with an advantage. Her torso had been crushed and all the organs, bones, etc had injuries from her trachea down to her upper abdomen. She was in a multi-week coma and the medical bills totaled in the high six figures. The plaintiff had been entering her senior year of college and the recovery period delayed her graduation by a year. There were claims of physical injury with residuals as well as mental and emotional injury and PTSD. Multiple medical specialty areas were represented in the experts on both sides.

The case was largely viewed by plaintiff's counsel as a damages only case and he was surprised that liability remained in play going into trial. Plaintiff counsel's background was largely in handling cases where liability usually wasn't a substantial issue: airline passenger crash cases and semi-tractor road crashes with little or no liability issues and he was successful in securing numerous substantial awards in such cases. His problem was that it had been a long time since he had been "taken to the hoop" on the liability end of a case. In addition his approach on damages had become repetitive with an available paper trail of opening and closing transcripts.

When he found himself in the midst of a major liability fight you could sense that he was in foreign territory: a place that he hadn't been in a long long time and hadn't had to recently use the instincts of how to counterpunch.

The first mistake came of course in misevaluating the case. Recent research by Dr. Elizabeth Loftus (UC-Irvine psychologist and law professor) shows that 68% of attorneys (more so with males than females) misevaluate their cases (44% less successful than predicted. 24% more successful than predicted). The way to avoid this mistake is with non-advocacy based jury research. (Advocacy based research requires that you can replicate your opponent's presentation in the research. That is very difficult to do. Second, the quality of the advocacy introduces a confounder into the research results on how jurors will react to the facts.) The defense jury research confirmed that there in fact was a viable liability defense and that the jurors would react well to the persona of the driver and had some negative reactions to the plaintiff. (The other way to avoid misevaluation is to get a "second opinion" from experienced trial counsel who has no stake in the case: who didn't develop the case and who does not have to defend the decisions made in case development or to try or settle the case. Healthcare is built around the concept of second opinions. It is a concept that should be utilized more often in litigation for the trial or settle evaluation stage.)

The second mistake came on voir dire. An attorney who has had a steady diet of good liability and good damages cases falls into the trap of believing they can sell anything to anyone: that the composition of the jury is irrelevant. The result here was a voir dire of 3 or 4 topics done in a perfunctory fashion with the only good topic "covered" being a general question (really more of a lecture) to the entire panel about tort reform issues. At the end of that plaintiff's counsel knew virtually nothing of the attitudes and life experience of the jurors. The defense voir dire was focused based on the jury research and also was fashioned to do more listening than talking by counsel. "Tell me what would make you a good juror. Tell me what would make you a not so good juror. Take a couple of minutes to tell me about the important things in your life: what the "core" of you is." Questions like that turned the voir dire into a "town hall" meeting style with substantial interchange and establishment of rapport with the jurors. In addition the defense team had the advantage of internet research on the jury panel that uncovered information not volunteered by panel members. The result was a jury well suited to listen to a liability defense and one likely to not be unduly swayed by sympathy.

The third mistake came on cross examination. Working from the premise that the good liability and damages would carry the day, plaintiff's counsel's goal was to get to closing as fast as possible even if it meant shallow cross examinations and examinations not on substance but ancillary topics such as the fees of the experts. We know from the post-verdict juror interviews that jurors were very turned off by this approach. They voiced that it did not help them do their job and they expected good, thorough substantive cross examinations. They drew the conclusion also that the lack of cross was an indirect admission of the validity of the defense witnesses.

The fourth mistake was a principally verbal only presentation style whereas the defense was a combination of high quality slides and multimedia along with verbal presentations in all segments of the trial. Jurors complained post-verdict that plaintiff's counsel's slides where hardly readable and that all he did with them was to read what was on the slide.

The fifth mistake was the damages "number" given to the jury in closing argument. It was big: $22 million, but that was only part of the mistake. The more important mistake is it was given without a rationale. Jury research tells us that the most important thing about the giving of numbers by both the plaintiff and defense in closing arguments is the rationale as to the actual number. Whether the number is big or small, what jurors look for is the basis for the number, what logic is there to the number.

The sixth mistake was failing to solve an essential dilemma in the plaintiffs case: the plaintiff looked well. Counsel for plaintiffs always face the decision of how much the plaintiff should be in the courtroom. If they don't "look" injured it can be harmful to the claims of damages. If the plaintiff is in a wheelchair the fear is over the course of a couple of weeks of trial the jury will get "used" to seeing the plaintiff that way and the "shock value" of the disability will be lost. At the same time, the jury has to see that the parties to the law suit are committed to the claims and their presence or absence effects the jury's deliberations. The presence of a plaintiff in court makes it more difficult for jurors to "look them in the eye" and then find against them. In this case plaintiff's counsel kept the plaintiff out of the courtroom for all except her testimony. She wasn't there for voir dire, openings, closings or any other part of the evidence. A photo of her wasn't even used by counsel in opening or closing. The first time the jury saw a photo of her was in the defense opening when before and after photos were displayed to make the point of a good recovery. While it needs to be recognized that the decision of how much exposure a plaintiff in a catastrophic injury case should have in trial is a difficult judgment call one of the lessons of this case is that more exposure than just for the plaintiffs direct and cross examination is needed.

The last mistake? Chalk on the shoes. Plaintiff's counsel went onto and over the line so many times during the trial he incurred a number of dressing downs in chambers by the judge. His reaction on each occasion was close to this: "Judge, the chalk on my shoes must have kicked it on them by Mr. Gass." That doesn't play well with an experienced trial judge.

**Conclusion**

The bottom line lesson of this trial though is for counsel for plaintiffs to recognize that the better the cases are that they secure, the better the intake screening, there is a trap of losing the instincts and skills of trying liability if their cases become principally damages presentations.

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