Gary A. Dordick
DORDICK LAW CORPORATION

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Proving injuries and damages in trial

MASTER THE DETAILS SUCH AS MEDICAL RECORDS UP FRONT AND PREVENT YOUR CASE FROM BEING TORPEDOED LATER ON; SUCCESS REALLY DOES LIE IN PREPARATION

You think you have stumbled onto the elusive million-dollar case. Your advertising dollars have finally paid off. Unfortunately, the defendant thinks the case is all lawyer-referred medical for unnecessary and overpriced treatment of soft-tissue injuries. The offer is less than the medical bills. What to do?

You can accept the low offer, bow your head in shame, and prepare your sad tale to the clients and lien doctors about how the case just didn't work out. Or you dig down deep into yourself, remembering why you became a plaintiffs' trial lawyer. There is nothing wrong with fearing all the possible downside risks. It is good to acknowledge all the risks in your mind and respect them. However, you must learn to move past the fear, take control, and do the work necessary to win the case.

Winning is no accident. Winning is not luck or chance. Winning is a product of tremendous pre-trial work, trial preparation, and trial skill. There is little room for mistakes. Mistakes cause you to lose credibility with the jury and in trial, credibility is the key to success.

The devil is in the medical records

Where is your case most likely going to get torpedoed? What might sink your masterful first three days of a four-day trial? The answer is in the details. It is the problems in your case that are buried in the medical records that you did not appreciate until those facts come out presented to the jury on cross-examination of your client.

You must obtain subpoenaed copies of the records from every medical facility where your client obtained care. This is not where you can save money. You must get the subpoenaed records from every location. Read every line on every page of every record. Start with the medical records before your accident. Yes, they always exist. Everyone goes to some doctors or hospital sometime for something. Know what is in those records.

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Juries today do not excuse a single "mis-recollection" or failure to disclose when it comes to prior injuries. When asking for damages, there is zero tolerance. You need to know what is in the records to prepare your client and the experts. Your experts are probably not combing the records as carefully as they should. You need to highlight problems for them and work to find solutions.

After reviewing prior medical records, go in order and review all post-collision medical records chronologically. See how the injuries unfold. Look carefully for consistent and inconsistent information. Compare the histories, complaints and findings of doctors that saw the plaintiff in temporal proximity to each other.

Are the early complaints consistent with the later diagnosis? A herniated disc or aggravation of an asymptomatic disc must have early complaints consistent with the collision causing acute onset of pertinent symptoms.

Look very closely at all forms completed by the client. Medical questionnaires and pain diagrams are often the most fertile ones for defendant's cross-exam. Plaintiffs often put "none" for prior accidents and injuries when they have priors. You may not be able to overcome this type of incorrect information in the client's own handwriting. Often when comparing pain diagrams, essential body parts are not noted by the client or do not indicate the correct dermatomes. Radiating symptoms are often not documented. You need to know before trial and before expert depositions where these problems are. If you first learn of the inconsistencies or incomplete diagrams during trial, you are in big trouble.

Look carefully at physical therapy, chiropractic and acupuncture SOAP notes. Check what is written for each day of treatment. The notes can be very helpful to support plaintiff's claimed injuries or very damaging to your case. The key is your knowledge of what is in all the medical records.

Identify the strengths and weaknesses early

Every case has two or three key strengths and two or three key weaknesses. You must identify them before trial and focus on emphasizing the strengths and minimizing the weaknesses. Your trial themes will be based on the strengths. Weaknesses must be brought up by the plaintiff and diffused early. Problems need to be addressed in voir dire and opening statements. Alcohol, drugs, speeding, attorney-referred doctors, treatment on a lien, prior injuries, subsequent injuries, language barrier, inconsistent medical records, and unavailable witnesses are examples of things that must be discussed in voir dire and explained in your opening statement.

The plaintiff

Ask yourself whether the plaintiff is someone the jury will want to see get money. Why or why not? Jurors can almost always find a way in the evidence and law to make an award for the party they want to see win. The question is how do you make the jury want to see your client win?

You must bring out the qualities and character that the jurors will respect most. Jurors like to help the people that do all they can to help themselves. Did the plaintiff work hard in physical therapy and follow all doctors' instructions? If so, bring in the physical therapist to tell the jury that the plaintiff never missed an appointment and worked harder than any other patient. Have the plaintiff tell how he or she Googled the therapist to make sure they were qualified, or how the plaintiff does home physical therapy three times a day. Show how hard the plaintiff has worked to recover from the collision.

Show that the plaintiff used their time on disability productively. Maybe they took an ESL class, rehabilitation courses for a new occupation or moved to a single-story apartment to avoid the stairs. Show your plaintiff to be a hard worker before the collision. On direct, ask the plaintiff how old they were when they got their first job. You will often hear answers that the plaintiff started work at 12, 13, or 14 years old and has worked their entire life until the collision.

Bring out the lack of prior claims or lawsuits. A person who has never asked anyone for anything in their entire life, but is forced to now, deserves to be treated fairly. Bring out military service, public service, volunteering, charity, church and any other similar, respected activities.

Bring out life activity that is consistent with activity the jurors have discussed as important in their lives during voir dire. Show the plaintiff's similarity to your jurors. Have the plaintiff connect with the jurors by directly addressing their inability to do activities and events important to the jurors.

Should the plaintiff be there every day?

Do you need to have the plaintiff present in trial every day? The answer depends on the plaintiff and the facts of your case. It is a difficult judgment call. On one hand, if most jurors indicate they feel stuck coming to court every day, then the plaintiff better be there every day. On the other hand, most plaintiffs do better if jurors see less of them. The catastrophically injured plaintiff seems less sympathetic after the jury sees the limitations all day every day. A plaintiff with less obvious injuries appears "fine" to the jury day after day which may lead to a lower verdict. Overall, it's best not to have the plaintiff in court every day, but discuss their absence in voir dire and explain it in opening statements.

The defendant and Evidence Code sec. 776

Just as you must analyze the plaintiff carefully, the same must be done with the defendant to capitalize on defense weaknesses and minimize defendant's strengths. Your goal is to highlight all the negative aspects of the defendant. Sometimes you have a lot to work with; other times you will make the limited points you can make and sit down.

Most of the time you will take the defendant on cross-exam in your case-in-chief pursuant to Evidence Code section 776. It is always best to control the flow of information and you can only do that on 776 exam. When to put the defendant

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on the stand is a difficult question. The answer depends on the nature of the case and how helpful or potentially harmful the defendant will be to your case.

Even a potentially dangerous defendant should be taken on 776 to soften the blow of his or her testimony. Otherwise, as soon as you rest your case the defense will call the defendant and elicit the testimony in a manner far more unfavorable to your case.

Putting the defendant on the stand early – such as your first or second witness – is very risky. Yes, you might win liability on the spot early, but you may also lose the case on the first day. It is best to score points with the jury before putting the defendant on the stand and have other witnesses set the stage before taking the defendant on 776.

Jury selection and big dollars

You cannot get big-dollar damages from jurors who do not believe or do not want to award big damages. You must start with open-minded jurors willing to listen to the evidence and fairly consider a plaintiff award and an award with large damages.

Your voir dire questions must ask extensively about the jurors' thoughts on the legal system, jury system, money for plaintiffs, large damage awards, pre-set damage limits; and their thoughts on multi-million-dollar awards. If the judge permits, ask about specific dollar amounts in voir dire and discuss their thoughts. Do not ask the jury about large damages that have no relationship to your case. Keep the amounts discussed reasonable in light of your anticipated damages. It is okay to ask about damages of $20 million or $30 million, but not on a soft-tissue case!

Listen carefully to their answers and watch how they react when you discuss large damage awards. Good jury selection is not just listening, but carefully watching is crucial. A second pair of eyes will help a lot when picking a jury.

Opening statement

Do not be boring. Do not discuss every fact and every witness. Plaintiff attorneys paint in broad strokes and the defense picks at the little details – broad strokes are better for opening statements. Use your case strengths to weave together a compelling story. Use your Rules of the Road and Reptile theories to show the jury the importance of your case.

Give the jury reasons why they want to see your client get a large award. Make them interested in hearing more about the case. Have them gain respect for your skill as an advocate and your decisions to fight the good fight. Use your pace, tone, knowledge and sense of righteousness to persuade throughout your opening statement. Make no mistake, an opening statement is a very persuasive statement of the evidence. Do not fall into the old school notion that an opening statement is just a "road map."

Lay out liability and damages in opening. Explain the past and future medicals and loss of earnings. Get them familiar with the large numbers early. Tell the jury how much the economic losses are. Considerable debate exists whether or not to tell the jury how much general damages you will be asking for in your opening statement. When in doubt, particularly if the plaintiff looks "okay," don't. Save the large damage number until closing argument when you have proven your case and the jurors are all on board for the big numbers.

You must take the wind out of the defense's sails. Cover all of the defendant's key arguments in your opening. Explain how the defendant's evidence is either out of context or simply incorrect. Be the one to bring up any actual problems with the plaintiff's case and explain them right away.

Trial witnesses

Never put plaintiff on the stand early. You must build drama; you are setting the stage for your plaintiff. It helps to have the plaintiff's family and friends tell how the accident has affected the plaintiff's life and what the plaintiff can and cannot do. The doctors will tell the jury what the plaintiff has been through and what they can expect with plaintiff's presentation in court.

In a Mild-Traumatic-Brain-Injury case, the doctors must testify before the plaintiff to explain why the plaintiff will look and sound "normal," but on closer examination has significant deficits not immediately apparent.

It is rarely effective to have the plaintiff testify to all the things they cannot do. It almost always sounds like whining. Others can testify to what the plaintiff cannot do. The plaintiff can testify to what they can still do albeit with considerable difficulty.

Never start your case on a weak witness or one that will have problems on cross-exam. Trials are all about credibility. Each day you gain points in the bank. You need to gain credibility points with the jury, every session of every day, so when you ask for money they trust you and will listen to you.

Call your solid witnesses early and sandwich problem witnesses between the strongest witnesses. Strong witnesses can testify longer; with weak witnesses, keep it much shorter. Strong witnesses get to talk; weak witnesses get mostly yes or no questions.

Jurors are inherently distrustful. Your experts are paid a lot of money. The family wants to see the plaintiff get money. You need to call as many witnesses without bias that support the plaintiff's claims. Call supervisors from your client's work, next door neighbors, employee at therapist office, a member of church or temple, ex-girlfriend or an ex-wife. Find witnesses that do not have a direct bias in favor of the plaintiff.

Make sure you have witnesses to establish that the plaintiff was 100 percent healthy and active before the collision. Next, establish there was an acute immediate onset of symptoms after the collision. Then, have percipient witnesses to prove continued residual problems and explain long-term difficulties. If seeking life care as part of your future medicals, you need to show that the plaintiff has limitations justifying the items in your life care plan.

Percipient witnesses do not cost anything to bring to trial. Generally, they are not asked to be identified in discovery

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and can be tremendously persuasive. They must be on your pre-trial witness list, so start identifying and contacting your percipient damages witness early.

Generally, it is best to put your liability case on first. When the jury feels you have proven your case, go on to laying out the damages. In some cases, you can call doctors early to let the jury know you are presenting a big, credible, severe injury case. You grab their attention and perhaps soften them up to viewing liability more favorably. Overall, a good rule is liability first, then damages.

Examining expert witnesses

Have a good plan of attack on every defense witness prior to trial. Get all the prior deposition and trial impeachment on them. Have a game plan. Pick your strong points and attack on them. Do not roll in the mud with experts. Do not argue with them. Do not take them head-on over the technical aspects of their profession.

Ask short simple questions calling for yes and no answers only. Get them to agree with everything you can get out of them that is favorable to the plaintiff. You score your major points on cross-exam. Everything the defense expert agrees to you will highlight for the jury in your closing argument.

Attack on bias and credibility. Often experts cancel each other out. They all have biases. They all get paid too much money. Two equally qualified experts come to opposite conclusions on the exact same facts. At a minimum, have them cancel each other out, but get all the concessions and admissions you can.

Keep your credibility. Smile and stay calm no matter what the experts say. Score your points when you can. Look for mistakes in their review of records, false assumptions, incomplete or non-existent examination of the plaintiff, etc.

Get in and get out. Most of the time, less is more. The defense experts score the majority of their effective points on cross-exam. If you go at the expert on an issue and fail, every juror will write it down and remember that point. It is best to be more calculated, control the exam, make some good points and then sit down like you destroyed them – no matter what happened. The perception of how it went may be more important than the words spoken.

Closing arguments

To get big damages, you need to ask for big damages.

By the time you get to closing, liability should be pretty clear. Generally, liability is based on easy to understand concepts and jurors form early opinions about it. Your closing must connect the law with the liability evidence for the jury and show them how to fill out the verdict form, but the main purpose of closing is to explain damages.

No juror shows up for jury service with an idea of what a person's suffering is worth. The jury instructions are little help. They tell the jury to be reasonable and use their common sense. It is the trial lawyer's credibility and explanation that persuades jurors to make large damage awards.

You must passionately remind the jury of the devastating effect the collision has had and will have on the plaintiff's life. Discuss the value of health and well-being in society. There is nothing more human beings want for people they care about than a life without pain and suffering. Make the jurors fully understand this fundamental basic desire of all people.

A lifetime of pain

Nothing destroys a life and family more than chronic pain and limitations. The jury must appreciate that it is not one day or a week or a month or a year but 10-20-30-40 years of suffering 24 hours a day, seven days a week. You must convey the devastating effects of constant pain.

Most plaintiffs with chronic pain are continuing to deteriorate. Make sure the jury appreciates the fact that after the jurors leave and go back to their lives, the plaintiff will continue to suffer and get worse and worse until the day the plaintiff dies. There will be future treatment and future surgeries as the case may be and a slow but certain painful deterioration that cannot be stopped.

Asking for the damages you want

Explain the value of money in society today. Today, money is not worth what it was 10 or 20 years ago. Houses cost over $1 million, a week's groceries cost hundreds of dollars, dinner and a movie is $100.

Acknowledge when you are asking for a lot of money. Explain the money is a large number because the injuries and damages are substantial. The amount must be large to be fair. Remind the jury of voir dire when you discussed this concept. Remind them of their agreement to award all damages proven even if the amount is substantial.

You must always use CACI 3932 on future suffering and life expectancy. You must explain the jury verdict must be fair for every day of suffering for the rest of plaintiff's life. Big damage awards come from suffering years into the future. The longer the plaintiff will live, the easier it is to get large future damages.

Start your closing strong with passion and end empowering the jury to make a significant large and fair award to do justice. Let the jurors know they are to be proud of the hard work they do and take pride in accomplishing a fair and just award in accordance with the facts and the law.

Conclusion

Big damage awards are about hard work, trial preparation and credibility. You and your client must maintain credibility all day, every day of trial. Your case presentation should give the jury a reason to want to see your client win. Emphasize the strengths of your client's case and work early to minimize the weaknesses. Act courteously and be civil at all times. Show the court, its staff, defense counsel and all witnesses respect even when it is hard to do so.

Swing for the outside fences every time you go to bat at trial. You will not always hit a home run, but the harder and more often you try, the greater the likelihood that you will.

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No words, no books, no CDs can be an effective substitute for trial experience. Trial skill is learned through hard work and practice. You will learn with every trial. You will learn more from your losses. The losses hurt deep and stay with you forever. You will go over the trial in your head searching for answers. As you reflect and analyze, you will see things to improve on. Sometimes the answers are less clear; that is the nature of trials.

When you win for a deserving client, there is no feeling like it. You will feel a strong sense of pride and accomplishment. Often you will be too busy enjoying that success to really see what can be learned from the trial experience.

You are the advocate for the most important matter in your client's lives. Commit yourself with heart and soul to representing your clients.

Embrace the honor of being an advocate for good people in need. Remember, when you fight a good fight for the right reasons, you can never lose.

Take very seriously the responsibility the clients entrust you with.

Go try cases.

Gary A. Dordick is a trial attorney in Beverly Hills specializing in plaintiff jury trials and has done over 150 jury trials in his career. He is an Emeritus member of the CAALA Board of Governors. He won CAALA's Trial Lawyer of the Year in 2001 and was CAOC's 2009 Trial Attorney of the Year. He was named one of the Daily Journal's Top 100 Lawyers in California in 2017, as well as one of the Daily Journal's Top 30 Plaintiff Lawyers in California for 2016. Also in 2016, he was awarded the Loyola Law School Champion of Justice Award for his career achievements representing plaintiffs. In 2015, he received the "Civil Advocate Award" from the Association of Southern California Defense Counsel (ASCDC). In 2003, Mr. Dordick received the University of West Los Angeles's highest honor - The Bernard Jefferson Award.