Daniel Rodriguez
RODRIGUEZ & ASSOCIATES

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Three ways to get a big verdict

FINDING A VILLAIN, USING THE RIGHT WORDS AND FOCUSING ON WHAT DEFENDANT TOOK FROM YOUR CLIENT – USUALLY, GOOD HEALTH

This article is meant to offer you an approach to damages to be used in jury trials and not necessarily for settlement purposes. My approach to damages at trial may differ a little bit from the current conventional approach to damages. It is an approach that I have developed over the course of 150 jury trials. These jury trials have been both civil and criminal (although the last criminal trial I tried was 13 years ago), as well as both in state and federal courts, and up and down California, as well as in other states.

My approach to damages in jury trials has also been influenced by hundreds of focus groups as well as trial consultants with whom I have worked over the past 45 years. And I also need to mention that my approach to damages has been greatly influenced by the Gerry Spence Method, where I have been an instructor for the last 16 years.

So, let me offer you three things that can help jurors come back with a big verdict.

You need a villain

The thing that drives the size of a verdict more than anything else is the defendant's bad conduct. Of course, the severity of the injury matters, but it takes a back seat to the bad conduct of the defendant. The bottom line is that our trial story, like any other type of story, needs a villain. The bigger, the nastier the villain, the better.

Who makes a good villain? There are several ways we can answer this question. The best villain is the person who knew the most, but cared the least. For instance, the defendant corporation had the most information regarding how toxic their product was and yet continued to market and sell it. The defendant driver knew it was dangerous to drink and drive and did it anyway. The defendant general contractor knew that it was dangerous to ignore the OSHA safety regulations regarding the use of scaffolding but ignored them anyway.

That's why I think the hardest cases to try are admitted-liability cases. But it can still be done; we can still get big verdicts in those cases. How? By finding villains other than the defendant himself. Who? Well, it can be the defense attorney or the defense expert or anyone else in the defense camp.

How do we make the defense attorney or the defense expert or defense witness or anyone else a villain? By showing that one or more of these individuals did one or more of the following things: Lied to us, cheated us, or hid something from us. We might take the scene where an individual did any one of these three things and incorporate it in our opening statement. One way to bring such a scene to life is by telling or showing that scene in the first person and present tense. Showing the scene this way draws the jurors into the scene where they actually experience and live through the scene. The jurors, like any human being, will *feel* that they have been betrayed by that individual. And they will not like that individual. They will be "pissed" at what that individual has done. Which brings us to the Betrayal Story.

Betrayal

If we try our case framed as one of mistake or negligence, we will get a low verdict or even get defensed. I cringe when I hear a plaintiff's lawyer say in opening statement that the defendant made a mistake or exercised poor judgment. Why? Because as a predominantly Judeo-Christian society, what have we been taught to do with people who make mistakes against us? To forgive them. But, how do we generally react when someone betrays us? Do we forgive them, or do we want to punish them? For instance, does the wife forgive her husband if he makes a mistake or exercises poor judgment when it comes to disciplining their children or handling the family finances? Probably. But, will that same wife forgive her husband when she finds out that he cheated on her, that he betrayed her? Probably not. And the more the husband tries to explain his infidelity, the more the wife will feel hurt and angry. Her husband's explanations will sound more like excuses. The same is true for the villains in our case. Once we show their betrayal to the jurors, the more their defenses will sound like excuses. And the more they fight, the more they put on their defenses, the more it will infuriate the listener, the viewer. And the listeners or viewers in the trial are our jurors.

In a lot of cases, the defendant would do much better in the eyes of the jurors if they came in with hat in hand and said they're sorry. It's hard for us to hate on someone who comes clean, who admits they've done wrong and are willing to accept the consequences. Luckily for us, defense lawyers are loathe to do that because in their mind, how can they justify their existence to their clients, the insurance companies?

Make sure we own our client's misconduct

And staying on the subject of mistakes, do we have cases in which the conduct of our clients was less than stellar? Maybe our client was non-compliant with medical advice or treatment. Or maybe our client said something that was inconsistent with something he said at an earlier time. How do we handle these situations at trial? I would suggest that we bring them up before the defense, at the latest in opening statement. And make sure we own the conduct and that we frame them as mistakes.

For example, let's say that there is no question that in a car-wreck case our client lied to the police. And there is no question that he did so, because it's captured on the officer's body-worn camera. And after the officer confronts him with evidence showing he's lying, the client admits he initially lied to the officer. Now that we know the power of framing conduct as mistakes, maybe we would say the

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following in opening statement when we are in the scene: "And then Joe panicked and made a huge mistake. He lied to the officer. He flat out lied to the officer. Since making that mistake, admitting to it, he's done everything to make up for that mistake."

The bottom line is that the only people who make mistakes in our trial story are our clients or witnesses. But it can never be the defendant who makes a mistake. Instead, the defendant's conduct is always framed as one of intentional choices.

Word choice matters

It seems that the current conventional wisdom is to focus on making the plaintiff whole. After all, isn't that what we were taught in our torts class? Typically, that means the plaintiff's attorney argues in closing that the plaintiff should be compensated because he broke his back, because he suffered a TBI, and so forth.

Let's examine our choice of words and the sequencing of our words. Let me suggest that our client did not lose her leg, but rather the defendant tore her leg off when he slammed his car into her. Similarly, our client didn't lose her husband or suffer the loss of her husband. But rather, the defendant killed her husband when he dropped a steel beam on him at the construction site.

In other words, our client didn't wake up one morning and find her leg missing, because maybe she somehow misplaced it the night before. No, the defendant *took* her leg. Similarly, the client didn't wake up one morning and find that she had lost her husband because somehow, she misplaced him. No, the defendant's choices *killed* her husband. Our word choice should never be dictated by the defense attorney because he will seek to minimize or sanitize the choices and conduct of the defendant.

And when do we choose our words? Let me suggest that we choose our words throughout the course of the lawsuit. So, our word choice begins with the wording of our complaint, the written discovery, and the depositions.

And especially in every document we put before the judge, including our motions in limine and trial brief. For instance, we can frame our case by describing it for the judge as, "This case is about a pedestrian who was hit in a crosswalk." Or, we can frame it as, "This case is about a speeding motorist who ran over a pedestrian in a crosswalk." Can you *feel* the difference between the two?

One option focuses on the choices and conduct of the plaintiff and the other focuses on the choices and actions of the defendant. Whose choices and actions do we want the jurors to focus on, to second guess? Whoever we make the subject of our sentence will be the person whose choices and actions our jurors will focus on, and ultimately judge. Wouldn't this mean that we would want our jurors to focus on the defendant's choices and conduct? After all, we are most critical of that which we are most familiar with. And our word choice and sequencing make our jurors most familiar with the defendant's choices and conduct.

Compensation for what was taken versus diagnosis

The current standard approach to damages is for us to ask the jurors to compensate the plaintiff for a broken arm, a herniated disc that required surgical fusion, a TBI, PTSD, etc. That approach focuses on the diagnosis as well as the pain and suffering associated with the injury or diagnosis.

I would suggest that we instead frame the item that was taken from the plaintiff as his good health. Why? Because when we drill down a bit, does pain have any value in the average person's mind? Likewise, does suffering have any value in the average in the average person's mind? But, does good health have value in the average person's mind? Does dignity have value? Does independence? Is it easier for the average person to assign value to something positive like good health, dignity, and independence as opposed to a negative emotional state such as pain and suffering? Based on numerous focus groups that we have conducted in the last 10 years, the answer is a resounding "yes!"

Voir dire

And, when do we start talking to jurors about this concept of assigning value to good health? What about in voir dire? Can we see ourselves starting a discussion regarding good health by saying, "Now folks, in cases like these, part of the job of a juror is to assign value to what was wrongfully taken from the plaintiff. Often, one of those things might include the person's good health. In order to give you some context, let me tell you just a little bit about the law on the subject. The law refers to the taking of good health as the pain and suffering inflicted on the plaintiff. Does that make sense, folks? So, may I start with you, Ms. Smith? How does good health show up in your life?"

Ms. Smith answers and you validate her answer and thank her for sharing. Then you go on to a different prospective juror and have a discussion with him as to how good health shows up in his life. After having a group discussion on how good health shows up in the jurors' lives, you go back to your first juror, Ms. Smith. And you ask her, "Does good health have value?" She answers and you ask, "Because?" Please note that the question is not "Why?" but rather, "Because?" The reason we use the word "because" instead of "why" in this context is because the word "why" generally puts people on the defensive. And that does not promote the open and honest discussion we want in voir dire.

Something else we might want to do is to talk about how the actual experience or diagnosis made the plaintiff *feel* as opposed to just the diagnosis itself. For instance, let's say the plaintiff was forced to spend three weeks in the hospital for treatment for the injuries that the crash inflicted on him. Instead of just telling the jurors that the plaintiff had to spend three weeks in the hospital and expect the jurors to award damages for the hospital stay, we might have his daughter, who spent the entire three weeks with him come in to testify about what the experience was like for her dad.

Your opening statement

The best place to talk about the daughter's perception of that experience

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is probably in the opening statement, not in a third-person recitation, but rather in the first person. We might say to the jurors, "We're going to hear from Mr. Martinez's daughter who will tell us: 'Hi, my name is Maria Martinez and I'm 25 years old. I'm the eldest of my dad's three children. My mom passed away 10 years ago from cancer. At the time of the crash, two and a half years ago, I was in my senior year at UCLA majoring in industrial engineering.'"

And she goes on to tell the jurors, through us in role reversal with her, "My dad did not want to be a burden to us. He would tell me to go home, that he would be OK alone at the hospital. But, I wouldn't hear of it. The nurses were kind enough to put a cot in my dad's room. That allowed me to stay with my dad 24/7 during the entire time he was in the hospital. He would constantly apologize to me because the surgeries and medications made him pass gas uncontrollably. I would wipe his bottom clean after he would have a bowel movement on the portable commode because he was too weak to make it to the bathroom."

She goes on to say, "I could see the pain of embarrassment on my dad's face and he would start to apologize. I would tell him that there was no need to apologize. In my mind, it was the least I could do for my dad. Especially because he had been both dad and mom to me and my siblings for the last ten years after my mom had passed away."

Let's unpack the above scene as told in our opening statement. First, we had a person other than the plaintiff talk about how the hospital stay made the plaintiff *feel*. Why? Because having the plaintiff testify about how bad he felt might cause people to think he's a whiner. Or, that he's being self-serving in telling us how bad the hospital experience was. So, always have some other person in your case tell this part of the plaintiff's story, not the plaintiff himself.

Second, when talking about, or showing this scene in the opening statement, avoid conclusionary language. Instead, use facts. Don't say Mr. Martinez is an amazing dad or that his daughter is an amazing daughter. Instead, give facts, preferably in a first-person format, that allows the listener/viewer of our story to come to their own conclusions about the type of man Mr. Martinez is. And, assuming our jurors feel that Mr. Martinez is a good, caring dad, how do you think jurors will react to our ask for damages? If they like Mr. Martinez because they *feel* he's a good man, they're going to root for him. And, those good feelings toward Mr. Martinez may just translate into a good verdict.

Conclusion

I'm hopeful that the three suggestions I have made in this article will be of some help to you. Like anything else we want to accomplish in life, our mastery of the above three techniques will take time, hard work, and commitment. So, remember we need a good villain for our case because jurors do not return a verdict in favor of a plaintiff, but rather they return a verdict against the defendant. Second, our word choice matters. We need to keep the focus on the defendant's choices and conduct, and not necessarily on the plaintiff's choices. Finally, we need to focus on what the defendant wrongfully took away from the plaintiff, which is usually good health. And, we need to use facts and avoid conclusionary language to describe what was wrongfully taken.

If we do all three of these things, our clients will be well on their way to a just and righteous verdict.

Daniel Rodriguez is a lawyer based in Bakersfield with a national practice. He obtained his bachelor's degree in engineering from California Polytechnic State University in San Luis Obispo in 1977 and his law degree from University of California, Los Angeles in 1980. He grew up as a migrant farmworker, living in labor camps as his family followed the crops from Texas to California. As such, he attended three to five different schools every year up through the 8th grade. He describes himself as an old cotton picker who graduated to grape picker to a lawyer who toils in the vineyards of justice.