Six Humble Suggestions

Successfully Defending a Minor

By Clifford L. Harrison

A defense damages theme must be tailored to engage a jury's sense of injustice over making a defendant—even a large corporation—pay for something that it does not owe.

Impact, Operated Back Case

It happens every day. A car sits at a stop light and a commercial truck sits behind it. The driver of the car has a bulging or perhaps herniated disk in his lower back, as do so many of us. It normally does not bother him, and he may have never sought any medical treatment or had any diagnostic testing performed.

The light turns green. The truck rolls forward, bumping the rear of the car. The rear bumper is scratched, or slightly dented. The driver of the car gets out and says that he is fine because he is. They exchange information, maybe take photos, and leave. Later, perhaps a day, a week, or longer, the driver of the car, often after seeing a lawyer, but definitely after "thinking about things," including that the truck was a commercial vehicle, owned and operated by a large company, begins seeing a doctor and receiving physical therapy. Diagnostics, including an MRI, are performed, revealing the disk condition in his lower back. Perhaps he is truly symptomatic, and perhaps he has experienced undiagnosed and untreated symptoms for years. Regardless, the symptoms are now significant enough to undergo surgery. The first surgery, a simple discectomy, is initially successful, but it does not provide full long-term relief. A year or two later, he undergoes a second surgery. This time it is a fusion, complete with the installation of titanium plates and screws. He does not work for several months, or even years and he cannot return to the physical work that he used to do. Medical expenses mount, approaching $100,000 or even $200,000.

The driver sues the large corporation that owned and operated the truck. His lawyer takes the deposition of the surgeon, a renowned and highly qualified practitioner. The doctor says that in his opinion, because the plaintiff did not report symptoms before the accident but clearly experienced them afterwards, the accident caused the disk herniation that necessitated the surgery, and the plaintiff will have physical limitations and perhaps even pain for the rest of his life. The attorney also hires a vocational rehabilitation "expert" who says that the plaintiff will be basically "unemployable" for the rest of his life, based upon the surgeon's testimony. The attorney also retains an economist who estimates the plaintiff's medical expenses, lost earnings, lost earning capacity and loss of "household services" in the $2 million to $3 million range.

The defense responds by hiring similar "experts," including an accident reconstructionist to state the obvious—that it was a minor impact—and a biomechanical engineer to say that the plaintiff was not injured as a result of the minor impact. The case, which began as a scratched bumper case, is now a large, very expensive case with a potential jury award of several million dollars. The case is "worked up" for a year, and just before trial, to eliminate the risk involved to both sides, the case settles for slightly over one million dollars.

This article sets out a road map to winning such a case for the defense and focuses on a defense based on causation. In other words, the minor accident did not cause the plaintiff's claimed injuries and damages.

Do Not Pay Witnesses to Say that a Plaintiff Was Not Hurt

Taking the hypothetical explained above, a jury already will know that people are not "injured" to the degree that the plaintiff claims in accidents like this. That is, until the defense lawyers start "proving" it. People decide cases on perceptions. Lawyers try them on paper. To do this, most defense lawyers often attempt to "prove" what juries already perceive. The very act of doing so—in this case, calling paid witnesses to say that the plaintiff was not hurt—tells a jury that the defense lawyer believes the plaintiff's claim that he was injured, and because there must be "something to" what the plaintiff claims, it must be "necessary" to hire witnesses to counter what might be true. The plaintiff, at this point, has done very little to win the case. Yet the defense has just taken a huge step in the direction of losing it.

It is absolutely essential that defense counsel use the proper terminology. The plaintiff's herniated disk must *always* be referred to as a "condition" or "medical condition" and *never* as an "injury."

By calling hired witnesses to rebut a plaintiff's claim, not only does a defense lawyer legitimize those claims, the defense lawyer gives up a very important point against the plaintiff's case: the plaintiff's witnesses were all hired in an effort to convince the jury that the plaintiff was "injured" when he clearly was not. The defense "experts" were not only hired for this specific case, they have been hired in dozens, if not hundreds of these cases. Worst of all, these defense "experts" always concede damaging points, including admissions such as "it is *possible* that plaintiff was injured" and "the treating doctor is probably in the best position to express opinions about the plaintiff's injuries."

The lesson here is that there is always a downside to calling or "sponsoring" witnesses. Often, that downside is potentially devastating to a defense, even though in very subtle ways. This downside must be weighed against the potential value to a defense of calling such witnesses, which is often fairly nominal, and even unnecessary.

Set the Stage So that the Jury Embraces Natural Skepticism and Overcomes the Assumptions About Causation

Returning to the hypothetical, while a jury naturally would view the plaintiff's claim that this minor bump changed his life forever skeptically, members would still assume, if not presume, that the plaintiff's herniated disk was either caused by the accident, or even if it preexisted the accident, that the accident exacerbated the disk condition so that the surgery became necessary. This "assumption" of a causal link exists for several reasons. First, the plaintiff will invariably contend that he had no symptoms whatsoever before this accident but developed excruciating pain in the weeks or months following. Second, a jury generally by inclination would not believe that a plaintiff would undergo surgery simply to try to make a lawsuit better. Indeed, when diagnostics confirm a disk herniation, the *existence* of the condition and the *necessity* for surgery often are not things that can be credibly questioned. The issue, however, is not one of diagnosis and treatment but of causation, and the danger is that jurors may "assume" causation once diagnosis and the necessity for treatment are established. Third, in the hypothetical the defendant is a large corporation that can afford to pay for the plaintiff's treatment, wage loss, and other damages. The fact that a defendant can "afford to pay" has the tendency, if not properly addressed, to remove jury's hesitation to blame a company for the full amount of perceived damages, particularly if the defendant's liability is clear.

This assumption that the accident caused the plaintiff's herniated disk must be overcome, and it can be. First, it is absolutely essential that defense counsel use the proper terminology. The plaintiff's herniated disk must *always* be referred to as a "condition" or "medical condition" and *never* as an "injury." This involves retraining ourselves, and anyone else associated with the case, not merely in how we *speak* but also in how we *think* about these cases. We cannot make a jury see a plaintiff's disk problem as a "medical condition" unless we see it as such. And we will not see it as a "condition" if we adopt a plaintiff attorney's language and refer to it as an "injury." This retraining must take place immediately, and the manner in which we approach thinking about a case as a "medical condition" case must be reflected in the earliest depositions. For example, an attorney taking the deposition of the plaintiff's treating physician must never ask, "doctor, are there other causes for this *injury,*" or "when did you last see the patient for these *injuries*?"

Second, engaging a jury's skepticism requires careful attention to the causation issue during jury selection. The potential jurors must understand that because there are many different causes for the hypothetical plaintiff's medical condition, it would be unfair simply to assume that this particular accident caused the plaintiff's condition. The plaintiff carries the burden of proving causation. Examples of questions designed to facilitate this include the following:

- Why do you feel that it would not be fair to make a company pay for a medical condition that it did not cause?
- What about the fact that it is a big company with lots of money and can afford to pay? Does this relieve the plaintiff of the obligation to prove what he claims? Why not?
- Can you leave room in your mind for the possibility that this medical condition can be caused by many things? (Remember not to use "*injury*"!)
- Tell me your feelings about requiring proof that it was the accident, rather than other factors, that caused the plaintiff's condition?

The purpose of these questions and the follow-up discussion is to plant a seed of doubt in a jury's mind at the beginning of a case. It also aptly illustrates the proper placement of the burden of proof, as well as the injustice of requiring a company to pay for "all this" simply because it can afford to do so. A word of caution is neces-

sary, however. It is important not to "oversell" the defense during jury selection. Trying to "win" a case during this stage usually succeeds only in disqualifying the strong pro-defense jurors. For example, it is almost never a good idea to show a photo depicting minor or no damage. Doing so will likely cause many potentially solid defense-leaning jurors to disqualify themselves by prompting them to say things such as "there's no way anyone could be injured in *that*." Save the photos for your opening. Any astute plaintiff's lawyer will likely show the photos during jury selection for this very reason. If this happens, a defense lawyer must be prepared to object to any attempt by the plaintiff counsel to call for a "commitment on case specific facts" by asking the jury panel whether anyone has "already decided" that there is "no way" that plaintiff could have been injured in this accident. It is important to explore juror experiences with back conditions and back injuries by asking them to describe their or their close family members' conditions, as well as their feelings about what may have caused such conditions. Returning to the hypothetical, not only is this essential to identifying jurors who may be inclined to accept a plaintiff's argument that a minor bump can cause a herniated disk and to strike those potential jurors, this process also exposes the potential jurors to examples of people with disk conditions who were never involved in an accident. This further engages their skepticism of a plaintiff's case.

Third, the opening statement is probably the most important opportunity for a defense lawyer to begin persuading a jury that a plaintiff's medical condition was not caused by the accident. Now is the time to show a photograph, and perhaps to leave it on the screen or on the easel for the entire opening. The structure of the causation argument must be simple, and associated with simple, concrete facts. For example, returning to the hypothetical, it could proceed as follows:

1. This was very minor bump (show the photo).
2. This bump did not injure Mr. Jones.
3. Mr. Jones even admitted this at the scene when he said "I am fine" to several people, including the investigating officer.
4. The surgery that Mr. Jones had on his back and the medical expenses, pain, wage loss, and other "incapacity" associated with it was caused not by this accident, but by a medical condition.
5. What Mr. Jones has is a condition called a herniated disk.
6. It was the herniation that made the operation necessary to remove the pressure from the nerve root.
7. A disk herniates over time, as the doctors will admit, and as a result of repetitive, heavy lifting.
8. It is not caused by a minor bump such as this.
9. Before you can say that some type of force causes something like a herniated disk, science and common sense requires two things: evidence that certain forces *can* cause a herniation and evidence that Mr. Jones experienced such forces in *this* accident.
10. While Mr. Jones' doctor is very skilled at performing this surgery, I think that you will see that when he says that this accident caused the herniated disk, he did not have all the facts about the lack of forces involved in this minor bump. He was just relying on what his patient (who has a lawsuit) told him.
11. So, while Mr. Jones had surgery had medical expenses, lost wages, and had pain and incapacity, all those things were caused by his medical condition, and not by this accident.
12. The plaintiff's lawyer has assembled a "lawsuit team" including a vocational rehabilitation specialist and even a hired economist, not to help the plaintiff with his medical condition, but to testify in this lawsuit and to put big numbers on the board. None of those numbers, however, had anything to do with this bump.

Develop Evidence of Other Causes

To support the theme that a defense attorney presents in the opening statement, the defense must develop evidence of other causes of a plaintiff's medical condition. While this can be accomplished with a "hired witness" it is far preferable to do so during the cross-examination of the plaintiff's treating surgeon. In a case involving a minor impact and herniated disk, a treating doctor will likely admit the following:

1. Herniated disks can be caused by many things, including repetitive lifting, poor body mechanics, natural aging, and a genetic predisposition to develop it.
2. Diagnostic studies may even document the fact that the herniation is long standing (evidence of disk desiccation, spurring, spondylosis, narrow foramina, among other things, none of which would have been caused by the bump.
3. The doctor has treated many patients for this same condition who were not involved in an accident.
4. The doctor has no knowledge of the minor forces applied to the plaintiff's back during the bump, either in terms of level of force or direction of force.
5. The doctor can point to no scientific or medical article or study which identifies the level of force required to cause a herniated disk to develop.
6. There is no scientific or medical article that confirms that the types of forces involved in this bump (show photo) can cause a disk herniation to develop.
7. The doctor's sole basis for concluding that this bump caused the condition is what the plaintiff told the doctor, and the doctor "doesn't have all the facts." (The doctor's opinion on causation will often be very conclusory, with no knowledge of the actual accident facts.)
8. What plaintiffs with lawsuits say about what caused their condition is not "scientific."

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The defense cross-examination of the plaintiff's treating physician will usually be played during the plaintiff's case in chief.

This is preferable, and usually more persuasive, than playing it during the defense case. Sometimes the plaintiff himself or herself will play the defense cross-examination. This can be devastating to a plaintiff because a jury can begin to wonder why the plaintiff is "proving the defense case."

The evidence of other causes of a plaintiff's condition also must be developed during the plaintiff's deposition. One of the most common causes of a herniated disk is repetitive lifting over a long period of time. Accordingly, evidence of the physical activities involved in the plaintiff's work and recreation should be developed. Sometimes, a plaintiff will step into a "trap" by describing that the reason that he or she cannot go back to work is because he or she cannot do the repetitive, physical work, including frequent heavy lifting that was required day in and day out for years. Describing these physical demands in detail usually benefits a defense in a case such as this where the defense contends that factors other than the "bump" caused the medical condition.

The economist that a plaintiff's attorney generally will hire also will also admit that he or she knows nothing about the "bump" and has no opinion about how the plaintiff's medical condition developed.

Another potentially good opportunity to reinforce this theme is on cross-examining the plaintiff's other damages "experts," which the defense should *never* refer to as "experts" but always as "hired witnesses" and "members of the lawsuit team." For example, a vocational rehabilitation witness often can be led into the same trap as a plaintiff by asking the vocational rehabilitation specialist to discuss the work activities that the plaintiff can no longer perform. Both the witness and the plaintiff attorney will think that the defense counsel has made a tactical blunder by politely reinforcing the physical difficulty of the plaintiff's work, especially in relation to the plaintiff's back. But five minutes into the cross-examination the jury will realize—and ten minutes into it the plaintiff's lawyer will realize—that what the witness has just done is to provide a detailed description of how plaintiff's back condition developed with repetitive heavy work over an extended period of time.

The economist that a plaintiff's attorney generally will hire also will also admit that he or she knows nothing about the "bump" and has no opinion about how the plaintiff's medical condition developed. He or she generally will also acknowledge that if the plaintiff's inability to earn income was not caused by the accident, the "big numbers" listed by the economist should not be awarded by the jury, and "zero" would be appropriate. Of course, both witnesses will admit that they are often hired by lawyers to testify in these types of lawsuits, and in the case of the vocational rehabilitation specialist, not to provide any rehabilitative services, or any other "help" to the plaintiff, other than to try to build his or her lawsuit. There is no reason for a defense lawyer to be "adverse" or "offensive" in any manner. Good cross-examination is almost never "cross," and rarely, especially in the case of hired damages witnesses, lasts longer than 15 minutes.

Use the Photo Early, Use It Big, and Use It Often

A photo depicting the small amount of property damage is essential in showing the jury how minor the bump was. Jurors will often conclude, immediately, that a plaintiff was not injured. Therefore, as mentioned earlier, the photo should be blown up and shown to the jury during opening statement. Initial visual impressions are extremely powerful and difficult for a plaintiff to overcome in these cases. Once the perception of a minor bump is fixed in the jury's mind, a plaintiff's burden of proof may be insurmountable. Throughout the remainder of the trial, the defense should focus merely on reinforcing this perception with evidence as described above, largely on cross-examination, and not on "proving" the defense by calling witnesses. Calling a hired witness to say that the plaintiff was not hurt serves only to tell the jury that the defense counsel believes that the plaintiff could have been hurt, in spite of the clear photograph, and that hiring a witness is essential to prove that plaintiff was not injured. This severely undermines the powerful effect of the photograph and will cause the jury to question it.

Because a "minimal impact" photo is so potentially devastating to a plaintiff's case, many astute plaintiff lawyers object to such a photo on the grounds that it is not probative to depict the level of forces at impact unless accompanied by expert testimony, and without such testimony, the prejudicial effect outweighs its probative value. Many trial judges sustain this objection. Defense counsel must be prepared to meet and overcome this objection. It is possible, for instance, that other issues in a case may make the photos relevant. If the extent or amount of property damage is at issue, a photo depicting such damage is likely relevant. A photo may also be relevant to impeach a plaintiff's version of an accident. For example, if a plaintiff testifies that an impact was "violent" and "knocked my car 30 feet," then photos showing a minor scratch, or that demonstrate that the car did not move on impact, may be relevant.

It may be necessary for a defense to engage a witness or witnesses to testify that based upon the physical evidence, including the photos, the impact was minor and the forces applied to the plaintiff's back were also very minimal and not sufficient to cause a herniated disk condition to develop. This is often accomplished by using an accident reconstructionist and a biomechanical engineer. The reconstructionist will develop an opinion on the relative velocity and force applied to the rear of the plaintiff's car and will rely, in part, on the evidence provided by the photos. This should make the photos admissible. The biomechanical engineer will compare the estimated forces to the known scientific studies regarding the causal relationship between traumatic force and disk herniation and will likely conclude, based upon the known science, that the minimal forces experienced by the plaintiff in this accident would not cause disk herniation.

This adds a significant expense, not only for the work performed by the experts, but the cost of depositions as well. As a plaintiff's attorney will surely request to take their depositions, it is usually advisable for the defense to cross-notice the deposition by video, arrange for a videographer, and do a short "trial direct" at the end of plaintiff's discovery deposition, making use of the available photos. A plaintiff's attorney may be less prepared to cross-examine such a witness during a deposition, and so the video direct examination may be more effective during the trial than calling the witness live and exposing the witness to another cross-examination.

During pretrial, admissibility of exhibits is often considered by a court. With the testimony of a reconstructionist and a biomechanical engineer, it is less likely that a plaintiff's attorney's objections to the photos will be sustained, and more likely that the photos will be pre-admitted, sometimes with no objection whatsoever. The defense will then be free to use those photos during the opening statement. If the photos are pre-admitted, especially without objection, there may be far less need for the defense to call the hired reconstructionist and biomechanical engineer during the trial. If a jury is persuaded by the photos, calling hired witnesses to say what the photos clearly say undermines the strength of the evidence that the jurors see with their own eyes. It is usually far better to let the photos tell the story, without paying a witness to say what the photos clearly say. The photos, after all, cannot be cross-examined. The photos are objective. The photos are powerful. Leave the hired witnesses on the bench in the hallway.

Rest

Once all of the factual points needed to support a defense theme have been made, the defense should rest. While this sounds straightforward, few defense lawyers are able to do so without calling additional witnesses who, invariably, weaken the defense. Witnesses are always seen with skepticism, and it is far better for a jury to be skeptical of a plaintiff's witnesses than defense witnesses. Moreover, the concessions made by plaintiff's witnesses in favor of a defense are always more credible than those same points made by the defendant's hired witnesses. Yet defense lawyers constantly make the blunder of calling witnesses, thereby communicating an "uncertainty" or lack of confidence about the defense points already made with a plaintiff's witnesses during the plaintiff's case in chief.

It is not *safe* to call witnesses. It is not *risky* to rest behind a plaintiff. It is *risky* to call witnesses who will only marginally advance a defense case but who could significantly undermine it on cross-examination. It is risky to focus a jury's skepticism away from a plaintiff's case, where the defense wants it, and onto the defense. This is, in fact, potentially fatal to a defense case.

Rest. If the necessary points have been made, and particularly if those points have been made by a plaintiff, rest immediately behind the plaintiff. It takes some experience, judgment, and confidence to read the evidence through a jury's eyes and ascertain whether the defensive theme has been presented and is consistent with the jury's basic values and sense of injustice. Reading a jury is difficult and the signs are usually subtle. Another objective pair of eyes and ears, not necessary familiar with the case, is often helpful in "reading" the evidence and a jury. Is the jury engaged? How does the jury like the plaintiff? How is the plaintiff's lawyer perceived? How persuasive is the physical evidence? Are the jurors making notes? Are they writing down the numbers testified to by the economist and by the doctors, or is the jury bored with the "expert" testimony, having already decided that this is a case in which the plaintiff is trying to make something out of nothing? We read other people with our instincts, and we must trust those instincts. And when we have won, we must rest. Or we will lose.

Addressing Causation During the Final Argument

The written jury questions, or jury charge, almost always begins with liability questions and ends with the damages questions. Accordingly, during final argument, a plaintiff's lawyer usually argues the liability issues first and damages last. Defense lawyers sometimes give little thought to the order of their argument and simply follow the same pattern of addressing liability first and damages last. For a defendant, this order is almost always a mistake. It is a mistake, primarily, because this order sets up a structurally inconsistent theme. A defense lawyer, by addressing liability first, in effect says "we were not at fault, but if we were at fault, the plaintiff was not injured, and if the plaintiff was injured, the plaintiff was not injured very much." This type of inconsistency, which is accepted by lawyers as perfectly normal, lacks credibility in the eyes of a jury. Lawyers are trained beginning in law school in the "art" of "alternative pleading," and this behavior is reinforced throughout a lawyer's career, stemming from a fear of waiving a vital point or of "not covering something." This is illustrated by the proverbial case of the farmer who had his cabbages eaten by his neighbor's goat and sued the owner of the goat for the value of the consumed cabbages. The lawyer for the goat's owner, well-schooled in the art of "alternative pleading," answered the lawsuit thusly:

You had no cabbages.

But if you had cabbages, they were rotten and worthless.

If you had cabbages, they were not eaten.

But if they were eaten it was not by a goat.

But if they were eaten by a goat, it was not my goat.

But if it was my goat, he was insane.

While such an alternative theme is fine for the law books, it appears inconsistent to a jury. Defense attorneys, in personal injury lawsuits, make this same argument

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when they argue a defense against liability followed by the connector "but," and then an argument asking a jury to award minimal damages.

The better approach, and one that avoids the inconsistency that undermines the credibility of a defense argument, is to begin by addressing damages. This is a natural place to start anyway. A plaintiff has just presented a powerful argument asking the jury to award an exorbitant amount of money, and the jury is now primed for the defense response. The jury wants to hear from the defense on the issue of damages, and defense counsel should go there immediately.

After arguing the damages issues, defense counsel can transition to the liability argument by using the connector "moreover," or "however," rather than "but," which makes the argument sound much more consistent and therefore credible. Here is an example of this transition:

> Moreover [or "however"], it is likely that you will not even reach these questions that ask about money because the instructions given to you by the judge require you to consider these questions only if you have answered the first questions [the liability questions] a certain way. And based upon the evidence, I respectfully submit that the answers required by the evidence to the first questions will make it unnecessary to answer the damages questions.

Then, defense counsel will move into the liability argument, illustrating why the jury question inquiring about the negligence of the defendant should be answered "no," or why the question inquiring about the negligence of the plaintiff should be answered "yes," or why with respect to the question regarding comparative fault, the plaintiff was in the "best position to prevent" the accident, and, therefore, should bear greater than 50 percent of the responsibility.

But whether this minor "bump" caused the plaintiff's medical condition must be addressed as a paramount and initial issue. It is part and parcel of the defense damages theme and should be addressed early during final argument. This "causation" issue drives how a jury will answer the damages questions, and therefore affects how defense counsel will address the damages numbers.

Delivered properly, one of the most powerful defense arguments on "causation" is an argument addressing the burden of proof. Simply reminding a jury that a plaintiff carries the burden of proof is rarely persuasive. An effective defense argument must use the concept of "burden of proof" to trigger a jury's sense of injustice and unfairness. Ultimately, the question is whether a plaintiff has proved that the medical condition was caused by the minor accident, and accordingly, whether the large amount of damages sought is justified in this "bump in the rear" case. When approaching this issue, and to illustrate how the burden of proof applies to the facts, it may be very useful to remind a jury that the defense does not contest that the plaintiff underwent back surgeries, or that such surgeries were necessary to treat the plaintiff's medical condition, or even that plaintiff incurred medical expenses, lost wages, or suffered pain or incapacity as a result of his or her condition. The question, again, is whether the plaintiff has proved the proposition that the condition, with all the resulting damages and expenses, was caused by the minor bump. It is often helpful to suggest to a jury that there are three possible answers to this question: "yes," "no," or "I don't know."

Before jurors can ever say "yes" to this question, they must be convinced, and in agreement, that a plaintiff has proved with competent, credible scientific evidence that his or her back condition was caused by this very minor accident. The jury's skepticism, supported by the photographic evidence and the treating physician's admissions that other things caused this condition, as well as the treating physician's admission that he or she really does not know anything about the accident, should compel an answer of "no." Certainly, the jury cannot answer "yes" because the plaintiff has not proved this. The more likely answer to this question, and the jury's first instinctive answer, is "I don't know." Jurors should be reminded that there are legitimate reasons for their doubts, and "I don't know" means that the plaintiff has not proved that this minor bump caused his or her medical condition. Because the plaintiff has not proved this, "I don't know" means that the answer to the question of whether this bump caused the plaintiff's damages must be "no," and "no" means that the answers to the damages questions must be "zero," not because the plaintiff did not incur medical expenses, but because those expenses were necessary to treat his or her condition, and not necessitated by this minor bump.

A defense attorney should cover each element of damages, suggesting, for example, that the question inquiring about lost wages must be answered "zero," not because a plaintiff did not lose wages, but because the reason that he or she missed work was because of his or her medical condition, and not because of the bump. The same argument should be made for each damages element, all while displaying the photo.

Conclusion

Every plaintiff is different, the facts of every case are different, every jury is different, and every judge is different. As for the facts and the dynamics of each case, there are more differences than similarities. Regardless, a defense damages theme must be tailored to engage a jury's sense of injustice over making a defendant—even a large corporation—pay for something that it does not owe. Counsel must understand a jury's natural skepticism, must tap into that skepticism, and keep that skepticism focused on a plaintiff's case. This requires understanding how jurors perceive evidence, and understanding the cost of "sponsoring" certain evidence. While there may be reasons to call a witness, those reasons must be not only important, but essential to winning a case. No witness should be called simply because he or she might "add something" or "the jury wants to hear this." There are no "safe" witnesses. There is almost always a cost and always a risk involved in calling someone to testify. Even if a person is a great witness, a jury's perception of the witness, and sometimes more important, the perception of why such a witness is "necessary," may harm a defense theme by focusing the jury's skepticism on the defense. Thus, even if a witness is "great," he or she may hurt a case. The days of automatically following a defense "formula" by calling experts simply to counter a plaintiff's experts must be left behind forever. A bit more analysis, and a bit more trust in the jury, is warranted. FD