Thomas Feher
FEHER LAW, APC

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Is there a recipe for success in trial?

A LARGE VERDICT MAY BE LESS ABOUT WHAT YOU DID AND MORE ABOUT WHAT THE DEFENDANT AND THE DEFENSE TEAM DID AND DIDN'T DO

We all hear of large verdicts and many of those are dictated by large economic damages, life-changing injuries, despicable conduct by defendants, or all of the above. But how can you get verdicts in the millions for a broken bone or disc herniation without surgery? We know it has been done because we have seen the results. Having tried over 50 jury trials, I hope to offer some insight.

A caveat I think we can all respect is that, in the art of trial, there are many factors and combinations of factors that lead to large verdicts. To try and simplify, qualify, or identify all of them would be an extremely arduous effort and perhaps even counterproductive. I say counterproductive because the oversimplification of complex realties can often lead to negative consequences like stunting individual growth and creativity. I cannot say "just do this one thing or these things" as if they were not only necessary but sufficient conditions to successful case outcomes. With that being said, that doesn't mean we cannot explore some reasons for why these verdicts happen.

A life-changing story stays in the memory

Does the person you represent have a life-changing injury? Life-changing does not only pertain to the person who suffered the loss of limb, is now wheelchair bound, or lost a loved one. Obviously, those are life-changing. The question becomes, has this person's life changed in some meaningful way or ways permanently and if so, will it get a little better, stay the same, or get worse? The degree to which an injury is life-changing is going to be context specific. A simple example, for a world-class pianist, a change in function to their fingers would not only be life-changing, but likely career-ending. A broken calcaneus or tibial plateau fracture that is not surgically repaired often leaves someone with a permanently altered gait and early onset of arthritis. To anyone, that would be life-changing and the measure of how life-changing, again, would have to be placed in context.

Context gives meaning to facts, and the way we do that is through story. There is so much information in a trial that learning to distill the most critical pieces of information and putting them in context is incredibly important. We have all been there – wanting to get so much information to a jury, thinking, if they just had this piece of information or that piece of information, we would win.

More information does not necessarily lead to winning. Think about how complex some of our cases are medically or technically. It is not feasible to expect jurors to learn every detail of your case in a couple of weeks. We should always be looking for ways to intelligently simplify our cases. From the juror's perspective, they are being inundated with information, so it is our job to help simplify that process with integrity.

Powerful stories effectively convey key pieces of information in ways that are memorable and meaningful. Think about a movie or show you have seen, and you go tell someone about. You may not recall all the details, character names, each point in the plot, but you can convey the critical parts of the story so that the person understands what you experienced. The more you understand how your client's injury affects their life and you are able to convey that part of the story, the better chance you have of jurors understanding the value of what has been taken from them. The responsibility of communicating the true value of what has been taken and will continue to be taken from your client because of some wrongful conduct done by the defendant is on you.

Out the gate, there are competing narratives, of course, one from plaintiff and one from defendant. Which story is more likely true will depend on a confluence of factors specific to the case and what each side can prove or not prove during the trial. In other words, it is not enough to have the story, you will need the witnesses and evidence to back it up.

Percipient witnesses can add the necessary flavor for success

The most powerful damages witnesses are not necessarily expert witnesses. I cannot tell you how many times jurors have just disregarded many of the experts from both sides and focused on the testimony of friends, family, and the parties. When I speak with family and friends, I do not sit there and tell them what to say. What I do is ask them to tell me about my client. Just like anyone interested in hearing about someone's life or if you were writing a biography, you want to learn the good, the bad, the ugly. You want the truth so you can tell jurors the truth.

Some of the best information or evidence comes from just learning about someone's life because it puts a lot in context and it helps you connect to your client in a meaningful way. I sincerely believe there is part of everyone's story that can resonate with something inside of me. It is obviously up to you to edit what is or is not important to telling your client's story. Whether they played ultimate frisbee throughout college, won the 1997 fraternity hot-dog-eating contest, or can make insanely ornate winter snowflake cutouts, may not be relevant. Just saying.

You need people who can speak openly and honestly about their observations. You may not get that from an initial conversation. People do not necessarily open up about life stories and it may take some time and work to build trust in a conversation with a friend or family member before you get the information that is helpful. I remind myself to get out of the bad habit of being a lawyer and go back to being human, which usually helps get to the human story.

Being good with evidence is like adding the perfect amount of seasoning

No case is perfect and there are evidentiary rules for a reason. You must protect the process by making every

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effort to exclude impermissible evidence and include permissible evidence. I know this may sound obvious, but just like in sports, calls that are missed or those that are made can decide the outcome. We have all seen it. Trial is clearly competitive and the side that can address issues head on with legal authority, credible arguments, and persuasive advocacy has an advantage. Consider the number of times you have faced an opponent who tried or did get inadmissible evidence in front of a jury, and it seriously undermined your case. It has happened to many of us who have been in the trenches.

I highly recommend reviewing and revisiting the Evidence Code regularly. Look at the provisions that are most often at issue in your cases so you can be comfortable arguing and citing Code off the cuff. It goes a long way if you do so consistently and accurately because you become the credible source of information during trial. For each trial, we anticipate what motions or briefs will be needed and have pocket briefs just in case. With our current state of technology, there is no excuse to not be prepared.

You'll never make the recipe without the key ingredients

While easier said than done, you need a fair and impartial jury. We all know that in each case, there are polarizing facts and/or issues. Consider a civil-rights case where an officer shot and killed an innocent person. I bet some of you just now reading that sentence had a voice come out of nowhere and question for a split second whether the person shot was truly innocent. You know how I know? Because as I was writing that sentence a voice popped into my head and did the same thing. I am not saying it will happen to all of you reading this, but some of you.

Obviously, people who believe every officer is corrupt or people who believe no officer would shoot an innocent person, cannot be jurors. What is not so obvious is that people will not necessarily reveal how strongly they hold one of those beliefs. At the end of the day, to some degree, we all fall on a spectrum of what we believe. The goal for each side is to identify anyone with a serious leaning one way or another that is prejudicial to the fair advocacy of their case.

Part of identifying what is polarizing may be obvious, like in the above example or it may be a bit more subtle and that is where you may want to focus-group your case and learn what issues and facts might be polarizing.

Even a great chef asks the kitchen to taste-test

We have seen an influx of motions over the past decade trying to preclude certain arguments from being made and excluding certain phrases for fear that this will lead to "big" verdicts. Time and time again, a verdict only seems large or small based on a very limited and biased recounting of the evidence by the trial lawyer or observer.

I have been in trial and thought the case was not going my way only to find I was wrong and vice versa. Think about how unnerving that is – we may not always be a good judge of what is happening to us or in front of us as trial lawyers and we may not understand why we obtained the verdict we did. In other words, sometimes when we win, we really do not understand why. That is why it is important that we debrief after a win or loss so we can better understand what worked and what did not.

Now, I am not sure how many people would admit they are not entirely certain as to why they got the verdict they did, but if you are looking to master this craft and push creative boundaries, you should try and operate from a first-principles approach. First-principles thinking is the practice of questioning every assumption you think you know about a given problem, then creating new solutions from scratch. We have all heard the phrase, You learn more from your failures or losses than from your wins. So, what I am suggesting is we should study our good and bad outcomes with the same rigor.

No "magic words"

I am not convinced that using certain words like "safety" or "community" necessarily has a direct impact or causal relationship to a righteous verdict. One could say those words repeatedly, but if the defendant truly did not do anything unsafe or endanger the community and that was how the evidence was received by the jurors, those words fall on deaf ears. Conversely, if the defendant knowingly sold a dangerous product, most people would come to their own realization that it is not safe for the community. Repeating the words "safety" or "community" is not going to change anything. The truth is right there.

While a defendant who knowingly does something wrong and injures a person, opens the potential for a punitive-damages case, what happens with the defendant who clearly did something wrong, but still refuses to admit their wrongdoing? How do people feel when they see someone do something wrong and refuse to acknowledge or admit the wrongdoing? Better yet, how do you feel? Naturally, we are upset and so are jurors. There will be a price to pay for that type of conduct and jurors will reward plaintiffs in kind. In other words, the verdict may be less about what you did and more about what the defendant and/or defense team did and how their behavior was perceived by the jurors.

To summarize, learn your client's story, determine if they have been harmed in a permanent way, find the witnesses(es) that will support that story, be on point with your evidence, make sure biased jurors are excused, and sometimes just let the defendant do defendant things and you may find yourself in a situation with a great verdict.

Tom Feher is a trial lawyer and Founder of Feher Law, APC. *His firm litigates and tries catastrophic injury, wrongful death and employment cases throughout California. He is a 2013 graduate of Gerry Spence's Trial Lawyers College and instructor of the Gerry Spence's Trial Program.*