

# View From The Bench



Judge Jerome LaBarre

## *Three surefire ways to lose a plaintiff's case*

By Judge Jerome LaBarre  
Multnomah County Circuit Court

One of the perks of seeing so many trials in tort cases for so long is that you have lots of experience on which to conclude what works and what doesn't. As a lawyer, I tried a lot of plaintiff's cases. As a judge, I have sat on even more of them. I have seen many plaintiff victories. But I have also seen too many unnecessary defeats. Sometimes fatal mistakes are made by a plaintiff's counsel that can easily be avoided. On the question of "what can be fixed?" — three mistakes come to mind. Avoiding these mistakes does not guarantee a plaintiff's victory. But if these mistakes are made the risk of losing skyrockets.

### **Neglecting time on damages**

Victory in a tort case is all about how big a damage award is given by the jury. Yet I have seen too many cases where the plaintiff's lawyer waits until the very end of the case to talk about damages. And then it is only done in a minimal way. This is a big mistake. Winning is all about the verdict form. Success for a plaintiff in a tort case happens in the jury room when the presiding juror writes large damages figures on the verdict form. Everything in the trial must point toward this moment. Too often I see plaintiff attorneys give brief attention to damages.

They usually suffer the consequences. True, damages must be handled with a lot of forethought, care and sensitivity. But it is so central to a plaintiff's victory that it belongs at every stage of the case.

There are many reasons for a natural resistance to spending time on damages. Starting from the time of law school onward, liability issues are king. When there is a big battle in the case it is frequently about liability issues. It is also awkward asking for money. While it is hard to do this gracefully it simply must be done. Ignoring time on damages puts your client at great risk.

### **How your client presents to the jury**

Cases are about people. From the time 40 potential jurors enter my courtroom to start jury selection in a tort case, everyone is watching the parties and their attorneys. Since the plaintiff is the one asking for money it seems to me the plaintiff gets special scrutiny. And not only the plaintiff but also friends and family sitting behind him or her in the courtroom. If the plaintiff does not appear sincere and convincing, no amount of sterling lawyer advocacy or expensive expert testimony can save the day. Very simply, your client must present in a compelling way. Obviously, we all have different personalities and a plaintiff's lawyer cannot try to make the client into someone he or she is not. Authenticity

matters. In witness preparation, efforts should be made to emphasize the positives and minimize the negatives. This is especially important in soft tissue and subjective injury cases.

Positive qualities include humility and optimism, and being a hard worker. I have found juries like to see an injured plaintiff who is fighting to get past his or her injuries and not giving up. Even though it may be a tough uphill recovery battle for the plaintiff, everyone likes an underdog.

Conversely, the negative qualities have just the opposite effect. Self-pity does not sell in the courtroom. Neither does greed, laziness or a sense of entitlement. Jurors watch every penny. A plaintiff must convince a money-conscious jury the money asked for is necessary, and it will not be just a windfall. Claiming money damages for problems viewed as trivial or contrived is especially troublesome. When I do mediations and judicial settlement conferences, the same factors are important. The defense attorneys and insurance claims adjustors talk a lot about how the plaintiff comes across and their views on the kind of impression they think the plaintiff will make on the jury.

### **Failing to present a clear story**

The people on the jury need to hear a compelling story. They need to clearly

see the picture in the puzzle. Cases are lost if they are presented in a haphazard way like throwing hundreds of pieces of the puzzle into the courtroom and hoping the jury will figure it out. Having a theme for the case is the best way to do this. If a case lacks clarity and is presented in a disorganized way, it is hard for a plaintiff to win.

When a jury trial starts in my courtroom, I always wonder how the plaintiff's attorney is going to present the client's story so it appears righteous and compelling. I have come to believe the plaintiff's counsel must be able to stand up and succinctly relate the story and the theme of the case. In other words, boil it down to a short "elevator speech" that is a convincing plea for justice. Anything less is will not be sufficient to overcome juror reluctance and skepticism to awarding adequate damages. Think about it. Even if the defense does not use the words "greedy over-reaching plaintiff" or "trying to get something for nothing," these thoughts may already be in the jurors' minds. The plaintiff's attorney needs to deal with this. The case must be focused and motivating.

### Conclusion

We know that trying cases is part art and part science. In a trial, many things can either go right or go wrong. Like a good reputation, it takes a lot to build a winning plaintiff's case and it can quickly be lost. Neglecting time on damages, not investing pre-trial time on how your client presents to the jury and failing to present a clear story are mistakes you must avoid. Otherwise, there will be trouble ahead.

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