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Intro:

This is Michael Cowen, and welcome to Trial Lawyer Nation. You are the leader in the courtroom, and you want the jury to be looking to you for the answers. When you figure out your theory, never deviate. You want the facts to be consistent, complete, incredible. The defense has no problem running out the clock. Delay is the friend of the defense. It's tough to grow a firm by trying to hold on and micromanage. You've got to front load a simple structure for jurors to be able to hold onto. What types of creative things can we do as lawyers even though we don't have a trial setting? Whatever you've got to do to make it real, you've got to do to make it real. But the person who needs convincing is you. Welcome to the award-winning podcast, Trial Lawyer Nation, your source to win bigger verdicts, get more cases, and manage your law firm. And now, here's your host, noteworthy author, sought-after speaker, and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Today is Episode 100 of Trial Lawyer Nation. I am so excited. This is a milestone, and so I wanted it to be very special. And David Ball, if you're a plaintiff's lawyer, you know who David Ball is, has agreed to come on because I wanted a special guest for a special episode. David, thank you so much for coming on.

David Ball:

It is my pleasure, and I'm excited it's your 100th one. I want to shake the hand of any person who can keep things going for 100 episodes.

Michael Cowen:

Well, the secret is having a good team that makes you record when you forget and get busy doing other things.

David Ball:

Well, the secret is also you've had a quite a run of good people, and now you know how to talk with them.

Michael Cowen:

Yeah. And you were nice enough to be in one of the earlier episodes. And you've done so much for not just me, but for the entire plaintiff and criminal defense bar. You've got a new book coming out, and I wanted to talk to you about some of the new things we've learned, and the new stuff that's coming out, if that's all right.

David Ball:

Sure.

Michael Cowen:

So your new book is Damages Evolving. You've written it along with Artemis Malekpour, your partner, and Nick and Courtney Rowley. Available from Trial Guides. I think it's coming out April 15th. I've already pre-ordered it. It's already up to pre-order today at trialguides.com.

David Ball:

And I'm pretty sure it's going to be available earlier than that. They just give you a late date so people don't start yelling at them. But apparently there are things like delivery problems for paper to print the book on, things like that. So everything is behind a little bit, but it'll be out pretty soon.

Michael Cowen:

Great. And it's called Damages Evolving.

David Ball:

Correct.

Michael Cowen:

What do you mean by Damages Evolving?

David Ball:

Well, it was originally going to be called Damages: The Evolution. Meaning, here's the next thing and what we've learned. And we started this before COVID, and I work very quickly when I'm writing to at least get out of my first draft stuff. And so I was pretty much through a first draft by the time COVID shut everything down and changed everything. It was an enormous change in our society, in our culture, and everything. And that was a change on top of a slightly earlier change of what happened in Washington. A couple of major changes going on there.

David Ball:

Then soon after that was the police knee on the neck of a man in Minnesota. And with each one of those things, something radical was shifting within the American public, and we realized we can't say, "This is where it is." Because by the time the book comes out, there may be two or three or four more other changes that we did.

David Ball:

So what we've done instead is, come up to the most advanced new stuff but also at least have some explanation of what do you do with these things as we get into new times, new shifts in the population, therefore on the jury population. It makes a big difference to decision-making. And at first people say, "Oh my God, what are we going to do with COVID?" And they're doing this on about day three. It was like after 9/11, where people were saying, "Oh my God, here's what you do." And all these authorities were talking about things to do. But it turned out 9/11 had virtually no effect on most jurors. So you can be very premature on these things.

David Ball:

This is really not only get you up to where we are, which is what most of us write about all the time, but how do we prepare you so that when you've done all your work and you learn how to do all these things and all of everybody else's things, suddenly one of these things happens. And right when they happen is when people are the rawest to them, they can make the greatest difference to your case.

David Ball:

What do you look at? It's very simple. I mean, if you showed me the book, it's embedded in the chapters, "Here's what to look for as things change." Or, "This one ain't going to change unless the human brain changes." So we decided Damages Evolving was a better image of taking us into the future. So that the book would be ... I never thought Damages 3 would be around for a dozen years, but it has been. Which is also part of the reason that, and I'll anticipate your next question, I bet, why this one involved the Rowleys.

Michael Cowen:

Yeah, that was a surprise when I first saw it, because most people, including me, would've put you guys in different schools of method for trial advocacy.

David Ball:

Well, not fundamentally. Externally, maybe, the external shape of it. But Artemis and I heard about Nick a few years ago. And I remember saying ... I remember she and I were talking about, "How does he do this?" I can understand how most attorneys, whether they were using stuff out of Damages 3 or something else, but Nick is getting this string of, like something you'd see in a movie in terms of the size very consistently and not just in one area of the country.

David Ball:

And so we started paying attention, and a lot of attention, and where we got to know each other, and then better and better. Basically, we do the same thing. How we get there is not always the same. One of the very early things in the book is a disclaimer, "Don't expect everybody to agree with everything here." That ain't going to happen. There is no one way.

David Ball:

I had come out of a long period in my career thinking, "Well, if this is coming from me, it's bound for Mount Sinai, and that's the way." And aside from that being an arrogant approach, it's also just not true. There is no one way. And the only judge of what is any good is whoever has to go into the trenches and use it. And so, if something of yours and something of whoever's ... I mean, look at just the Trial Guides shelf. A number of different, really good ... When I first wrote the first edition of Damages, those people ... There wasn't anything else. There wasn't a, "There's a great book out there." It was, "There's a book out there." Practically. There was not much else to look at.

David Ball:

And so the CLEs were recycling themselves for years. So when I wrote that first thing, there was absolutely nothing on Damages, and very little else on some things, Eric Oliver and a few other people had been putting out some good stuff. But now, and I'd like to think people like Eric and I and a few others, showed publishers that, yes, you can sell these books and return, and a reason to continue and visit. Again, just look at the Trial Guides shelf. It's an amazing shelf of books.

David Ball:

Outside of Trial Guides, has got great books. All the different publishers have now got what I consider important books that, had they come out 25 years ago, would have been landmarks. And I want people to know all that stuff so they can draw from all of it. And so it seemed ideal. And Artemis and I had this problem about, what do we do with Damages 3? Because we can't stop it. We don't want to take it off the market because 90% of it is still in effect. It's not like it got outdated.

David Ball:

Maybe 10% or 15% of it needed some revision, and then we had a bunch of new stuff. And so I didn't want to do a Damages 4 because I had to take the Damages 3 off the market. And then Nick came up with the idea of, "Why don't we do something together?" And I thought, "Well, how? You're one of the best people in the trenches." And I had Artemis, which is one of the best minds on the consulting side of the business. And Courtney, who I stopped saying, "Courtney is Nic's wife," and started saying, "Nic is Courtney's husband." That's how much I think of her.

David Ball:

And they're an amazing team, and articulate about what they do. They teach it well. And I learned probably more from Nick, not just about trial advocacy, but about myself, than I think I've ever learned from any one person. Maybe that's a bit of an exaggeration. There are a few others in my life with that kind of influence.

David Ball:

It just seemed ideal, and the only person who had really difficulty with the book was the editor, putting four different authors together in one set of covers. But Trial Guides has a wonderful, wonderful editor, and she managed to ... And all their people have done a superb job on this thing. They all managed to put up with the four of us.

Michael Cowen:

Was [Gina Ricks 00:11:20] your editor?

David Ball:

Yes. Gina Ricks, and she always got more patience than ... Who knows? But she also knows what she's doing. And if she says something, it's not that you accept every single thing she does says, but you seriously consider it. And you'd better have a really good reason not to, or you, yourself would've been uneasy that night. Anybody who's had the experience of working with her, and with her other people, first-rate.

Michael Cowen:

What are some things that ... You and Artemis do a ton of research. Artemis is out there doing focus groups all the time. What are some of things that you've seen, with the combination of the changes in society and what you're seeing in your jury research, that led to the need to evolve strategies on Damages?

David Ball:

Well, part of it, of course, was just, as you think about soccer and watch it in action, over the years. I saw the beginning of the opening, a template that's in Damages 3, work pretty well. As time when on, when I was launching them and we're using them doing more and more research on it. And realizing exactly what it was about it that was working well. And that allowed me to refine this thing we call alignment, and it's sort of the same, except now it goes right to the heart of things and it takes advantage to ...

David Ball:

Artemis and I've been doing some work, a lot of work with neuroscience research. We're doing a National Science Foundation project. Or, I've been doing, and it's finally coming to a head. Duke University with their, I think they call it their, Duke Institute for Brain Science, DIBS. Something like that. Anyway, a friend of ours there, who is both a scientist and attorney, and his colleagues there got a grant to do this project and do jury decision making.

David Ball:

And so we started to see more and more and more about, not just from that project but in general, what have the neuroscientist learn about the human brain makes decisions? And it's very different from what the 20th century psychologists thought. In fact, most of that stuff has now been shown to have been not just speculative, but wrong speculative, with all due respect. And it's radically changed some things. That helped reframe that beginning of the opening so that it was, if you get that alignment in place, you start winning in the first two or three pages of you opening, and it gives you a definite foundation to build everything else in the case on. So long after the jurors have forgotten exactly how you started your opening, that's still controlling how they think.

Michael Cowen:

I want to talk about that concept of alignment. You introduced me to that a couple years ago when we were working on a case together, and it really helped the way we worked up the case. The defense didn't let us do an opening in that case, unfort ... Fortunately enough, good for a client because they ...

David Ball:

I didn't let you ahead.

Michael Cowen:

We stopped negotiating and they just gave up and paid our number.

David Ball:

Well, that's one of the reasons people use it with the alignment thing in their negotiation with the other side. It can put the defendant in a near hopeless situation.

Michael Cowen:

Absolutely. Can you tell us what is the concept of alignment and how does it work?

David Ball:

What we know, we've thought this for a long time. I don't know if you followed [Greg Kusamano 00:14:58] and David Werner's early work. They certainly had this concept embedded, and their work unbiased. And I've known it from where I worked in theater, where the impressions you give an

audience at a certain point, control things for the entire rest of the play. And then a long-term the neuroscience is showing that this is not just ... We're 20th century speculation. This is really what's going on in that skull.

David Ball:

What alignment does, and it's very simple how to do it. Explaining why it works is much more complicated. But what it does is, it gets the jurors to start believing something important about your takes. It doesn't have to be the most important thing. It doesn't even have to be central thing. Just so they start, because the older Brice Privacy means people will remember the first thing they say, and that's simple false.

David Ball:

What is true, is that people tend to continue to believe what they start to believe. The first thing you believe about a new situation, you tend ... It's a very tiny tendency. But if the next thing they hear reinforces that initial tiny little baby believe, that baby believes that's a little bigger. Now the phenomenon happens stronger with the third thing, so that by the time you're far enough into your opening and this all gets done, and the alignment just maybe anywhere from three to five minutes long depending on the case, in some cases, it's two minutes. But by the time you ... For example, if you start with alignment and you get this little belief that, yes, the taxi company really didn't put the right tires on their cars, and should have replaced the tires earlier.

David Ball:

And they believe that now. Lets take them as you show them. On such and such a day, this happens, this happens, this happen. Each one of them or at least for each one of those -- the event in the case itself. The jurors start to accept that. They have no reason not to. And they do, if you're careful on how you do it. So that the next thing in next section, you come to at least in the opening the way we do it. Somebody else may do it differently. This will work.

David Ball:

But in our next section, usually is, who we're suing and why. So you take that again, very sequenced, a step at a time. Since they're slightly more likely to believe it, because they already have a little belief in your favor, that gives you a foot up with the next one. And that continues until by the time and opening, you get to undermining the opposition and undermining the thoughts that the jurors are going to bring in on their own. You're almost impervious to those things. So now you can say, "Here's what's wrong with those concepts. You'll this, you'll see that." Don't say those words, we don't advise that. But that's what you're doing when you're undermining.

David Ball:

And then when you get to damages at the end, you got a jury that's yours. And now the poor defense attorney has to get up and put on his or her case, and any damage they do, you've got the first witnesses to take care of. It's a lovely little system. The only thing I'm ashamed about, is that it took me 25 years in this business to finally figure out, how do we get jurors so oriented toward our side? That every new thing they hear will be that phenomenon that fulfills the bias that says, whatever I hear about something I pretty strongly believe, I will twist protest one way or the other, or make myself believe, or use to reaffirm or strengthen my existing belief.

David Ball:

I'm not sure that 25 years ago anybody would've been secure enough for that whole concept of how the brain works. Now there's no question about it. And now we see it illustrated every day on the news. Trump can do no wrong. Anti-Trump people say, "Trump can do no right." And it doesn't make any difference what it's. So that Trump could have done something exactly that Obama did, or vice versa and your attitude toward, would be totally controlled. Everybody's attitude is totally controlled by what your initial belief is. And then you determine, "Well, my initial belief is that Trump is X, and therefore if belief Trump is X, I look at that thing that he did in that light."

David Ball:

It's fundamental and it's a fundamental defense mechanism. And there's no question about the fact that it works. That's what alignment is about. How do we take advantage of something? That I don't need to explain all that stuff to an attorney? I could just say, "Here's a nice way to open, and here's why, because they'll believe in case, right here."

CRP Commercial:

Each year, the law firm of Cowen Rodriguez Peacock pays millions of dollars in co-counsel fees to attorneys nationwide, on trucking and commercial vehicle cases. If you have an injury case involving death, or catastrophic injuries, and would like to partner with our firm, please contact us. You can reach Delisi Friday by calling (210) 941-1301 or send an email to delisi@cowenlaw.com. That's D-E-L-I-S-I@cowenlaw.com. She will coordinate a time from Michael Cowen to speak with you in person, or by phone to discuss the case in detail and see where we can add value in a partnership. And now, back to the show.

Michael Cowen:

Now, I'm not sure I understand this right the way I thought I understood and what the goal of what I've been trying to do in my opening is that you want the juror by the ... Before you tell the juror that we're suing this person or this company for this reason, who we're suing and why, you want them to have already made their own conclusion that the defendant did something wrong.

David Ball:

I don't ever want them to have to rely on an attorney's conclusion because they don't -- tiny little example. Drivers are not allowed to follow too close. If they do or they hurt somebody, they're responsible for the harm. A Schneider Bros truck is coming South on Highway 85. It passes the first two exits in Fayetteville. Approaching the third exit, it comes up a long hill, and about two thirds of the way up the hill, it runs into the back of a bus. Every little juror's mind is going to say, "He was following too close."

David Ball:

I didn't tell them that. I didn't say the truck driver did anything wrong. I gave them no attorney's conclusion. Because there's probably no worse way to get a juror to agree with you than to tell them what to say. Try that when you are a teenager, and that sends the jurors away. I've now broken through any preconceptions of attorneys, because they now ... I've aligned them with me to a very small extent. Now I'm going to say, "Okay, let me tell you who we're suing or why or whatever you're going to do next. I'm just illustrating with this."

David Ball:

The first reason we're suing Schneider Bros truck company is they violated the requirement to train their drivers, to follow the rules of the road, making this unethical company.

Michael Cowen:

Right.

David Ball:

And then why is that important? And how do the violation of that rule, cause the problem in this case. And with each one of those went, "The jurors are with me. They don't have any opposite thoughts coming into their head." Of course they're agreeing with it. And I'm not just making out of theory. This was tested for a long time.

David Ball:

And then what they should have done instead, and then how would that have helped. And when you do that for each reason, you're suing. Now, when you're done with that, they're so far moved one increment at a time towards thinking your way. I can now say, one of the things been undermining the jury ... One of the things we needed to look at, was this. And then I'll fill that blank in with something the defense is going to contend or something we know jurors may bring in on their own.

David Ball:

So it'll be something like, "One of the things we needed to look at is, was there ice on the road that day? Because if there had been ice, then it might be the ice that was to blame, and not the fact that the trucker was following too close." The Schneider Bros truck was driving too close. In three or four sentences, I can dismiss that in a way that I couldn't before, but I can do it now. Call the weather bureau, ask you know the person, and you'll hear them say sorts and sorts of thing. And the jurors will buy that because they already believe everything else about it.

Michael Cowen:

Right.

David Ball:

As they run through everything that could undermine the case. And now, the jurors essentially have stipulated the liability. And now you say, "Let me talk about what this is meant for John's life or whatever." And now you go into your damages with a friendly jury. In fact, with a jury that's afraid of the kind of things the defendant did, that hasn't thought about your defendant at all and your client at all. All that their thought has been on, what finally becomes --

David Ball:

Why didn't that damn company just trained it's drivers? Or whatever the hell it did or whoever the defendant is. But that's the principle. And again, in the explaining, it sounds very heady and all that stuff. In the actuality of it, is the most down to earth way I know of providing a template that people can use to really get the thing working. The purpose of an opening is to show the jurors what they're going to see in trial. To orient them. Well, you're orienting them what's going to be in trial, perfectly. You're

covering everything. And then with the advice of Erick Oliver, which is brilliant advice, and always it is, you try to sequence your witnesses, so they reflect the sequence of your opening when you can't.

David Ball:

And that's been a little easier now, because we know how to make video depositions just about as interesting, and listenable, and memorable as live witnesses. I couldn't do that very briefly using subtitles, but that needs more explanation than that. This kind of thing just ... It harms you in a way that is done with respect to the jury. Not about law, not about you, not about the judge. It is totally, "We are here for the jury. Every step we take, we've examined carefully through their eyes." And then what I try to do, is reduce that kind of thing to templates that a busy lawyer can actually follow and organize his case around.

Michael Cowen:

And the thing I love about your template is that it makes ... Not only does it go with the science and the research, but it keeps our stories understandable because we suffer from the curse of knowledge. We've worked on the case for two or three years, and we just forget what people don't know. And then we want to overexplain and we want to overexplain too early. And I've seen lawyers, they get too defensive. They start talking off. They start trying to undermine before they've aligned and got the jury to bind on the ...

David Ball:

My God. This is why I got the job. I started life as an engineer. I learn that what engineers do, is they take the science and they translate it into something people can use. That's really an engineer, and that's the difference between a scientist and an engineer. It's not that I think I'm engineering as a trial consultant, but I'm serving the same kind of function. What I lack, is the ability to get up and do it the way you folks do it, because I don't have the temperament. I would tell the judge off. I would throw things with every sustained objection against me.

David Ball:

I, my social skills are now around zero, and my skills in front of authority are even lower. And I'm not kidding. That's not my strong point in life. I admire the hell out folks who can do that job and meet another one of my total limitations, which is on your feet, juggling several different things at once that may not even have anything to do with each other. I'm furious with what the judge did. And now I got to cross-examine this eight-year-old girl.

David Ball:

Now, how do I do that without going down, turning -- and do the eight-year-old the way you have to to cross-examine a child. I know how to do that. I don't know if you know how to do it, but you put me in that position and I'd be using the child to make my damn points against the judge.

Michael Cowen:

Yeah. Well, one thing I have found that really helps, and it doesn't mean that what I'm saying is true, but it's a mindset trick that has helped me retain my demeanor in trial. And that is, I have a mantra. The jurors are taking time out of their lives because they want to do the right thing. And so I'm going to trust them to do the right thing. The judge wants to follow the law and do the right thing. I may or may

not agree with it, but the judge thinks he or she is doing the right thing. So I am going to trust the judge and respect his or her decisions. And then I'm going to have fun while I'm here.

Michael Cowen:

When you have that ruling you don't like, you just tell yourself, "Well, the judge is doing what she thinks is right. I guess, going to live with it." You go on and you just let it flow through you because the getting mad is not productive. You do that after the trial, but when you're there, it separates you from the jurors.

David Ball:

Well, also should not have anything to do with where you are, I don't if you've had a chance to read Rick Friedman great new book, *The Way of the Trial Lawyer: Beyond Technique*. It does talk about the ethos of who you are. When I first heard of it, I was, "How crap a self-help book?" It's an amazing book. A really amazing book. And it has to do with what you just said with that. If I'm here because of my ego, I'm going to get mad at the judge. If I'm here, because I'm insecure, I'm going to get mad at the ju ... Or whatever is distracting me.

David Ball:

Something manages. No, none of those things have to do with who I am, of why I'm trial. And the other thing that is covered in *Damages Evolving*, is what I think is growing awareness of the importance of empathy, which is a very tricky word. It means to see things through another's eyes and to partly share what they are feeling in their given situation. Which lubricates the wheels, so that when somebody does something like that, whether there's a defense attorney or a juror that I don't like in a voir dire, or whatever it is, that I'm not assuming their universe is mine.

David Ball:

In fact, I know some judges who are from different universes, but that's a different story. But rather I'm assuming that there are differences in how they're seeing the world. What is driving the understanding the pressures the defense attorney has to stay in business that come from those pressures that come from the insurance companies, makes it a lot easier for me to deal with that person rather than my just thinking that person is a jackass.

Michael Cowen:

Right.

David Ball:

... there, but for the Grace of God, might go mean, but that's why I don't work that side of the fence. But you can have that kind of empathy without identifying with the person, without agreeing with the person, but it creates an ability to get much more out of your own client, especially ones you're having trouble with. Same with witnesses. And it skyrockets your ability to work with jurors. You come in every day before a trial starts and you look at each seat.

David Ball:

Lawyers will sit in each seat in the jury box, remembering who's there glancing at their notes from voir dire, to try to re-see the world of the trial up to that point through that juror's eyes. And once you can

do that, you've created that bond. It's one of the reasons actors love live theaters much better than film. Because there is something in that bond in live theater while here, you've got an even bigger than that, because you know exactly who they're. That means you start making great decisions that you're not even thinking about, because your mindset has to do with those jurors, specifically, not a jury, but with a juror that juror, that juror.

David Ball:

And again, it sounds heavy. It sounds vague. It sounds a little mushy. It's actually very easy, very practical and people automatically do much better when that's there. I don't mean sentimentality. I don't mean sympathy. I don't mean dripping gooey, "Let's sing Kumbaya." I don't mean that at all.

Michael Cowen:

Yeah.

David Ball:

And then understanding where others are coming from, just the way every great work and every great political consultant, of which there are two, and I can only name one. That's the great persuaders. It's hard to think that some of the most evil people in history having great empathy in what they do, because they know exactly their audience is thinking. We've had a recent example of a person that many of us do not admire, yet in that regard, he was better than anybody else around. Because he empathized on that level, not the sympathy one, or the feeling kindly one, or anything of that. But he empathized on that level with who these people are, what their lives were, what they nide to hear to them on your side.

Michael Cowen:

And language, that was their language.

David Ball:

Yeah. Without condescending and knowing which part of you, you wanted to, which parts of you to allow them to sin. Because, okay, whatever your life is, it's not the same as most people on the jury. It's the most down to earth, I suppose, but down to earth in Iowa and down to earth in British Connecticut are different things. So you really do need your audience. Damages: Evolution has a lot of that it from Nick and Courtney. But again is coming out of somebody in the trenches who shows you how to do it. And that's one of the lovely things about that part of the book.

Michael Cowen:

This is not from the book. And I'm just wondering if you have any thoughts on this. Nick and Courtney as a trial team, have had incredible results. I've noticed that I've done much better when I have a female lawyer trying the case with me as an equal. Is there something there to that?

David Ball:

Yeah. Years ago, a very good friend of mine who was he was, I think, the first attorney that ever hired. An absolute genius in Kentucky. I don't if you know Gary Johnson or not.

Michael Cowen:

I know who he is. He's an incredible lawyer.

David Ball:

He's magnificent. He would bring me in, and I would be involved when the case was over and we ended in some part of Kentucky, that all I wanted to do was go home, but there I was ... And all he wanted for me was little notes of what to do next throughout the day. And he had the judgment to know I was full of crap when you really need to do. Anyway, he told me earlier on, about what wisdom was in it especially when he said that, "Remember that awful lawyers joke about what you call a hundred lawyers at the bottom of the ocean?" And the answer was, "I forgot, not enough or-"

Michael Cowen:

A good start. Yeah.

David Ball:

And he said, "now, that picture in your mind, what are those lawyers wearing? They are all wearing business suits, because they're all men. "The bias against plaintiff's lawyers is far stronger. Almost all against the men. It's hardly there with the women. They bring an air simply because they were there when court reform was attacking them like that. There weren't that many women yet in the courtroom. So now they carry a sense of credibility with some.

David Ball:

And also my other understanding about all this is that, most people grew up being aware that dad would have to lie now and again. "Mom lied?" You want to win a case and have a woman with you who's eight and a half months pregnant. That's the most credible -- I think there's something to that. And I hate to say that.

Michael Cowen:

I've tried a case against a woman that was eight and a half months pregnant and it wasn't ... We got a verdict, but there was a little-bitty EV on that verdict. It was not something that went up on the website.

David Ball:

I watched the prosecutor in Durham years ago. She had been an okay prosecutor. Did occasional flashes and incredibly good work. But never as effective because when she was probably had her husband waiting at the court house store with the car warmed up. But even without being pregnant, and I don't want all the women lawyers to run out and get one of those fake pregnancy results.

David Ball:

I think that's part of the reason. The other part of the reason is, it gives you a point of view on the case with almost all the lawyers I know. That will be different. The amount that I have learned from Artemis over the years is not just because of Artemis' intellect ability to understand this whole business and how people operate in it, which is pretty formidable in itself, but she's seeing it from a different world. Women do not grow up in the same world situation that men do. They simply don't regard of how you feel about women's rights and all that stuff.

David Ball:

You can't make the arguments that we both grow up in the same world. We don't because we don't have the forces working against us. And that provides everything in the case. Probably most importantly, you, with an insight. Assuming you leave the doors open in the invitation from that person. I used to fight with people because they would ignore their female paralegals in trial. I'd write a note to the attorney I was sitting next to, and the paralegal would have written the same note five minutes earlier but the attorney didn't bother to look at that one.

David Ball:

But mine because he's paying me he looks and he does it. I've sat in endless meetings where the men with dodder around about a solution to something with brainstorming, and the woman would say something, and that's when they check their cell phones. They still do that today. They check their email. There's something rich in that other point of view, and to make the argument or the old stupid argument about women shouldn't be in business, and that's pure crap.

David Ball:

But what I'm saying it's not just a matter of equality, but in two different things there's a great strength. Laminated wood is indeed stronger than a solid piece of wood every time. That's an old engineering principle. But it's true. So I think there's something to add.

Michael Cowen:

Yeah, I think so though, but you have to have an equal. If you have someone carrying your briefcase or passing you notes who you don't treat right or doesn't get to talk to the jury or examine witnesses, I think that it can backfire.

David Ball:

Very much so because the women are watching you.

Michael Cowen:

Yeah.

David Ball:

And some of those women have been treated like that and they didn't like it, and they don't like the people who do it.

Michael Cowen:

Yeah.

David Ball:

And it doesn't take many people. When you're on the plaintiff side you ruin your case.

Michael Cowen:

Yeah. Never cast yourself as a villain accidentally, by the way, you treat the people on your own team. And this is no reason to do that.

David Ball:

Instead of just saying, "Don't do that because it can hurt you." Is, "Don't do that can hurt you." But if you do the opposite, it can help you actually find more than it usually will hurt you.

Michael Cowen:

It's also the right thing to do on top of that.

David Ball:

Yeah, but I'm not a great fan of sacrificing anything to your client.

Michael Cowen:

Yeah. That I agree.

David Ball:

The welfare of your client outstrips any of that, that's what this is about. That's why for clients, this is the resource they've got in the world. So no, I don't think we need to -- I think by our nature doing plenty of the cases we are serving a social purpose on a bunch of fronts. But to say that that's why we do it other than to help make things safer ... Well, the primary thing is somebody hired you to do a job, you better do the best possible job for them. They don't want to hear about social causes. So yes, it's the right thing to do. That's fine, but that's not why I push people to do it.

Michael Cowen:

I have another que ... And this is off the book and I just would like to get your advice on this. One of the things I'm getting to do, and it's a blessing is, I'm getting to work with lawyers who are developing and finding their own genius in my firm. And I struggle because you want them to do more in trial, but at the same time I've read and I've also found that if the same person does voir dire opening and closing that you create a relationship with that jury, that may not be the same as if you split them. What are your thoughts on that? Because I want to get people the experience of doing it, but I will have something to offer too. And also it's fun, and I don't want to give up all that stuff. What are your thoughts on that?

David Ball:

Well, you can do this, I think one of the things to do is start finding cases for them to do, even if they're pro bono cases. If you're training people, which is good for you in the long run, one of the ways you get them experience is just giving them cases that aren't that bloody hard or complicated to do. You get just to stand up in front of a room experience. Also another approach is to divide the -- I've seen really good lawyers do what you're talking about badly. Where they'll put a person into a position they're really not quite prepared to be in yet.

David Ball:

But what you can do, you can frame a case with consortium in a way that the consortium claim is not hard to do. That means you, yourself have really got to know to do a consortium claim, and it's not just a little appendix that waves around and then it's ... I know lawyers who will, "I'll do the liability, you do the damages." That's a pretty big division of responsibility. But to get more specific, you handle the science here. You deal with these.

David Ball:

Whatever it's, every plaintiff's case, I believe, enter injury case or death, wrongful death case should have five five or ten fact witness who are not members of the family, or not close friends to talk about what this process is like now, and have some others talk about what they were like before or one witness can -- Be with five or ten of those people, ten or fifteen minutes each, very powerful describing Damages 3 and other policies. That's a unit which has to do with getting people on the stand who probably won't even be cross-examined.

David Ball:

I know an attorney who -- defense cross-examine those people. And all you're doing is eliciting from them on the stand, little anecdotes that illustrate, "Mom's always tired. Or, he can't do this anymore." Thought what the change is, it was not abstract. That's a little unit you could give those people at first. And then step by step you expand their number of units. I'm not necessarily very adherent to the same attorney needs to do voir dire, opening and closing. I like it to usually to keep voir dire an opening in the same line because I think they're really part of the same movement.

David Ball:

But by the time you get to closing, they have heard from so many different people. If you can, you may put that decision off until you get the closing because you may have developed a really good relationship with the juror. Or your colleague, younger, less experienced than you were now. It may just turn out that you can feel that when they get up, the juror talk to them more. That's the person who can close it.

Michael Cowen:

Yeah.

David Ball:

Because the basic rule is, whoever the best person is for the job, they should do it. What you're trying to do here, is make an exception of that. But if you think of, "How can I use them in a way where it's at their skill level, et cetera?" And then give them on their feet in court clothing, preferably in a courtroom, practice doing the damn thing. Bring in. Hire some kids to come in and be witnesses. Hire some actors from a local college for \$50 or whatever. So they can actually ... Because half the reason younger or less experienced attorneys don't do all that, well, at first is they're scared to death.

David Ball:

And a lot of that is, "Shit, I'm suddenly in a real courtroom." It's like taking a kid from the little league and putting him on the mound in a World Series game. It really is. Well, how do you get them there? Well, we call it practice or we call it rehearsal in the theater. So the first time, act up against the old star is perfectly comfortable. That's another way to help. But I applied your effort to try to make them better.

Michael Cowen:

Yeah.

David Ball:

But to clear out some public defender's office is they're taking that urge seriously. They've got some wonderful attorneys, simply because they know they'd better make these people better if they're going to be looking for a job.

Michael Cowen:

Do you think it's ever okay to split an opening state but then have one lawyer do the-

David Ball:

Yeah. The judge will let you there. It can be times where that's very useful. "Okay, you've heard from me, you've heard from person A all the reasons about what went wrong here, or why we're here, what this person did wrong, what they should have done instead. You've dealt with all the things that are wrong with the other side's case. Now, let's get to the important stuff." And so for that, B gets up. That's one way to do that.

David Ball:

The most opportune time for career you work for is obviously voir dire because it's a two-way thing. However, once you've learned how to deal with a group of people you're talking to, everything you do in front of that of group is a two-way thing. Cross-examination of a hostile witness is a two-way thing between you and the jury. And you need to learn how to do that.

David Ball:

Otherwise, instead of bringing the jurors into the show, you are putting on a show for them to watch, which means they are not in your control, which means they are not your allies, which means they're not the group you want. Unlike that, you will learn to fix that sort of thing.

Michael Cowen:

Can you give some examples of how you include the jury in your cross-examination of a hostile witness?

David Ball:

When the witness is over there, the cross-examination. And so, I'll say, "Doctor, you were there, weren't you?" And I'll simply turn to the jury so we can share, and after an answer, the time you get the greatest information is when you shut up after they've answered, because they'll jump in and fill the gap. But when they finished answering the significant question, or a difficult question, I might turn to the jury and just I will think in their direction. Possibly about fifth of a single jury the whole time he makes somebody nervous. But you bring them in. That's just one example.

Michael Cowen:

Yeah.

David Ball:

If you've ever had the chance to work with Joshua Carton, he's got all sorts of ways to teach you how to make that jury pardon every step you take. But just simply playing and looking at them and sharing reactions without trying to sell anything by the look on your face. Just give them the feeling ... One piece of advice I used to give I haven't done in a while, I guess, because Artemis isn't going to all the trials. But one piece of advice that I used to give is, I finished the question, I finished a lower unit of questioning

and I look at the jury to give us all time to think but I'm looking at them as if I'm asking them, "What should I ask next?"

Michael Cowen:

Mm-hmm (affirmative).

David Ball:

"What would you like to hear next?" And then at a certain point, "Okay, I've got that. Let me ask them that." And that works. It really works. They feel like that ... Also, if I spend the whole trial in this orientation to you, I never become one with you. They never really get me. They get me at work, when I spent a lot of the time oriented in their direction with them, not just opening and closing. And even in opening and closing, consider dialogue. It's not just you giving them a bunch of conclusions. It's you working with them to arrive at a mutual understanding.

David Ball:

All kinds of things like that you can do to get that jury aligned with you. Hopefully, in jury selection you can hardly end up making a group, a unit, an organism out of this jury. Now, how to I bring those then to me? One way is to be Jerry Spence. Ordinate rally for that fact because that happens almost all by itself. Some people have that gift. Other ways is to learn. Somebody like Joshua Carton teaches that with some brilliant exercises. That finally makes people see, "These people are in the case with me."

Michael Cowen:

For me, it took a lot of working with Josh and with Sari de la Motte, and practice, and practice, and practice, and read, and changing my mindset, and getting over my own securities. It's not natural to me. And maybe it was natural to Nick and Jerry, but I think there were but most of us have to work hard at it.

David Ball:

Yes. I don't think it was natural either with them. I think it's maybe easier for some people to learn. And ultimately, some people are better at it than other people, but it's counter to the normal personality it takes to even decide to go to law school. Much less than going to trial law. But it's also unnatural to learn the law. That's hard too. Would I had passed the bar exam? I would have understood every bit of law school every moment of it. But ask me the next day --

David Ball:

Except I did read thoroughly more than once the restatements of torts because that becomes an awfully useful thing about the linguistics or even do with the linguistics regarding the laws of a difference sort. But it is learnable. And to not learn to do it well, and not just well, but the best that you can do. And it's one of the things that takes that as the equalizer between attorneys with great charisma and brilliance and natural talent, and those who don't.

David Ball:

The ones who don't will probably be better later in their careers if they had been learning the whole time than just relying on those natural gifts they have. And I see this all the time. The legendary attorney and they're less experienced not even a smart colleague, because some people aren't smart enough to always hire people smarter than them. And as the colleague who's doing the brilliant work, because the

colleague has had to learn how to do the brilliant work, the automatically talented one hasn't progressed one day. You can count, you see it all over the country.

David Ball:

Lawyers did really, really well early in their careers. They got famous, everybody knows them, they're in all the right groups and organizations and honor those people. They're not the ones bringing in the verdicts. They're not the very ... Some of them are, sure, but a lot of them, they're mired because they never had to do that work. It's like the pretty baby in the cradle never had to work to get people's attention. It's the ugly ones who had to work to get people's attention, so we know how to get attention. The Pretty baby has no idea.

Michael Cowen:

I want to shift back to what we talked about. I've gone on some tangents, but I just want to hear something interesting. I want to pick your brain on it, now that I have you here. Forgotten damages is ... I just looked at the table of contents, because that's the least available on the Trial Guide's website. And one of the things of the book is forgotten damages, what is for what are forgotten damage?

David Ball:

Not by the attorney, forgotten by people in general. Things that are almost always watched out. I'll give you one example, the book is ... Do want a ton of these. They're all compensable or they're not there and some places might allow one thing and not allow another, but most of them are available every place. If someone is in great pain, if that's your principal thing, they're going to be this horrible pain for the rest of their lives. And if you don't look for the forgotten part of what the damage is a pain. I'm not talking about its consequences or disability or other things can't hold your grandchild anymore.

David Ball:

What the hell else is there. And if you're staying up with what scientists are learning, if you have great pain, you will have trouble sleeping. You may fall asleep and it'll be a lousy quality of sleep. Probably you can't fall asleep in some situations. So what do you do? You have to take medications to help you sleep. Which is a crappy level of sleep. You're not getting the kind of sleep your brain require. And so what happens in the long, actually, even in the midterm, much less the long run, you will be more susceptible to severe physical diseases.

David Ball:

The odds that any one of these, I shouldn't say you will, but any one of these will come to pass is 20%, 30%, 40%. But the odds of ... One of these, have some serious consequence go goes way beyond the preponderance. So you can always get this stuff in. And certainly your clients concern about it, is way beyond preponderance. So the plaintiffs concern about it. So know that somebody with any kind of malady, in the future, something that seems totally unrelated, the lack of sleep thing, eventually causing senility, 20 years early.

David Ball:

Somebody who's not confined in their movements and has to be sedentary most of the time to find a wheelchair or whatever, their chance of cancer goes up by a third. Their chances of heart disease go up by a third. Their chance of, I forgot what the other really awful thing is, goes up by the third. We know

that being sedentary all the time is bad for you, which is why you got to get up and move around every hour if you want your body to be okay. Well put yourself in a position where you can't do that at all and then the consequences become enormous. That's a forgotten damage.

David Ball:

And to jurors, it's not just an equal level, the fact that you're in a wheelchair now is nowhere near as bad as the fact that now you don't know whether you're going to get which one of these things. All you know is, if you don't have the money to take care of yourself if you get that kind of cancer, or whatever it is, your kid is not going to be able to go to college. And what are the consequences? Well, hard consequences of the family in the beyond preponderant event that one of those things comes to pass, which is another thing you need to keep up with.

David Ball:

What is science learning more and more literally by week, about what is the consequences to think, we're worried about the long term consequences of COVID. They're nowhere near as likely as the consequences of being sedentary or getting bad sleep or other other things. So somebody, 40 or 50 years old, is not going to have the same remainder of life in the same ways, for reasons beyond what their injuries harder than the obvious ones. Totally different things harder as you're going to come up.

David Ball:

And they either know about the nuts, creates huge anxiety, there's a financial preparation that has to be there, there's compensation to the more than likely probability one of those things will have. It opens the door to a whole lot more economic damages, which is important in states where you've got non-economic damage chat. But it also shows the jurors how much worse than anyone ever thought, the consequences of what that trucking company did. It can happen to anybody I know, including me. Now you've got an engine working for you, just because you've looked at damages that nobody's ever thought of.

David Ball:

People always say, "It can't do brain damage, because it's invisible. Nobody can see." And how am I supposed to win that kind of case. That should be your strongest possible case. The case with brain damage, because it affects every single thing about a human being, select from, and everyone around them. The good unit in the book. Now you can bring all that together. But that all stems out of this forgotten damages.

Michael Cowen:

It just means we had to deal with more work to learn and educate and-

David Ball:

Look, if you don't do it, you're really not serving your planet and I would call that negligence because you are ignoring things that you as a injury attorney, ought to know about.

Michael Cowen:

I'm also doing all the work, I'm not criticizing that. I'm just saying you have to thank ... It's like a branch recase. It's an invisible damage, yeah, so you need to go find, like you said, those ten to fifteen people to give those fifteen minute vignette who want there best friends and family members.

David Ball:

Well, as the book point out, the worst harm in the case, is the fact that the damage is invisible.

Michael Cowen:

Yeah.

David Ball:

That's what causes so many of the social problems. That's why those people can't go out of their house anymore. Which happens to many of them. The book explains all that.

Michael Cowen:

You can't just go higher a paid expert and expect them to do all that for you. You got to go do the work.

David Ball:

No. They'll tell you how it happens and what one can expect, but the impact on your clients life, you're not going learn that from reading anything. You need to understand the principles, and keep up with the science, which is like I said, weekly learning, major new things about they consequences of current things happened on us. It's not just poisoning that would have affected the kids in school, it's what it's going to do to there brain when they're 65, when they're going to start meeting outside the system to get through activities of daily living.

Michael Cowen:

I found the best expert for those that welcome when you share that literature with them so that they keep learning from the ones they will. I'm the expert, so you don't tell me anything.

David Ball:

Well, you don't need that stuff, all you need your expert is to talk about ... You find out the concept, go on ScienceDaily or any of the other places that can be a guide, just do an index services you want there. So you'll learn about, basically what they are or rely on expert to explain how that happened and how common it is. It's only up to you to show how that's affected, your expert can really go into how it's affected your client's life. What that whole area on lost damages does is open up that area at least as big as the one we've already been traditionally been using.

David Ball:

In most cases, one example and I'll shut up, every single case that has an impact to a human being even if it doesn't touch the human being. And it's like a whip lash or something. Make sure there no brain damage because there often is and brain damage can skyrocket your verdict once you know how to a brain damage case. Well, a brain damage happens much more easily than you think. If somebody falls down, even if they don't hit their head, or even if you don't know that they hit their, they can hit their hard enough to cause brain damage.

David Ball:

That's falling five or six feet from head to floor. Much less, all the other things that happens to us.

Michael Cowen:

Another concept, and it's one of the bullet points in your book, and I think it's something that I learnt from you a few ... I think you explained to me a few years ago, and it really seems to resonate with the conservative juror, that we need if they are not always in our social circles. And is-

David Ball:

You need to start spending half your time out of your social circle.

Michael Cowen:

Well, I live in Texas. Spending time with conservative is not an issue for me. I have family members from deep blue to deep red and everything in between. If you learn to love everybody and listen and not argue, then you can learn how to talk to everybody.

David Ball:

Or behave all the same. That's the other way.

Michael Cowen:

But one concept that's in there in the book is, lose control equals lose of freedom of choice. Explain that.

David Ball:

It's a huge biggie. I don't give a damn as a juror that your client can't pick their petunias any more. Or play golf anymore, do the things they love to do. I really don't care. I understand your arguments saying, well, you know, take the most precious thing to me and I if couldn't do any more, how would I feel. But most people would say, well, I'll do something else. They don't understand the laws of a thing like that, till they can't do it anymore. It is a wimpy kind of argument to expect people to make that leap. Some of them do, most don't. But not just conservatives, but particularly conservatives. It's not that she's lost her ability to tender her damn opportunities, it's that she has lost the freedom to choose to do that, whatever it is.

David Ball:

They have taken away her freedom. Now, obviously, this is a highly topical issue. If you think about the "I'm a free person, I don't have to get a COVID shot," or whatever the argument is. Yes, it's a very ... But it's always important to people in our culture, because one of the things we fear the most is losing our ability to choose what to do. It's one of the things that scared the young people about growing old. It's one of the things that's scary about any kind of injury, whether it's a teenager saying, "I won't be able to go to the prom this year." Do they still have proms? I have no idea.

David Ball:

It is the loss of freedom to be able ... It's the thing we all fight against when we're teenagers. I'm trying not fight, but fight for. I want my freedom to do what I want without my parents telling me what to do. It is our first strong fundamental selfish drive. It is very powerful. It slits families. People want their

freedom to do what they do and don't pin me in and that's what it is to be an American, mostly. And in cultures, where that's not true when the immigrants come in, that has totally shifted in America within a couple of generations.

David Ball:

Don't tell me who I can marry. Don't tell me I need to do this. Don't tell me I must be that. Imagine getting stronger over the past few decades. When you couch the disabilities, the things people can't do anymore, you couch them as, they've taken away forever. Is freedom to choose. He cannot go to a movie when he wants to. His freedom to go out dig in the back garden and plant things that he loves. It's not about, "I don't give a damn as a juror about whether he plants things or not." I don't identify with that. It doesn't make any difference to me. I think it's weird and silly.

David Ball:

Freedom is the channel between the dualist. And in fact, it ultimately explains claustrophobia, where you lose the freedom to get out of where you are. That's the ultimate loss of freedom. That's what solitary confinement is. It's like wearing clothing that's too tight. I haven't got the freedom to lift my arm and scratch my head because the armpit is too tight on my shirt. These are all things that we live with all the time. And we do all we can to overcome them. You take that ability away, you've taken away something really precious.

David Ball:

It's what I'm calling a flashpoint. The book has got a list of about 20 flash points or so. The things you can build your damages case around.

Michael Cowen:

Can't wait to get it. I know we're going a little long, but there's just a couple more things that are so interesting. If you don't mind, I'd like to just take a little extra time and talk about. You also talked about science and experts.

David Ball:

I mentioned a little earlier. Fellow that I been working with for a number of years now, named Pate, P-A-T-E. [Pate Sean 01:03:35]. He's a neuroscientist at Duke, and he studies decision making. He saw, well, what better area to look at the practical things like decisions being made the, practicality of that then in the law, which is all about decisions from beginning to end, especially the juries. He's a scientist at Duke. Natural thing you go over to the Duke Law School and you get yourself a degree at age 55, 56, I don't know.

David Ball:

And so we did that, and his trial advocacy teacher put him and me together, because we knew we were thinking along the same kinds of lines about a lot of things. Here is all we're doing the National Science Foundation Research with him and a bunch of others. He has spent a year after a law school at the National Judicial Center in DC, which is a branch of the Justice Department, where he specialized in and still does this kind of work, science in the courtroom.

David Ball:

In a way that becomes accessible, not just to judges expecting them to read a book about, that set, to understand what to do. Is there and all the information is in there, but most judges don't have the time to read all of that. And then our jurors are up there. How do you frame all this in ways which the jurors can pick up and understand and use, which is of course, my part of the deal. The two of us wrote this chapter together. It's held the reliability test. The first principle of all evidence, is that it must be reliable. Also relevant, that's the other one.

David Ball:

But those are the two absolutely cynical analogies you don't have evidence, and this is both reliable, and relevant or relevant to something material. What this is, it is a way of showing that the other side is not merely mistaken, which is valuable enough in itself that they're wrong. But my part of it was to say, "How do we frame this to show they are not just mistaken, they are cheating." And they're not just cheating, me and my client, they're doing the worst sin you can do. They are cheating the jury. And you want the jurors to see that without you ever making the accusation.

David Ball:

These simply three things you look at to decide whether something fulfills our -- article explains it, so that jurors can get fourth graders pick this up. In fact, it's based on a series of fourth grade lessons that are taught in schools. And by the time you're done, you hardly need to question the expert about their opinions. Anyway, this is for opinions, not just people coming in to give an opinion expertise. And so the jurors hear these three standards, they are all direct extensions from the law. They all reflect Daubert, Frye, and others science standards, which applies to all expert testimony, not just science.

David Ball:

And the jurors understand is that simple, little one, two, three thing. And when they understand, they themselves begin to see during your questioning whether that person questioning your expert, fulfilled those things, therefore this is reliable. Reliable doesn't mean right or wrong. If you did it, right, you got there using the right steps. There are expert did that, make sure they do that. You can count on the fact that an expert that an insurance company hired, that a 90% chance that he cheated.

David Ball:

When I first heard that kind of statistic, I thought, I can't believe that. I don't care which institute they're from, I don't care who they are, I don't care about their credentials, they will shade the research because they know the jurors and lawyers don't understand what they should have done. So they can make their research dance and come out and do anything they want to, because they cherry picking the information and go the way beyond anything we've dreamed up. That's what this chapter is about. How can you get the jurors ... does not -- Pate, my co-writer on that chapter. His intention was just write something that everybody should understand what's required and the science to be reliable. I forgot the next step. And I made this very clear because they didn't want to be on one side of the other or anything. But I took the next step. Is that, "Okay. How can we then use this to show the jury that they are cheating." The defense cheating with these people, because once they see that, you have raised try the lie to suppose useful possible manifestation which is lying to the jurors. We're never going to use those words, lying to the jurors.

David Ball:

And that we know is an enormous Damages motivator. This is why it's in the Damages book, even though it's a liability point. It isn't really with independent medical examiners.

Michael Cowen:

Are so called biomechanical witnesses that ...

David Ball:

You can wipe them out in five minutes.

Michael Cowen:

What are the three questions that you use to determine reliability?

David Ball:

Their standards.

Michael Cowen:

Their standards.

David Ball:

Their reliability. Standards first. You have to gather all the available information. We've always known that, and factor into your conclusion, your opinion, the effect of the reliability ... with this much too worldly and complex of the book pages simpler. And account for the missing information that you couldn't find that didn't exist in terms of how it affects the reliability of your conclusion, of your opinion. That is requirement one of any kind of science research.

David Ball:

Kids understand that the minute. You got to gather all the information. If you don't have some of the information, got to tell us, "Did you come to the same conclusion? Could it have been a different conclusion, if you'd found that. Literally a 10-year-old, a 15-year-old can understand that. That's the first one, don't try to do this based on what I'm saying here, there's a little more to it to shape it. The second is, you must go back and check your work and keep your work, and keep your check of their work in writing, to see if you made a mistake. Simple as that.

David Ball:

People unconsciously make mistakes all the time. People have biases that lead them to make mistakes all the time. Go back and look at it again. The kids know this. In my day, was added the column of numbers going from top to bottom, and then check your work by going from bottom to top, or check your work by making sure you got to real number in their. And the third is, your work needs to be excessive. You need to let us know in enough detail how you do your work for someone else to come along and attacker it and say, "Here's what's wrong with it."

David Ball:

You have to do what's called red team mate. Red team people are people that a corporation hire students to see what's wrong with security system. Actively trying to hack into your ... That's the red team.

Michael Cowen:

My brother used to do that. Yeah.

David Ball:

It comes from the Catholic Church in the Middle Ages, when they were going to sanctify somebody, make them the saint. They bring in what's called the red team to take apart all the arguments to sanctify that person to make sure it was really okay to sanctify them. In other words, you approach at hosteling, let's see, can I groove it away? Can I show it is not more likely than not that these injuries came from a bad back to start with, and actually came from this wreck. And there's a number of other things that it's actually easier to do than I just made it sound.

David Ball:

But if you look at it, those three questions are very easy. The teacher says, "Gather all the information you need, to figure out what should the number be on the bottom area, if added them all up. And then go back and check your work carefully and make sure every step you did, you didn't leave something out. And then give it to me, so that I can look at it. And I'm going to look for mistakes. And if I find mistakes, I'm not going to give you an A, am going to give you a C." That's all this really is. Which means anyone can understand it. And once jurors understand that, it now becomes a challenge for them to find flaws on what somebody has done.

David Ball:

Is like, if you teach attorneys finally how to do criminal cases properly, they get the jurors to start searching for reasonable doubts. So it becomes a game. A Mystery. And I don't want to do that, that's -- I got to outdo the other guy in finding the reason. I'm going to do everybody else to find out what's wrong with this. And once they're doing that, the other side is cooked. They're done. It's a very powerful tool. It's in there.

David Ball:

And then there's a little section at the very end of the book about ... I forget how many pages, not that many, which has the updates that you want to go back, and if you use Damages 3 that you can go back it's setup so you can actually cut these things out and take them off the page of the Damages book if you want. Because you know, people have so many notes in the Damages book. It's another reason they don't want to take it off the market. You can't take books like that.

Michael Cowen:

One thing I love about your help and helping us expose when they defense ... They call them experts, I call them paid opinion witnesses. I got that from Mitnick.

David Ball:

I call the independent medical examiner -- The independent medical examiner who's the only profession in the world with three lies in the job.

Michael Cowen:

But it also really helps us have a villain in our trial story when there's not an obvious villain, like admitted liability, or it's a 70-year-old lady that just made a mistake and rear ended somebody and there's not a lot of property damage.

David Ball:

You be careful to not call them the villain. Don't use words like that.

Michael Cowen:

I never use that word. But what I do is, I look at what are the facts I can bring up in trial to try to get the jurors to come to that conclusion themselves. Once I say it, I feel like there's going to be a juror that says, "No, they're not. I'm gonna prove you wrong."

David Ball:

And that's why the reliability test works so long. The jury is totally on their own come to the conclusion that person is trying to cheat me. I am trying to do what I can do and regardless if you like it or not, most of them are trying to do what in their eyes isn't the right thing.

Michael Cowen:

Yeah.

David Ball:

I'm trying to do what I think I'm doing the right thing by my lights. And this cream is trying to keep me from doing it, and I'm the one with the oath. Break his own oath but don't make me break mine.

Michael Cowen:

Yeah.

David Ball:

They get furious at them. That's why try to lie is so powerful. Trying to lie is less powerful, if it's just, he lied to my client. It's when that line turns his direction from the client to the jury. And once that happens ... It's like somebody looking you in the eye, and slat out lying, and you believe them, and later you find out they were lying. And that, for many people will be the worst violation you can do to a person. And it traces back in terms of evolution. It is one of the worst things and we live in a little tribes, everybody's dependent on each other. Little trivialize make no difference, but anything of substance, where I have to make an important decision, I don't want to be misled by anybody. And if they do mislead me, I'm going to try to get rid of them from the tribe. It's a life and death thing.

Michael Cowen:

The last thing I want to ask you about from the book, that I think we talked a little about before when we were planning what we're going to talk about today is, you're right about respect.

David Ball:

And so a nice segue into what we're just talking about. Our strongest feelings is the wrong word. Our strongest drives are things that humanity evolves over however what humanity has been evolving. It depends on when you think humanity started and when we became humans or whatever we were before that. But once we started living in tribes, but this is true of animals as well. The concept of respect is a life and death issue. If I'm in a tribe and I behave in the ways that people stop respecting me, I get thrown out of the tribe.

David Ball:

And human beings back in the day, when we were evolving, back in the cave days -- If you were thrown out of the tribe, you're gone, you're dead. The only people who survived were the ones to whom respect was enormously important. Today we see, that a lot of the world today, that's irrelevant. However, the drive is still there. We also see this lack of respect thing that can get you killed if you disrespect somebody in the wrong setting, like in prison, or at a bar late at night when people have been drinking or a lot of other situations. Lack of respect in the workplace, no matter what we call it, it can be sexism or ageism or harassment, or just ignoring you or making ... Whatever, those are all lack of respect things. And we hate it.

David Ball:

I could do something in a group of people that would disrespect somebody in public, and that person would remember that forever. The people who watched me do it would hate me for the ... You can watch, you can be standing in line to get into a play or a show, and there's two lines. And you see somebody cut into the other line, somebody comes along and shoves someone to the side and cuts into the line. We hate that person. You're not going to slow me down, I'm going to get there just as fast. You hate that MF. You just hate them. That's a respect issue. So now let's take one little step with that. That is a true step. Every act of negligence is an act of disrespect to everyone that you possibly could have hurt. It's not just that it's dangerous to me physically or to my life, it is dangerous to me on a life or death. Consciously think of respect as life or death, but that's what it comes out.

David Ball:

It's as important as any other drive we have back in the day, and we've kept that. We haven't evolved away from it at all. When I see somebody doing that or if they do it to me, that's one of the worst things people can do to each other. It's that lack of respect. And when you can frame the issues of your case, negligence, and really the act of negligence, if you think about it that way is indeed in lack of respect. If I disrespect your safety, obviously I'm disrespecting you. You can't separate those two things. And that's a very down to earth argument that doesn't need any explanation to the judge. It's like the word freedom. Everybody knows you disrespect me, and I get really unhappy. There are exceptions, there are people who beat themselves, so beaten down in life that respect has become a luxury. They just don't expect it anymore.

David Ball:

But other than that, and in my book, that is still the reason Donald Trump won the White House.

Michael Cowen:

Absolutely. People feel a lack of respect, and there's someone finally speaking to them.

David Ball:

When he said to the Black Community, "Vote for me, what do you get to lose?" It almost worked. It came very close, except they didn't quite believe he'd treat them any differently. But the notion of disrespect, look, all the people in America who have problems of one sort or another, women's positions, the Me Too movement, or racial stuff, all of those things, all those people are still living among the best lives in the history of the world, materially and in health and in other ways, but we're all except the very, very bottom, living the best lives. However, when we are on a one of those lower echelons, with due respect to somebody else, we feel that disrespect. It's the disrespect that's constant it.

David Ball:

So as things rise as they did in a place like the United States, this is still the top, that's still the middle of the bottom, but that differential where the lower part is not respected by the upper part is of enormous importance. The different psychologically between being a servant in 19th century, 18th century, England, where there were very strict rules of respect to your servants was one of the biggest differences between that and slavery. Not the only difference, obviously, but the worst things about slavery, not just the work people, not just the individuals, it's the lack of respect for you as a human being. It is the universal, whatever the opposite word is to --.

David Ball:

And when you frame your case and it's easy to do, it shows you how you can probably figure it out anyway, you got a very powerful working for you. Just as powerful a persuasive tool as you'll ever find is to try to harness the power of how much we hate disrespect. You can probably remember all the times in your life that you were disrespected more than a trivial level. And if you are the kind of person who looks back and shoot right at things you've done, probably some of those things are when you disrespected somebody. And so that's that. When somebody's done us really, really wrong, one of the ways we get even with them is to disrespect them. We ridicule them. We make fun of them. We attack them in public. That's the way we get even. So when we think somebody has done something very bad to us, we will try to do something that makes them shamed in public because we know that respect is our jewel.

Michael Cowen:

That's great. David, thank you so much.

David Ball:

No, my pleasure. You whine me up and I won't shut up. Thank God.

Michael Cowen:

No, I love it. I'm learning. I can't wait to get the book. In the meantime I think I'm going to have at least one trial, hopefully between now ... COVID permitting, between now and the time it comes out. And I'm going to try to use some of what I learned today. Everybody that wants to try cases needs to go to trial.dias.com and get this book. You all been listening for the five years. No, I don't say that very often, but this time I really mean it. And David, one last question. I've had the joy of working with you and Artemis on some cases that has not only helped my development, but also really helped my clients because we got some really good recoveries. If someone wants to work with you all, what is the best way to get a hold of you or to learn more about what you do?

David Ball:

Thanks for asking because a whole lot of people think all Artemis might do is write books and do research. 95% of the time we're working on cases. If you can email me, it's the easiest way to get something started. It's jurywatch. J-U-R-Y W-A-T-C-H. Jurywatch@gmail.com. Or contact Artemis which is ... Artemis. A-R-T-E-M-I-S. Artemis@consultmmb. Mother, mother basketball. Consultmmb.com. Artemis@consultmmbb.com. And that's the quickest way because Artemis is traveling a lot. I check my email very often so we can get back fairly quickly to either spend a half hour on a case study or spend a half year on a case, a year, everything in between. That's what we do and that's what we learn all that stuff.

Michael Cowen:

And its so fun to go up there and spend a day brainstorming a case with you. I mean it's ...

David Ball:

We're doing most of that now via Zoom for obviously ... And that's even better because we spend half the day, then you go home and do a bunch of stuff, and then you come back so we can refine what we talked about the first half of the day. And really it's really a good day.

Michael Cowen:

Although the focus group stuff can get depressing sometimes because you find out all the things you need to overcome in your case it's incredibly valuable and I've enjoyed --

David Ball:

Then we can do the case before trial in preparation and after trial in retrospect.

Michael Cowen:

I agree. And I have to remind myself of that. It's that fun, but it's important. And so thank you for taking the time here. I look forward to the next time we get to work together and to the next time I see you.

David Ball:

Thank you. And I love that you do these things, not just with me, but with anybody. These things are such valuable things for the profession. And they didn't exist a decade or two ago. So thank you so much, Michael.

Michael Cowen:

Thank you, David. Have a great day.

David Ball:

You all take care. Stay safe. Stay healthy. And these days, stay warm.

Outro:

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