

Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Speaker 2:

You are the leader in the courtroom and you want the jury to be looking to you for the answers.

Speaker 3:

When you figure out your theory, never deviate.

Speaker 4:

You want the facts to be consistent, complete and credible.

Speaker 5:

The defense has no problem running out the clock. Delay is the friend of the defense.

Speaker 6:

It's tough to grow a firm by trying to hold on and micromanage.

Speaker 7:

You've got to front load a simple structure for jurors to be able to hold onto.

Speaker 8:

What types of creative things can we do as lawyers, even though we don't have a trial setting?

Speaker 9:

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.

Voiceover:

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 on Trial Lawyer Nation, I have attorney Ben Newman out of Austin, Texas. Ben is a younger attorney, but he just got an incredible verdict in a really, really tough jurisdiction on a case that was not a slam dunk. He's agreed to come on and talk to us about how he did it, and how he got himself to the point where he could do it. Before we start talking to Ben, as always, I want to give a shout-out to LawPods. LawPods is the company that produces and edits and distributes this podcast. They make it so easy. All I have to do is talk to people like Ben and they do all the rest of the work for me. So if you're thinking about doing a podcast, and I think you should if you want to grow your practice, I highly recommend LawPods. That being said, Ben, how are you doing today?

Ben Newman:

I'm doing great, Michael. I'm so excited to be on. I'm thrilled to be on. I listened to the very first episode of Trial Lawyer Nation with Josh Karton. I just remember the first time I saw it come up on my email feed. Before then, I had been looking for something to listen to on my commute that talked about trial skills and trying cases, and I've been listening to it ever since. So I'm super thrilled to be here. And with some of the names that are on here, I hope there's something of value that I can add. But we're going to try.

Michael Cowen:

Well, I'll tell you, when I ... You sent me an email, not asking to be on the show, just telling me you learned some stuff from the podcast. You got a \$1,076,000 verdict on a case with only \$45,000 in medical expenses, some therapy and a couple of injections in Collin County, Texas. Which is a place that I've always, with all respect to the people of Collin County, tried to avoid filing a lawsuit there if there was anywhere else in the state I can file one. Man, I want to learn from you. I want to figure out how you did that. So thank you so much for coming on the show. But before we get to trial, tell me a little bit about you.

Ben Newman:

Well, I'm a father of one. I have a three and a half month old baby, a wife, Elizabeth, who I love very much. It helps me out with trials and gives me the non-lawyer perspective, which we all need sometimes. And yeah, I love trying cases. I wanted to try cases from the moment that I decided to become a lawyer. And from that moment on, everything that I did in my career was to prepare me to be a trial lawyer. So I'm just really, I'm thrilled to be trying cases now and to be on this podcast with you.

Michael Cowen:

So how long have you been out of school?

Ben Newman:

I have been licensed for six years. I've been out of law school for about yeah, six and a half years. I'm pretty young still, many would say. But I've worked hard to get trial experience, and to learn and to read all of the literature and use all the tools that are out there.

Michael Cowen:

And did you start off on your own or did you start off working with someone else?

Ben Newman:

So when I started off, I started off with a defense firm and they promised me immediate trial experience. So I took that and tried a number of cases with them, and then from there I went on to another defense firm and worked on some bigger cases. And then I was working on this wrongful death case while I was at that firm. Actually it's funny, this is the dram shop case that [Suri Delamont 00:04:17] worked on a while back. At the time I didn't know she was on the other side. But I was working on that case, actually. And after hearing some of the stories of the plaintiffs, the wrongful death beneficiaries, that sort of thing, is really when I decided, okay, I'm going to make this jump. I'm going to the plaintiffs' side. This is the time. These are the people I want to be representing. So that's how it really started for me, jumping over to the plaintiffs' side. I always wanted to do it. I'd always wanted to be on the plaintiffs' side, but overall I wanted to try cases. Yeah, so that's really when the time came for me.

I had met with a number of people leading up to that point and figured I could probably get some pretty good referrals to get me started. So I just jumped ship and started on my own.

Michael Cowen:

What was it about the plaintiffs' side that attracted you?

Ben Newman:

Well, I liked the idea of going in and trying to win and get recovery for somebody who's injured, as opposed to representing a faceless client, if you will. Especially in that case, I really saw what some of these things can do to people and I really wanted to help them. I just found it to be a lot more exciting. I just expected that it was going to be a lot more exciting than working on the defense side.

Michael Cowen:

And what made you decide to go out on your own instead of trying to go into another firm, maybe a plaintiffs' firm?

Ben Newman:

Well, I had talked to a number of people, so I knew that I was going to be able to get some cases to get me started. Shortly after I went on my own, I got a pretty big plaintiff, actually, a breach of fiduciary duty case. The firm had just lost their litigation associate and it was a contingency case. They didn't do that much litigation, so they were really looking for a second chair and somebody to go help get that case ready for trial. I was able to get in on that case and the case ended up settling. So that is kind of what gave me my start, so I was working on that for quite a while. And then while working on that case cultivated some referral sources, and was able to bring in some cases and represent some really good clients.

Michael Cowen:

And if you don't mind me asking, going off on your own, after spending a few years at two defense firms, what did you do to cultivate referral sources?

Ben Newman:

I called up people that were good trial lawyers. Honestly, I cold-called a couple of trial lawyers and some of them are some of my really great friends to this day. They just put me in touch with people and had lunch with me. Of course, they like to talk about themselves and they would tell me about trials that they've been involved in. I just had a blast listening to it and they probably understood that I was genuinely interested. And that's just how it all started. I was considering going to a couple of plaintiff firms actually here in town, here in Austin. And after I decided to go on my own, I got the full support of those firms. They've sent me some cases and they've been great partners ever since.

Michael Cowen:

Well, that's great. There are so many ... not everyone, but there are so many plaintiffs' lawyers that have this abundance mentality. There's plenty out there for all of us, and your success does not detract from my success and vice versa. It's so nice to hear that that's still happening out there. So what made you decide you wanted to try cases? I mean, the money isn't settling them, let's be honest. I mean, you can settle 10 cases in the time it takes to prepare one for trial.

Ben Newman:

Yeah. It's hard to really put my finger on where the fascination for trial came from. When I was a child, when I was younger, a teenager, my family watched a lot of courtroom dramas. So maybe the thrill for the courtroom developed in me subconsciously early on. But far back as I can remember, I always wanted to do this type of work. I wanted to actually be in the courtroom. For a while I thought that's all being a lawyer was. But then you go to law school and you figure out that actually there are very few lawyers that spend the majority of their time in the courtroom, or spend a lot of time in the courtroom. So it just started early. And because I wanted to get good at trying cases and learn how to try cases, I went to Baylor, which has a phenomenal trial program. The third year at Baylor, they have you reading hundreds of pages of case law a night on the rules of evidence, the rules of procedure. Everything that you're going to use in a courtroom to get you ready, to where you can go try a case and do a decent job. Really just all the basics. So from the time I started looking at law schools, I knew that I wanted to go there.

And then when I got there and started doing these exercises and started trying these mock cases, I really just fell in love with it more than I ever thought I would. So it was kind of an early fascination and it turned into a passion

Michael Cowen:

And it's fun.

Ben Newman:

It's a blast.

Michael Cowen:

That's why I like them.

Ben Newman:

It is an absolute blast. Yeah.

Michael Cowen:

So what have you done then ...? You went and worked with the defense firm, tried some cases. You've gone out there and got some cases of your own. What did you do to learn your craft as a trial lawyer?

Ben Newman:

Honestly, I told you at the beginning of the podcast, or maybe it was before we got on, that I was looking for something to listen to because I had a commute. I was trying to find podcasts that would talk about ... or anything. I mean, YouTube videos, whatever, anything that would talk about trial skills and trying cases. And then I found your podcast, like I said, popped up on my email feed while I was at a defense firm, so defense lawyers do listen to this.

Michael Cowen:

I know.

Ben Newman:

So I started listening to your podcast. Really, I mean, your podcast is really what started me down this road of tracking down all of these resources to help me develop my trial technique. When Joe Fried came on and talked, he was really, really insightful. And also Keith Mitnik, who, I read a ton of Keith Mitnik. That's really what gave me the courage to go ask for a lot of money in these smaller spine injury, herniated disc cases. I mean, everything that I do in the courtroom can be traced back to something that I've read or something that I've seen. Something that I've seen on Courtroom View Network. Of course, Rules of the Road, Advanced Depositions by the AAJ Paul Sceptur. Those are the basics, right? Those are the first ones. I think you even said on this podcast that those are the first ones that you want to read, so I did that. And then also, of course, Don't Eat the Bruises. I've listened to all of Keith Mitnik's podcasts and I applied a lot of his techniques in this trial. I've read David Ball, Damages 3 and Damages Evolving. I use David Ball's outline for opening statement. I think it's a really, really great way to compartmentalize all of the pieces that you need to get in front of at the very beginning of the trial.

And then also, I watch a lot of Mark Lanier on Courtroom View Network. I've listened to the entire J&J asbestos talc powder trial. I think he does a really great job with witnesses. So I love how he really does a great job of one, talking in present tense and he does a really good job of keeping the jury on track. He'll start his examination and say, "All right. We're going to make these stops today. Stop number one, we're going to talk about, expert, your qualifications and your background and why you're here talking to us about this. Step number two, we're going to talk about the source and the cause of the injury. And then step number three, how long is the injury ...?" That kind of thing. It gives the jurors a really good roadmap and it helps them stay on track, because if they miss something it can be critical. So I use a lot of Mark Lanier in my evidence presentation and there's countless more that I could talk about. Yeah. I mean, I've done everything that I can to get myself ready. And also Trial Lawyer University, I watch a lot of that, listening to lawyers break down trials that they've done before. That's super helpful too.

Because if you watch it on CVN and then you watch it on Trial Lawyer University, it tells you why they're doing what they're doing, and that can be really helpful too.

Michael Cowen:

Have you been to Lanier's seminar yet?

Ben Newman:

No, I have not, and I'm not the best at going to the seminars. My practice was born in the pandemic, so a lot of my prep is just done listening, actually watching trials, reading transcripts of other great lawyers that are not really that well known but they're some of the best lawyers out there. Some of the lawyers that were involved in the hog farm cases are really good. I read that transcript. So a lot of what I do, a lot of my prep is just done in front of the computer and reading books and meeting with people. But that is one thing that I need to do a little better job of, is getting out there to the presentations and seeing them live and stuff.

Michael Cowen:

I got a lot of real practical ... I bought an IPEVO document presenter. I changed some things we did with witnesses. I'm doing more, between Suri Delamont and Mark Lanier, I'm doing a lot more drawing and creating in-person, as opposed to having everything pre-prepared and beautiful with an artist. I think there's a place for both of them. But he bought my KING flip chart, which is a double wide flip chart, which is a lot easier when you have bad handwriting like mine to write on. It gives you space to actually write and draw and all that stuff. So I do highly recommend. Obviously, I don't get him. He won't even

come on the podcast. He's too busy. But I still have a lot of respect for him and I do highly recommend his seminar. Maybe he'll hear about that I recommend him. Maybe I'll get him on here one day.

Ben Newman:

Yeah, for sure.

Michael Cowen:

But I do have you. So let me ask, tell me about this case. You've got a \$1,076,000 verdict in Collin County. So was this a big truck crash, broken bones, big company corporate fault?

Ben Newman:

It was against an individual, and that was one of the things in the case that we really had to get around. Because it's one thing to be going in there against Darth Vader insurance company or a corporate defendant like Johnson & Johnson or a Fortune 100 retailer or something like that. But when you're going in there against so and so that lives down the street and is 65 years old and maybe just made a mistake, it can be hard to convince a jury to assess a million dollars against him, or to say he has to pay or put a million dollar figure under his name. It can be difficult. So that's of course one of the things in the case that we wanted to make sure that we addressed. But to tell you about the case, it was a red light, green light, traffic light dispute. Our client was driving down an access road and the defendant ran a red light and crashed into him in the middle of the intersection. Our client had a five millimeter herniation extrusion at the L5-S1 level. The MRI said, no impingement on the thecal sac, which is basically the sheath that surrounds the spinal cord. So that was something that we had to get around, because the client was having real pain and he was 26 years old. Obviously, he had never had pain there before the crash. He's having it since the crash.

So that was something that we had to explain, is the mechanism of this pain, what's going on internally to cause this. Yeah. In a nutshell, that's pretty much the case.

Michael Cowen:

So how much for your medical bills?

Ben Newman:

Medical expenses were \$45,000.

Michael Cowen:

And what did that consist of?

Ben Newman:

That was about four months of physical therapy and two epidural steroid injections that were spaced about two years apart.

Michael Cowen:

Oh wow. How long had it been between the last medical treatment and the time of trial?

Ben Newman:

Well, the second injection was shortly before the first trial setting, which is when I came in. I mean, this was not my case from the beginning. One of the things that I'm really trying to do with my practice, is get to where I can parachute into cases late before trial, and go help out lawyers that could use a hand with their cases. So this is one that I parachuted into just a couple of weeks before the first trial setting and he had just gotten that injection. Then the second trial setting was November, so I'd say it was about four months or something like that.

Michael Cowen:

How bad was the property damage?

Ben Newman:

The property damage was pretty bad. I mean, on an access road and under a traffic light, you're usually going to have a pretty high impact collision. So the property damage was pretty bad, which, a lot of times that's a lot more than what you're working with. So that was a good fact for us is, the property damage was pretty significant. The car was totaled. There were some pretty compelling photos of the property damage, so that was one benefit that we did have.

Michael Cowen:

What was the reason the client went so long without ... I mean, he got one shot and then one over a year until he got another one?

Ben Newman:

Well, so with the ESIs, you can get them one to three times a year. It just kind of depends on the relief that you get. Also, the client, he had moved and just like everybody else, he was trying to get on with his life. He had moved to a different place so he was kind of far away from the clinic. And this was also during the pandemic, so a lot of stuff was closed. The pain management doctor said, "Yeah. I mean, there were people that I didn't see for two years. I'm just now seeing that we're here and that we were here the last time in mid 2020." So that was a lot of it. He was doing a lot of at-home exercises and that was one of the issues that we had to explain in opening statement. And then also, especially when we put our client on direct and we asked him, "What were you doing during this time? What were you doing for your injury?" And then he walks through his entire daily routine, which was really compelling. It was stuff that you just can't make up. That he wakes up, he stretches, takes his dog on a walk to loosen out his back. And then he goes to a job that he took so that he would have the freedom to stretch at his job.

There's just a long list of things that he did in order to help himself and use some self-help mechanisms. I think that was really helpful to the jury. Because as much as a lot of people think that the jury wants to hear about the client complaining and talking about how much it hurts and how many problems there are, the jury, that's what they expect to hear. I mean, they expect to hear people come in here and complain and talk about how bad they have it. But for this client and what I really wanted to make sure we did, was talk about what he's doing to help himself. It really worked because after the trial ... It's the craziest thing. So after the trial, after we get the verdict, the judge lets the jurors out, tells them that they can talk to us if they want to. A lot of them were hanging out right by the exit doors. We walk over there and they literally have a box of some kind of baked goods. I guess they got it for our client because they gave it to him. They were just like, "Can we see the client? Can we talk to the client?"

So Austin, the guy I tried the case with, who did a phenomenal job-

Michael Cowen:

Wow, that's awesome.

Ben Newman:

... with voir dire and some other parts of the case. Both he and I, usually we would want to talk to the jurors right after and ask them about everything that they thought about the trial, but we just didn't want to ruin the moment. The client got choked up. I got choked up. It was a pretty special moment.

Michael Cowen:

I've never heard of that happening. That's really incredible. I want to go back a little bit, ask a little more about the trial. So you said it was a red light, green light. Was there a dispute as to who had the red light?

Ben Newman:

Yeah, there was a dispute. It was a he said/she said thing. Our person said it was green. Their person said it was green. It's interesting, we had a third-party witness, just somebody who was traveling behind the defendant that said he saw the defendant run the red light. So we had that on our side. But what we had that was more important than that ... I talked to one of the jurors, I called one of the jurors after the trial and talked to her. She was actually an attorney. But one of the things that we did have that really helped us was, the defendant in his deposition admitted that there was a vehicle right next to him, approaching the intersection with him basically right before he proceeds into the intersection. And since we got that fact in through him, it was really helpful because our client was coming from the defendant's right-hand side.

So if the defendant's light was green, you would think that the car that's approaching the intersection with the defendant, would have gone into the intersection and been involved in the crash instead of the defendant and our client. But since we got that fact in through their witness, through their client, it completely sold the jury. And it was important because ... and we called him adversely. We got that fact out on cross adversely. He was the second witness that we called so it was something we were able to establish early on in the trial, so we could talk about damages for the rest of it. But what's interesting is that the jury, after talking to the juror, they didn't really believe the third-party witness all that much. They kind of thought that he was playing it up a little bit and he had just been cut off by the defendant, apparently. So there were mixed views about him in the deliberations room. So that fact admitted by the defendant that there was a car directly next to him approaching the intersection was integral in getting the liability verdict.

Which we kind of thought we had in the bag because we had a third-party witness who's disinterested, saying that the guy ran a red light. But sometimes that's not how it works.

Michael Cowen:

Well, it's good someone thought to ask those questions. It sounds like someone took a good deposition and said exactly what was there. Were there any other vehicles around? I mean, setting that scene and not just, well, I've got an eyewitness. I'm not worried about it. I think the truth can come out, even when they're trying to lie, it can come out when they give the other details.

Ben Newman:

Right. Yeah, Austin did a great job of that. Because I did the cross-examination so when I was looking at that transcript, I was really thrilled to see that. Because sometimes when you jump in late, there's stuff

that you would have done differently. But he had worked the case up. He did a phenomenal job so that's always nice. It's always helpful.

Michael Cowen:

Absolutely. So proving liability, I'm figuring you called the eyewitness first, the defendant second?

Ben Newman:

Yeah, that's exactly right. Yeah. We did that, what David Ball says in his book, he says that the first witness that you want to call is the witness that can confirm the most facts from your opening statement. That way you're keeping the jury on track and you're keeping your promises, and you're doing it quickly when they're paying the most attention. So that was the thought behind that. And then we called the defendant and then obviously, like Roger Dodd says to do, we just had him admit all of our good facts that we could. And then from there we just rolled into damages. It's actually funny because we wanted to put the experts on right after, and two of our experts weren't there. We were getting towards the end of the day and the judge was like, "All right, call your next witness." I was like, "Well, Your Honor, they're not here. We didn't expect to have to get to them today." We were like, "We don't have any witnesses. It's four o'clock. Could we adjourn for the day and then put the rest of our evidence on tomorrow morning and hopefully be done early tomorrow?" She was like, "Well, I see a client," and she was pointing at our ... Or "I see a witness," and she was pointing to our client.

But it actually turned out, it worked pretty well. Because we were able to put him on and have him just talk about the liability stuff, and then save the damages for later after we called the experts and talked about the medicine and all that stuff.

Michael Cowen:

So did you call your client twice then?

Ben Newman:

Yeah, exactly. I got the judge to agree that, "Look, he's not going to be cross-examined today. So this is just, we're just going to go through his direct until 5:00 PM and then we'll continue the rest of it tomorrow. So it actually worked out kind of nicely because the jury got to hear from our client so early. He did a really great job and the examination went really well. We just talked about liability and then liability was done after that day, and we got to move over to damages the next day, which was a nice little segment.

Michael Cowen:

So did you submit the medical bills in this case?

Ben Newman:

We did. We did. I'm usually against submitting the medical bills, unless we're talking about a non-permanent injury that's complicated and has a lot in medical expenses and not a lot in future pain and impairment. But here we did submit the medical bills and everybody has their preference on that. And when I'm coming into these cases late, I always give the originating attorney the final call on a lot of things because they're the ones that have the money in the case. They're the ones that worked the case from the beginning. So reasonable minds can disagree on those kinds of things. I just didn't really feel that the medical expenses were going to anchor us because I really believed in our client. I believed in

the jury. I thought that our client had a really great story and there were ways that we addressed it in opening. We say, "Look, medical expenses are \$45,000, but that pales in comparison to the pain and impairment that he's had to deal with and what he's going to have to deal with for the rest of his life." I think the jury understands that. So that's how we worked through that issue and anticipated it a possible anchoring of the verdict through use of medical expenses.

Michael Cowen:

And was there any dispute as to whether the amount of the medical bills were reasonable?

Ben Newman:

There was actually. I hate that because it's so boring. I always like to give the jurors some entertainment. I want to be talking about the most important parts of the case, the future pain, the future impairment, the reason we're going to be asking for millions of dollars. But there was. There was a lot of cross-examination on that topic. The other side did not have a controverting affidavit expert because the bills were low. I mean, \$45,000, it's not that much. So they did not have a cost expert controverting. They didn't call anybody to controvert the bills, but they tried to cross-examine our pain management doctor on it. And our pain management doctor, he doesn't really put together the costs and everything, so there wasn't really much to cross-examine him on. This is what was charged for the medical expenses and they didn't present any evidence that it was unreasonable. So it didn't turn out to be a really big issue. We really kept the attention off of that for the most part.

Voiceover:

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 by calling 210-941-1301 to discuss the case in detail and see where we can add value in a partnership. And now back to the show.

Michael Cowen:

So how did you frame your damages in your opening statement?

Ben Newman:

There were a couple of things that I wanted to get in front of. First, I wanted to get in front of the idea that our client doesn't look injured. A lot of times these spine injuries, kind of like TBI, they are invisible injuries. You can't see it. You can't see the pain on the person. The pain is beneath the surface. I really wanted to get in front of that in opening statement. So what I did was, I used an analogy that is in David Ball's Damages Evolving book, that says that your primary job as the jurors is to be an appraiser and to appraise the value of the damages to this human being. And the damages to the human being I got from Nick Rowley. But what I said in opening statement was, "You're appraisers and instead of appraising a painting or a house, you're appraising the damages to a human being." It sounds serious and they took it very seriously. It kind of goes against the usual bias of these lawyers and these injured people that are coming in here and they're trying to play on our emotions and they're trying to get sympathy.

I specifically said, "No, we're not here for sympathy. The reason that we're going to be talking about this stuff is so that y'all can do a fair appraisal of this injury, of the damages to this human being." We used a couple of analogies about what the qualities of good appraisals are. One of the analogies was, good appraisals don't judge a book by its cover. You can have a big beautiful house up on a hill that looks like

it's worth millions of dollars, but beneath the surface you've got some serious structural issues and that house might not be worth a dime. So that was one of the analogies that we used for that. That was something that we really wanted to get in front of. And then we also used the similar, the appraisal analogy for the per diem damage model. And that's what we used, was a per diem. We said, "This is a permanent injury and he's going to have permanent pain. A disc does not un-herniate." We used an analogy of a jelly donut. "Once the jelly's out of the donut, it's not going to go back in." This is permanent. There are things that you can do to help with the pain, but there's nothing that you can do to completely fix it and go away.

So for the per diem damage model, as a lot of the listeners know, per diem damage model is just where you argue or where your damage model is that this person's going to have pain for the rest of their life. They should be compensated for it moment by moment, hour by hour, because that's how they're experiencing it. So in order to use the per diem model and to orient them to that, first use the appraisal analogy to say, good appraisals are detailed and comprehensive. They take into account all the details and that's why we're going to be talking about the details of this case. And then I used what Keith Mitnik says a lot, saying, "We're talking about a lot of pain over a lot of time," and used the pilot light pain analogy that Keith Mitnik often talks about. The analogy that says, the pain is like a pilot light. It's always flickering in the background. And depending on how much the person, depending on their level of activity, that pilot light can flare up and then flare back down. The more they move around, the more it flares up. Or if they're completely still and not moving at all for a long time, then it flares up again. So those were some of the analogies that we used in order to orient the jurors to that per diem model, and I think it was pretty helpful.

We talked to the jurors afterwards, they really were expecting for us to ask for a lot more money. So they were pretty surprised when we said 1.1 or whatever it was. So yeah, that was how we got in front of that issue.

Michael Cowen:

Did you state a number at opening or did you wait for closing to give your numbers?

Ben Newman:

I didn't state a number in opening. I just said at the very end that the evidence is going to show that this case is worth well over a million dollars, and left it at that. And then let Austin fill in the per diem model during closing, which he did a phenomenal job at.

Michael Cowen:

And did Austin do anything to set up any of these analogies of the per diem idea in the jury selection?

Ben Newman:

Well, I don't think that we talked about the ... Yeah, I don't think we talked about the per diem model in jury selection, but we did get 16 strikes for cause, which was great.

Michael Cowen:

Oh wow.

Ben Newman:

Thanks. Well, and it wasn't me. Austin did the questioning and then I did the note-taking, and then I argued the cause strikes. Which I think is a really great way to do it, to have two people on it and strategize about the questions that you're going to ask. And then have the person that's actually sitting there watching the whole thing go down, write notes, and then prepare the argument for the for cause strikes. I really wanted to do that. So he asked some good questions that we were able to get a lot of jurors stricken through.

Michael Cowen:

What were the main sources of the cause strikes? What were the big topics?

Ben Newman:

Well, so this is a big one and this is one that we came up together. This is something that David Ball talks about a lot, applying the burden of proof to damages when we're talking about significant amounts of money against an individual. Can you do that? A lot of jurors were like, no, I would need to see way more. Especially if we're talking about damages, especially if we're talking about millions of dollars and that sort of thing. And then there was one juror that made a statement that we believed was definitely for cause grounds, and then Austin asked the other jurors to raise their hands if they agreed. And they did, I took them down. The judge took them down and we just went and got them.

Michael Cowen:

That's great. So did you call any lay witnesses, or just your client?

Ben Newman:

We did. We called two lay witnesses. Well, of course the eyewitness, but we called two before and after lay witnesses. We called the father and we called the partner. Our client was a gay man. The partner was really helpful because he could tell us the day in the life and the effect that it's had on their relationship, and those things that a partner would observe. So I think that was really helpful. That was an important piece of the trial. So yeah, always good to have before and after witnesses because it really takes the burden off your client. It makes your client less stressed about testifying. I would never go to trial without a before and after witness in an injury case.

Michael Cowen:

I agree. I'm so happy to hear that you made the effort and investment to call doctors. Because I see too many people just try to, they want to go cheap and they don't understand why the jurors go cheap, and finding those before and after witnesses. Collin County I know is not as deep red as it was. Did you find the gay man issue was at all an issue with the jury or it just doesn't matter anymore?

Ben Newman:

It didn't matter at all. We talked about possibly addressing it in voir dire, but we decided to just go ahead and leave it alone. We thought that we could identify the jurors who would have a problem with that through a lot of the other questions. So we left it alone in voir dire and we didn't really have an issue with it, thankfully.

Michael Cowen:

Yeah. It's interesting because I've had similar things where we had cases where we were going to call a spouse that was the same gender, or we call a partner with the same gender ... and then I had a case with an African American client and a jury [inaudible 00:37:59] that was going to be less than five or 10% African American. And I haven't addressed it. I think just letting the jurors know, we're not asking for sympathy. We're not asking you to treat people any different. We just trust you. We think you're going to treat people like people. I think that society's changed a lot where I don't think we have to address ... I know other people really disagree with me. But I would do what you did and obviously it worked for you.

Ben Newman:

No, I'm totally with you. I really think that one of the key ingredients to getting this verdict was trusting the jury, like you always talk about on this podcast. Like you talked about when you went on the Elevate Podcast. I mean, that was one of the main things you talked about. And when you trust the jury, it takes a lot of the stress off of you. When you trust the jury, you're not afraid of the truth. You're not afraid of a witness of the same sex and what the jurors are going to think about that, because you trust them. So that was really something that I think really helped us and gave us the courage to ask for this recovery that our client deserved.

Michael Cowen:

So what were the harms and losses? I mean, we know you've got 45,000 in past meds. You've got 150,000 in future meds. Any wages?

Ben Newman:

No, no wages. The future pain I think was 300, and then the future impairment was 100. And then actually our life care planner was able to testify that he was going to need future injections. So that wasn't in the ... Well, our pain management doctor was able to testify that he was going to need future injections and that wasn't in the life care planner's plan. But it was an opinion rendered during treatment and the judge didn't have a problem with it, and the defense didn't object to it. So we didn't have really much of a problem getting that in. So that added in future medical care, it added a pretty significant portion to it, a couple of 100,000.

Michael Cowen:

That's incredible. So I'm assuming that they had just offered you tons of money before this trial?

Ben Newman:

No, they offered \$45,000.

Michael Cowen:

Well, that made it easy.

Ben Newman:

Yeah, right. Yeah, it's great when they make it easy like that on you.

Michael Cowen:

So in closing, did you do the closing or did Austin do it or you split it?

Ben Newman:

Austin did the closing. He did a great job. He picked up on a lot of the themes that we touched on during opening. He laid out the per diem model beautifully. This was all stuff that we talked about before I jumped into the trial. It's really funny because Austin and I met when I was on the defense side and he was on the plaintiff's side, and we had a big motion against each other. We had kept in contact ever since and he was helpful with me starting my practice. So we talk a lot about cases. I started talking about Keith Mitnik and a lot of the strategies that he uses whenever Austin would talk to me about a problem in a case that he was trying to get around. So I would tell him about Keith Mitnik and then he goes and buys Keith Mitnik. And then now we're both just kind of nutty about Keith Mitnik and all his strategies, and trying to apply all of them. So we really see eye to eye on pretty much everything, just because we read the same stuff.

Michael Cowen:

That's great. So did you get to talk to the jury afterwards at all? I know you didn't want to interrupt this awesome ... I mean, they brought baked goods for your client. You definitely connected with the jury when they brought baked goods for your client afterwards. I've never heard of that.

Ben Newman:

Right, and they didn't even-

Michael Cowen:

That's awesome.

Ben Newman:

... want to see us. They just wanted to see the client.

Michael Cowen:

That's good.

Ben Newman:

Yeah, we talked to the jurors a little bit after. It's crazy because there were 38 members of the panel. We got 16 strikes for cause, a couple of other people were excused. You get six peremptory strikes. So we were in a spot to where we were like, okay, there's one we can either ... So we waived three of our peremptory strikes in order to get the jury that we got, because we were going to lose the panel. It was going to bust the panel if we didn't do that. So there was this one juror who said that he thought tort reform was a good idea and that he believed in tort reform. But he didn't raise his hand for any of the other questions. He didn't have any problem applying the burden of proof. He didn't have any problem doing all the things that we wanted him to do. So we were just stuck on, do we bust the panel over this one juror? And we decided not to. We decided, okay, let's keep them on.

And then fast forward to the end of the trial, who's holding the paper, who's holding the verdict form when they come in after the knock? It's that guy.

Michael Cowen:

Oh, that's got to be scary.

Ben Newman:

Yeah, we were terrified. And then they read the verdict, and he was one of the ones that we talked to. He was the one that told me about getting the defendant to admit that there was a car approaching him into the intersection, how that really did it for him. He didn't have any issue at all with the damage model or anything like that. So it's crazy trust in the jury, just like we said. It's crazy what happens when you watch them not raise their hand to a lot of the questions that you're concerned about, like applying the burden of proof and things like that. And you just go with it and you trust them and sometimes it works out.

Michael Cowen:

And there's no jury instructions saying that the case is only about the medical treatment, or you can only get two times or three times the medical bills or whatever that is. I mean, you can make the case about what it's really about, trust the jurors to do the right thing. I think it's when we're scared they're not going to do the right thing and we push too hard and argue too hard that they don't do it, just because we look like we're scared.

Ben Newman:

For sure. And one of the things that we did in this trial, one of the things that I really made it a point to do, is try to cut against the stereotypes that people have about lawyers and litigation, and injury attorneys specifically. They expect that you're going to come in there and fight with the other side and not be able to agree on anything, not be able to get along with the other side, with each other, with the judge. And that it's just going to be this whole mess and nobody can agree, nobody can get along and everybody's just kind of being rude to each other. I made it a point to be as positive as I could be, and be as nice and polite to everybody in the courtroom as I could possibly be. The defense lawyer, she was very contentious. She made every possible objection. The judge overruled them all. She did everything she could to try to derail the trial, and a lot of people get upset about that. I found that it was a lot easier to just be nice to her. And people expect you to react a certain way to that, and when you don't give into those stereotypes and when you treat them politely, it's really helpful.

And also you tell yourself, she's just doing her job. That helps you stay sane. She's just doing her job and she's doing it the best way that she knows how. She's not a bad person. That's just her strategy and sometimes that works for people. So you don't get upset. You're nice to everybody and cut against that stereotype. We really made it a big point to not do that.

Michael Cowen:

What I try to do is just ... I'm not saying I never slip, 98% of the time I don't slip. I just remember myself, this is a gift from the other side. Every time they're being obstructionist, every time they're overly objecting, they're making everything difficult, they're showing the jury that they don't trust them. That they don't want the jury to know the truth, that they're scared of the truth. They're showing who the bad guy is. So I'm trying to just remember, it's a gift. It's a gift. Don't get mad, it's a gift.

Ben Newman:

For sure.

Michael Cowen:

It gets annoying when someone's constantly, you can't get a paragraph of your opening or closing done, but it works.

Ben Newman:

And when they're objecting, leading the whole time, when you're just trying to move along the examination and they're not contested issues and they're just objecting leading the entire time, it really helps you. And then what also helps you is, during their case when they lead their client the whole time and you just sit back and don't say anything, it really helps to be polite and to not make the mistakes that they're making.

Michael Cowen:

I agree. So what's next for you? What's next on your agenda?

Ben Newman:

Well, I've got quite a few trial settings coming up that I'm getting ready for, some cases that I'm looking to parachute in on, just like I did on this one. I keep a very lean docket of cases so that I can do that. And I handle, I take plaintiff contingency cases only and I take other types of cases than injury cases. I'll take business disputes. I have quite a few pretty big will contests that I handle, just because I find those cases fascinating for different reasons. But the injury cases and representing injured people, of course has a special place in my heart. I love doing that type of work. So yeah, it's for me, just trying to get better, keep learning and try as many cases as I possibly can.

Michael Cowen:

And if someone wants to talk to you or maybe even someone's got a case that they thought, well, maybe Ben will come and help me get a million dollar verdict on this case. That sounds fun. How does someone find you in the world?

Ben Newman:

Sure, just you can call my cell, 361-438-1073. Or you can just shoot me an email at Ben at, B as in boy, N as in Nancy aalaw.com. And then yeah, I'd be happy to talk to you. Or if you just have a case that you know have some things that you are concerned about, and want to just talk strategy on how to address them during opening and during the witnesses and the evidence, then I'm always happy to talk about that too. I absolutely love doing that, so happy to do that also.

Michael Cowen:

Well, thank you. We will have Ben's contact information in the show notes. Ben, you have both inspired me to want to go out there and try some more cases. And then when I got your email saying that you got things from this podcast to help you get that verdict, it just really warmed my heart. It made me so happy. So I really want to thank you for reaching out and for agreeing to come on and share your victory and share your knowledge with us. So thank you so much.

Ben Newman:

Thanks Michael. Thank you. Yeah, it was great to finally meet you. I've probably listened to a 100 hours of your voice, so it's good to put a face to a voice. I'll look forward to seeing you again, hopefully sometime soon.

Michael Cowen:

Thank you. Well, thank you, Ben and thank you all for listening. One last thing I want to pitch, if you want to put a face to a name, I am having my Big Rig Boot Camp, our annual seminar here in San Antonio, Texas on June 13th. If you want to learn more about that, you can go to our website, bigrigbootcamp.com. Or keep listening to the podcast, we'll talk more about it. But we're going to put on a really good show this year. It's going to be a lot of fun, as well as hopefully educational. We encourage anyone who does plaintiffs work to sign up. You defense lawyers who are listening in, you're not allowed. I'm sorry. Thanks, Ben.

Ben Newman:

Thanks, Michael.

Michael Cowen:

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