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. You want the facts to be consistent, complete, incredible.

Speaker 4:

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

Speaker 5:

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

Speaker 6:

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

Speaker 7:

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

Speaker 8:

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.

Now, here's your host, noteworthy author, sought after speaker and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Today on Trial Lawyer Nation, I'm joined by my partner, Malorie Peacock, and we're going to talk about our last trial. How are you doing today, Malorie?

Malorie Peacock:

I'm doing good. I'm still recovering from trial. It was only two days ago that we got a verdict, so I'm still a little tired.

Michael Cowen:

Yeah. Before we jump into the trial, as always, we want to thank LawPods. LawPods sponsors our podcasts. They make our lives so easy because all you and I have to do is talk.

They do all the recording, the editing, the setting everything up, the making the clips to post on social media and advertise the podcast. I love working with LawPods.

If you want to do your own podcast, I really recommend them. Let's talk about it, Malorie. We were in trial for about two and a half weeks in Hidalgo County, Texas on a tough case.

Malorie Peacock:

Yeah. Hidalgo County, for people that don't know that aren't from Texas, is right on the border. It's like what?

Three and a half, four hours from San Antonio. It was a little bit of a drive for us, but it's also where me and Michael first started practicing law together.

Michael Cowen:

Yeah. In fact, the judge, your first trial as lead counsel many years ago, was in the same courtroom with the same judge. That had to be an interesting experience for you.

Malorie Peacock:

It was, it was. I've grown a lot, obviously. It's been a number of years, and funnily enough, in the middle of trial we celebrated.

Well, we didn't really celebrate because we're in the middle of trial, we had a coffee to celebrate, that me and you have been practicing law together for 10 years, so that was exciting too.

Michael Cowen:

Yeah. I am so happy and blessed and here's to many, many, many more decades of practicing together.

Malorie Peacock:

Yeah.

Michael Cowen:

I say many more decades. I'm 53, at least maybe two more decades of practicing together.

Malorie Peacock:

Well, I think people are really excited to hear about this verdict that we got. I guess before we start talking about how we did it and what we did, what was the verdict, Michael?

Michael Cowen:

Okay, so it was a product liability case. They found the product effective. They allowed $17.5 million in damages. That's all compensatory. Unfortunately, they did find that our client was half at fault, because he did lose control of the forklift and caused the crash.

But they found that the forklift manufacturer was half at fault. So under Texas law, we get half the damages, so $8.75 million. With interest, it'll be over $10,000,000. Not a bad day at work.

Malorie Peacock:

Not a bad couple of weeks.

Michael Cowen:

Yes.

Malorie Peacock:

Actually, it was a really fun case to try. We had some real professionals on the other side, that made just trying the case as pleasant of an experience as it can be.

We've all tried cases with people that are really difficult to deal with on the other side. Luckily, these are professional, very good lawyers that we had against us.

Michael Cowen:

Although part of me, and I even told them this, is like, "I'd almost prefer someone a little less professional and less good." They were really, really, really good lawyers. One has done these cases all around the country for 20 something years, his former associate reached out to me. I think he had won 23 in a row before we tried ours on this particular product theory.

The other guy, I've been in trial before, he's the best person I've ever seen in South Texas, not all of Texas, on the defense end trying cases. We were fortunate enough too, they were both gentlemen and professional, but they were really good, which is probably why we got 50/50 on the comparative fault. If we got someone that was more of a jerk or that would've annoyed the jury, we may have done better in the comparative fault.

But I'm still happy with the result, especially since there was no settlement offer that would've put a penny in our client's pocket. They said they'd never even pay $100,000. It was one of those no pressure, just go try it and hope for the best.

Malorie Peacock:

Yeah. The best it was a good result, I think, and I think the client's happy with the result too. How do you feel?

Michael Cowen:

I feel really good about it. I'm going to be really honest though, a little bit about the case. Our client was operating a stand-up forklift, and on a stand-up forklift, there's just an opening behind you. There's not a door. You don't have a seat or a seatbelt. You're just standing up there operating it, and they're really tight quarters.

What happens is people, they lose their balance or they think they're about to get in a crash. They just instinctively stick their leg out to try to stop themselves, but these things weigh 7,000 pounds. They don't look like they weigh 7,000 pounds, but they're really heavy. They must be hard to control because they crash into stuff all the time.

If you look at any of them, they all have a bunch of scratches and scrapes all on the paint. Just when people lose their balance, you sit sideways with usually your left leg. That said, you stand sideways usually with your left leg closest to the edge. What happens is people lose their balance and they try to instinctively, just reflectively, catch themselves.

Their left leg goes out and it gets smashed between the forklift and whatever it's crashing into. Usually, like in this case, it ends up with an amputation. You get a really bad crush, the doctors can't fix it, and then they end up having to cut off about part of the leg. The horrible cases, it happens once every eight days, we found out.

Malorie Peacock:

Yeah.

Michael Cowen:

The jury didn't get to find out that statistic. Unfortunately, we'd lost that particular motion, but it's happened hundreds of times before. But the industry has been winning the trials on the defect allegations, saying that these are defective for this reason.

As far as we could tell, they lost one case in the '80s and one in the '90s. They, until this week, were undefeated in the, is it 21st century? Yeah, 21st century. In the 2000s, they hadn't lost any, which was a challenge, but also really took the pressure off.

We didn't have to worry about if we lost, oh well, it's just money that we spent on the case, but there's no shame in losing, if the last 23 people that tried it lost too.

Malorie Peacock:

Yeah. Yeah. It was a challenging case because it was unique, I think, from a product liability perspective, because we were going up against the industry.

There's nobody that has a fix for this problem, or manufactures a fix for the problem or intends to manufacture a fix for this problem.

It wasn't just us against one forklift manufacturer, we had to show the jury that the whole industry is wrong, the way that they make these. How did you feel going into that?

Michael Cowen:

Yeah. Well, it was scary. As we found out when we got into the case, there was no one in the United States that was solving the problem there. The same company in Europe had solved the problem, but we'll get into that a little bit later. They sold a safer design in Europe than they did in the US, so they didn't make the US design available to customers. Sorry, they didn't make the European design available in the US, and that was one of our big points.

But that was my biggest fear, is that there is an organization called the American National Standards Institute, who I used to think put out standards for industry standards. I found out American National Standards Institute or ANSI actually, accredits other organizations to put out standards. The standard for stand-up forklifts that applies, in 2004 was amended to have something that says if it's a stand-up forklift, don't put a door on it.

Because if it's going to go off a loading dock or if it's going to tip over, you want people to be able to jump out. One of our safe alternative designs, was going up directly against the written industry standard, the ANSI standard. Which they had been very, very successful using in other trials saying, "Hey, this is the industry standard. We met it." We knew from our focus groups it was going to be a problem. It was a challenge and we had to figure out how we're going to get past that challenge.

Malorie Peacock:

Yeah, yeah. I think we need to back up a little bit, just so that the listeners know a little bit more about what we're talking about.

These stand-up forklifts and industry standards for open operator compartment, can you draw us a picture of what we're looking at here?

Michael Cowen:

Imagine it's a forklift, so you have forks in front. Then around the operator, you have plate steel in front of you, on either side of you, but behind you, there's a big opening so you can step in and step out. You're standing up when you're operating it, you're not sitting down, you're standing up. One of your feet has to be on something called a dead man's pedal, which is basically a little, round thing that if you pick your foot up, it's going to apply the brakes.

Your right hand is going to be on a lever, and if you push it forward, it goes forward. If you pull it back, it will either apply the brakes or eventually go into reverse. Your other hand's on what's called a tiller, which is like a steering wheel. You usually operate these things going backwards. The forks are behind you because when you have a load, you can't see where you're going. You're standing sideways, looking usually to your right behind you almost with one hand.

You're all twisted around, with one hand on one lever, one hand on the other lever, one foot on this pedal. The problem is if you lose your balance or if you are going to crash into something, and instinctively stick your foot out to stop it, your foot gets stuck between the forklift and whatever you're hitting. These things, they must be hard to control because they crash all the time.

On any of them, you see a bunch of paint scrapes and paint transfers because just in these warehouses, they're always hitting up against things. The problem is if you lose control, if you try to catch your balance. Well, if you pick your foot up, one thing is you pick your foot up and try to take a step to catch your balance, usually what happens, your left foot goes outside the forklift. That's how these people get all these injuries.

And it applies the brake, which then it puts a force to push you outside the forklift. If you use your right hand and pull back, it applies the brakes. If you lose your left hand to try to catch your balance and it steers it. What happens is just a minor loss of balance from someone steering a little too hard or unexpectedly taking their foot off of something.

Turns into just loss of control getting worse. Then you end up crashing and getting your foot crushed by this 7,000 pound forklift.

Malorie Peacock:

Yeah. For people that go to Home Depot or Lowe's, these are the type of forklifts that you will see there.

They're the stand-up ones that you'll see sometimes in the aisles at Lowe's or Home Depot. If you want a mental picture of what it looks like, that's where you'll see it.

Michael Cowen:

They're evidently really dangerous because there have been hundreds of people, probably thousands of people that have lost their leg operating one of these over since the '80s, I guess the '70s actually. We have data going back all the way to the 1970s, showing that these injuries keep occurring.

Our expert went and looked at 2015 to 2020, and not only do these injuries keep occurring, but they're the most common injury with stand-up forklift. 52% of the injuries that are associated, the serious injuries associated with stand-up forklift use, are these lower legs getting out of the compartment and getting crushed.

It's a big problem, but the industry's been able to avoid having to change anything, because they've been able to get the standard written to support their design decisions. They've come up with this, I call it an excuse, that if you tip the forklift over or you're going off a loading dock.

Let's say you're using the forklift to load an 18 wheeler trailer, the 18 wheeler pulls forward and the forklift falls off the dock. That you could get really badly killed or really badly brain injured unless you can just jump out real quick.

They say if you have any kind of protection for the operator to keep the feet in, then it'll make them less likely to be able to jump out. They're basically accusing us of trying to kill people in order to save legs.

Malorie Peacock:

I think that's a good overview of what we were facing. I guess, this is just so the listeners know, this is going to be a multipart podcast, because we only have an hour that we have with you.

There's a lot of different things that, I think, people would be interested in about how we did it. But just so that the listeners have an idea, how did you and I split this up so that one of us didn't have to do everything?

Michael Cowen:

Yeah. Well, we generally agreed that I was going to do liability and you were going to do damages. I think the only exception we made, because you did all the expert depositions, is that they had a statistician. They ended up not calling her.

But if they had called her, you did such a great job on the deposition, that we're going to have you do the cross of the statistician, even though it was going to break that damages liability line, because I didn't think I could do it any better than what you did.

Malorie Peacock:

Yeah. We really just split it in that way for the whole trial. Even in voir dire, I did the voir dire on damages. You did the voir dire on liability issues.

Then in opening, we split it the same way. Closing, we split it the same way. All of the witnesses, we split the same way. I think it worked well for us, that division, well, obviously.

Michael Cowen:

I think it worked really well and I think it worked well for a couple reasons. One, it really let us each focus on our part of the case. I only had to worry about what is the liability story? How am I going to tell the liability story? Frankly, we told the liability story first. While you're putting on the damage witnesses, obviously, I'm paying attention while we're in the courtroom.

But at night, while you're prepping witnesses, I'm getting ready for my cross-examinations two days later, so I got to be ultra prepared. But I think another thing is that you and I, I think we're both good lawyers, but we're different. I think you and I, because we're different, are going to connect with different jurors. If we're both picking the jury, we're both doing opening and closing.

We're both doing significant and equal parts of the trial, it really gives us double the chance of connecting with jurors. Because there's the jurors who would like you more than me, or the jurors who would like me more than you, and then we get the best of both worlds.

Malorie Peacock:

Yeah. I thought it worked out pretty seamlessly. I think when we were going into it, I was a little bit worried about how it would look when we were splitting things like that.

Would it be confusing to the jury or would it be abrupt or shocking? But it really wasn't. Really, we had planned it out in a way that it came together pretty nicely when we did it.

Michael Cowen:

I just told them in jury selection, because I started the jury selection because we always want to talk about liability before we talked about damages. We had a very serious injury. He was 21 at the time, he was 27, because of COVID, it was a long delay by the time we got to trial.

But we didn't want to start talking about an amputation, young guy, woe is me, until we established the defendant did something wrong. Because we were worried that if we looked like we were trying to elicit sympathy, it would turn off some jurors.

But I told them straight out, "I'm going to talk about liability or whether the forklift was defective or not. Then my partner, Malorie Peacock, is going to talk about the harms and losses that were caused by this."

Malorie Peacock:

Yeah.

Michael Cowen:

No one had a problem with it. The judge didn't have a problem either. She just said, "You have this much time, you all split up however you want it."

Malorie Peacock:

The defense ended up splitting up what they did too. Everybody was splitting everything, so I don't think it was that alarming to the jury. It was also helpful because I had done a lot of the depositions in the case, and so a lot of the depositions we were playing, of course, had my voice in them. Something, just trial strategy to think about.

If you have someone working up the case, that's different than the person that's going to try it, can be confusing if you hear some random voice they've never heard of before, asking questions. Then they don't know where to place them or is this the defense? Is this the plaintiff?

Just something to think about whenever you're trying a case where you're using other people's depositions. You need to at least introduce who that person is so that it's not confusing to the jury.

Michael Cowen:

Yeah. I think there's another, and I don't know how much of a factor this really is, but if you have a male lawyer and a female lawyer, and there's not a huge, obvious age discrepancy.

If I'm trying a case with a two or three-year lawyer, I don't expect that the jurors would get mad that I'm not letting the two or three-year lawyer do much.

Malorie Peacock:

Right.

Michael Cowen:

But you're not a two or three-year lawyer. If I went and did everything and you didn't do much. Then some woman that's on the jury, who has been disrespected at work, who has not been allowed to shine, may be triggered by that by saying, "Oh, this is that kind of guy."

Maybe that's all in my head, but it just seems like if you're going to try a case with a woman, then you need to let her shine and get out of the way sometimes. Because if not, the other women in the jury might hate you.

Malorie Peacock:

Yeah.

Michael Cowen:

I don't know if that's true or not. Obviously, if I didn't think you could do as good or better of a job at what you did at the knee, I still wouldn't have done that.

Malorie Peacock:

Right.

Michael Cowen:

But luckily, we've tried enough cases together, where I just had absolutely no worry about you doing things, because I've seen you do it and I know you can do it.

Malorie Peacock:

Yeah, and it worked out. It was the right move, I think.

Michael Cowen:

It absolutely worked out.

Malorie Peacock:

For this chapter of this, I don't know how many chapters it's going to end up being, because I think me and you could probably talk about this case forever. It took two weeks to try it.

Michael Cowen:

Two chapters. I think we're going to talk about liability today and damages on the next one.

Malorie Peacock:

My first question for you on the liability perspective, is you mentioned that there was this data that we had that showed most injuries on these kinds of forklifts were leg crush injuries.

Then also it happens once every eight days. I think people would be curious to know, first of all, where did we get that data and how did we talk about it at trial?

Michael Cowen:

Yeah. There were three sources of data on other injuries. One were incident reports that the company had on people getting hurt. Texas law's not really good at getting that kind of stuff in. You have to show substantial similarity in other similar incidents, but the problem is you have a hearsay problem too. Even though it's that company's documents, their reports coming in from other people, they don't necessarily give a lot of details about what happened.

They're typically written in a way that is just blaming the worker anyway, because that's the way that they write them up and the way employers write them up. That wasn't a particularly useful source of information for this trial. There was also OSHA has data. Now OSHA has a big database starting, I think, in about 2015 where employers were required to report serious injuries. The OSHA database, the good part is you could search for injuries involving stand-up forklifts. What we called a reach truck.

The kind of stand-up forklift we had in our case was called a reach truck, which became pretty significant, because there's different types of stand-up forklifts. The problem is that data, again, it shows what type of injury it was, what type of equipment it was. It usually doesn't show the manufacturer of the model. One of the big things that the defense was bringing up is, "Hey, you can't say that these are our forklifts causing these injuries. You can just say that there's someone's forklifts."

Then they tried to make the hearsay objection again. Which we were able to overcome the hearsay problem, just by Rule 702 allows an expert to base opinions on things that other experts in the field would reasonably base their opinions on, including even if it would otherwise be hearsay. What we did is we found other published, peer-reviewed papers outside the litigation context, where people were using OSHA injury data to look at workplace injury.

I think the compromise the judge did on that was she let us, because we needed to talk about whether this was an unreasonable risk of harm or not. She let us talk about the fact that this was the most common injury and other injuries were happening on this kind of design, because that's something the designers should take into account when designing the product. But she did not, on that set of data, let us get into the exact numbers, because we couldn't prove who was which forklift.

The third set of data that we ended up getting to use, there was another manufacturer, a company called Crown. That in the 2000s, Crown did a really good job of getting their customers to tell them anytime a forklift got in an accident, whether someone got hurt or not. If one had tipped over, if one had gone off a dock, whether someone got hurt or not, and of course all the injuries, they had a pretty good set.

Our expert and then someone else had published papers where they reviewed that data. Again, when we were doing it, we were allowed to go into, according to that data, what percentage of injuries were caused by this. We didn't go into the numbers. But luckily the defense, because the defense is saying, "Well, these things tip over a lot. They go off the dock a lot, but people were able to jump off and not get hurt."

They actually went into one of those studies and said, "Look, this is a number of off-docks or forklifts going off a dock, that they found in this study from the '70s through 2006. This is the number of tip overs that they found in that study from the '70s through 2006, but look how few injuries there are." Then you add up the number of leg injuries, it's about equal to the number of tip overs and off-docks.

Which according to them, means if you put a door on the forklift that all these people are going to start dying and you're going to have all these deaths. I think they were wrong on that, but that was what they did. But they put the numbers in, and so once they put the numbers in, they opened the door. Then we got to bring in the fact that there were, just from that one manufacturer during that time period, 474 lower leg injuries and one death. And that the author that studied said, "You should put a door on the darn thing."

Malorie Peacock:

Yeah, yeah. Speaking of studies, one of the things we had to teach the jury about is the difference between just doing some random test and a peer-reviewed study. How did we teach the jury the difference and why did that matter in this case?

Michael Cowen:

Yeah. Well, I'm going to start with the why. The defense had done a lot of their own testing and a lot of their own studies. They used what I call the lawsuit engineers, which are the people that work for the risk management department of the company, as well as their outside testifying, paid opinion witnesses would come in, get together and do tests and do studies.

Because they did a study saying, "Well, if you put a door on there, it's going to take so much longer to get out and all these people are going to get killed." They did studies where they put a crash test dummy unrestrained in a forklift and tip the forklift over or knock it off a dock. Then it was funny because sometimes the forklift would come to a crash and the dummy wouldn't get hurt.

The dummy would fall out of the forklift after the crash and hit its head, which would never happen to a person. But they didn't submit any of those for peer review or publication. Whereas our expert, his own work and the work that was done by the other papers we relied on, they were all published, peer-reviewed, presented at conferences to the American Society of Mechanical Engineers.

We were just saying, "Look, peer review is important because if you're not rigging it, then you want to present it to other engineers, other people in the field, so that they can give it a second look and make sure this is really reliable." If people don't peer review it, it means they know that it's not going to stand muster because it's rigged testing.

Of course, for appellate purposes, hopefully that would help because all the Daubert rulings are saying peer-reviewed stuff is what matters. We said we agree, and that peer-reviewed stuff was on our side in this case.

Malorie Peacock:

Tell us about you mentioned that their tests were rigged. Tell us about how you showed that their non-peer-reviewed tests were not reliable to the jury.

Michael Cowen:

Yeah. Well, I think one, they would put crash test dummies in forklifts and knock them off a dock, or put them halfway on a truck and halfway on a trailer and have the trailer move forward. The big one on those is one, a crash test dummy moving at random, however gravity goes is not what a human being's going to do. A human being's going to hold on. A human being's going to tuck in, try not to fly off the forklift. Whereas the crash test dummy it's really easy.

I think the only off-dock that they showed initially using our model forklift. Our model forklift had a safety cage on the front of it to keep people's fingers from being caught in the forks when they're going up and down. Normally, if you're going off the dock, if you're using... We'll go into later that this particular model of reach truck, which is the type of stand-up forklift it was, wasn't supposed to be used to load trailers.

But even that being cited, when you go, you go forks first in the trailer, forks first back out. When it fell down forks first, the forks would catch it. Normally, that safety cage, the dummy would land on the safety cage, nothing bad would happen. On the way they did the test, it just coincidentally, the dummy was positioned way to the right. It was angled a little bit to the left, so when it fell, it would stop.

Then the dummy would then stop, hit the safety cage, but on the edge and then fall out. Then when the dummy's head hit the cement after the dummy fell out of the forklift, that's when the injury data, according to all the sensors they had of the crash test, showed what that injury was. We just showed, "Look, you rigged this test." The more fun we had is they did test where they tried to tip it over. The problem they had is a reach truck, now I got to get technical on something else.

A reach truck is different than what they call a counterbalanced stand-up forklift. The counterbalanced stand-up forklift, which is probably what you may have seen at Lowe's, which is one that they would use to load and unload trucks. Has one wheel in the back and then it's got a big weight inside, and it's got two bigger wheels in the front. A reach truck actually has two wheels in the back, and then it's got these little arms coming out the front with two wheels on each arm.

It's going to be a lot more stable because of that. You're also not supposed to drive with a load that's more than like six to 12 inches off the ground, because you want to keep the load as low as possible. Well, they tried tipping it over by going full speed without a load, and cranking it as hard as they could steering. It wouldn't tip over. They tried putting in a heavy load and raising it way up and going to full speed, and then cranking the steering as hard as they could.

It wouldn't tip over and they finally had to unbalance it. They had to lower one of the wheels on one side to make it like a table. If you've ever been at a dinner table and they're not set, so you have to put a matchbook underneath or something because it's uneven. They had to do that to it. They had to raise up one of the wheels to make it uneven. Then they had to switch out another wheel to make it grip more, to make it more likely to roll over.

Then go full speed, then crank it as hard as they could. Then hit the brakes right when the turn forces were at the maximum size, to get it to turn over. We just showed, "Look, it's got to be really hard to tip over if you have to do all that stuff to rig it that would never happen in real life." That was also with 4,500 pounds at maximum height. You'd have to be insane to run with 4,500 pounds at maximum height, at full speed with a modified forklift and crank it.

We just said, "Look, maybe other forklifts are tipping over and going off-docks, but these aren't." Then we supplemented that trial with questioning them. When they were talking about examples, we got them to admit they weren't aware of any examples of this particular model forklift, the reach truck, going off a dock or tipping over.

I think that became very powerful because they admitted they were aware of other legs that got crushed, but they were not able to give us specific examples. Well, we're sure it must have happened, but all their examples were other models, not this one.

Voiceover:

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Malorie Peacock:

Now, why was this particular model, the reach truck as opposed to the counterbalance or some other kind of stand-up truck, why was this particular reach truck not going off docks?

Michael Cowen:

Yeah. That's something that's really important, and I want to take a step back before I go into why it wasn't. The simple answer it wasn't going off-docks was it wasn't designed to use to load and unload trailers. This particular reach truck is designed when you have a warehouse, when things are really high, you can reach up to 30, 40 feet high to put things on multiple shelves in these huge warehouses.

It's not meant to go in and out of trailers. It's got a lot of things that makes it hard to get in on a trailer. The mast and the forks can get stuck because they go up too high. The little wheels in front are too low to get over the dock plate. They can get stuck really easy, so it's not supposed to be used for that. It's not the intended purpose of the product, so that really helped.

One thing we had seen in the other cases is that in the past, and I'm not criticizing any other lawyers. We got to learn from other lawyers' misfortunes. The experts had to fight the fact that these people could get hurt or killed when they're going off a dock or they're tipping over. They tried to say, "Well, you're better off holding on than jumping out and riding it out."

The plaintiff's experts had done their testing and studies. The defense expert had done their testing and studies. OSHA had come out on the side of the defense saying, "If it's a stand-up forklift, you should try to jump out, if you're going off a dock or tipping over." We decided not to do that, not to get in that fight. I thought of the Joe Freed mantra, "How could they be right and we still win?"

We just owned it, "Yes, it's a bad idea to be in one of these things when they're going off a dock or when they're tipping over." Now this jumping out doesn't work very well. We were able to get some examples that the defense had, where people tried to jump out and couldn't and got killed. Your solution's not particularly effective, but we agree it's a problem.

But luckily, this particular forklift, this reach truck, isn't supposed to be used to go on and off trucks. It's not easily tipped over like some of the other ones are. It's really, really hard to tip it over. You can't find any instances of it happening in the real world. Whereas so maybe those other forklifts shouldn't have a door on the back, but ours, either you should have a door. If you don't like the door, we found do what you do in Europe.

Put a seat and a seatbelt in it, and you sit sideways so you can fit in a little compartment. You put a seatbelt on, it can do all the same things. But if you don't want to put a seat and a seatbelt on, then put a darn door on it. You keep people's legs in and you don't have to worry that much about the off-docks or the tip overs, because this one's not used on the dock and this one doesn't tip over very easy.

Malorie Peacock:

I started this podcast by saying we were trying the industry and by the end of it, we weren't.

Michael Cowen:

We weren't.

Malorie Peacock:

We were trying a case about this specific reach truck, in this specific environment.

Michael Cowen:

Yeah. The defense kept trying to say, "Well, our expert says they're all defective." I said, "They're wanting to fight other battles from other cases and other products. What we're talking about is this specific product." They may be right on other products, but they're not right on this one. They need to consider the uses and benefits and risk of the particular product they're designing.

The fact that they have a risk on another product, is not a reason to sacrifice legs on this one. We also got lucky. I don't know that we knew how important it was going to be. But when we were taking depositions, we got the dealer to say, "No, we tell our customers do not use these things to load and unload trailers. It's not the recommended use. It's not safe."

We had the employer, the supervisor said, "Well, at one time they did, but we found out it's not safe. We told our employees, 'Do not use these use to load and unload trailers,' so this would not be used to load and unload trailers." There the corporate representative, the actual designer of the forklift, hemmed and hawed on it. He testified in an afternoon when they asked him on direct and he said, "Well, it's not really the intended use. The intended use is doing something else."

Then I guess they prepped him at night, because when I cross-examined him the next morning, he goes, "Well, this could be used to load and unload trailers." But I finally got him to admit, "Well, it's not the intended use. Someone could do it, but it's not what we meant to have happen." I said, "Well, your dealers are saying not to. How are they figuring this out?" Then the jury got it, I think.

Malorie Peacock:

Yeah. The reason this stand-up forklift, I mean we could tell it wasn't intended for loading and unloading trailers, is because it had these little, tiny wheels that to drive over a dock plate, it could get stuck. That's not what it was for. Then the utility of this particular truck, is that it's called a reach truck.

It can reach really up high into racks, so it has this really high mast that goes way, way up in the air to put stuff on high shelves. So often, it's too tall to even get into an 18 wheeler. It could, maybe it could, but it really is not.

Michael Cowen:

This one, you could get it. I did the math as I wanted to see. You could get it in a trailer, but you'd have to be really careful in there because if you lifted your forks up a little too high, the mast would be hitting the roof of the trailer and causing damage and getting stuck. I think that point was made really well, and I think the defense wasn't ready for it.

I think because the defense lawyer, his former associate contacted me, who's now a plaintiff lawyer. I think he'd won 23 of them, maybe more. I think he was ready to try the case he had won the last 23 times. I think when we came out and just instead of fighting them on the off-docks and tip overs, he said, "That's right for those other forklifts, but that's not a big risk on this one."

Not that it's not a risk at all, but it's not a big risk on this one. I don't think they were ready for that tack.

Malorie Peacock:

Right. What were some of the other defenses that we had to deal with?

Michael Cowen:

Well, I think the biggest one is, well one, they claimed they had a warning saying, "Don't stick your foot out." Our guy admitted he knew not to stick his foot out, and so we had to hit that two ways. One, we had to really show in product design, warnings are only supposed to be a last resort. You say you try to design out any dangers in the product. If you can't change the design to eliminate the danger, then you just try to guard against the danger by putting doors and other kinds of guards.

If that can't be done, then you warn because warning is the least effective. Their design engineer actually agreed with that basic premise. Then we also made sure that we got good literature from before articles and standards on how to design a product, that were in effect well before the design of this product and just went through. It wasn't just our experts saying it, but we backed it up.

It talked about you can't rely on training, because the accident reports are full of people that were supposed to be trained and weren't and they got hurt. The other thing we really did, I think, is really

establish to the jury, "Our client did not intend to stick his foot out. He lost his balance and took this reflective, what we call compensatory step, where he just stepped to the left trying to catch his balance."

Not realizing that that was getting him off the forklift, because it's just one of these split second, instantaneous reactions. That was another big fight we had because they hired so-called expert witnesses to say that, "No, look at the biomechanics. He has to have intentionally stepped out. There's no force that would make him lose his balance."

They had some weird thing where they claimed he was going like heel backwards and stepping all the way off, whereas we were saying his foot was going out on the side. That was a really big fight because if he was stepping off on purpose, even though there was a door, he could have opened the door. Then his leg just would've been stuck between the door and the forklift and crushed anyway.

That was another big fight we had because we're saying warning, you can't warn someone not to do something instinctive and reflexive, whereas they're saying he knew better and he did it anyway.

Malorie Peacock:

Right. That was actually really big. It's a really technical fight that without, I think, seeing some of the evidence, it's hard to explain on a podcast.

But I think generally that's the issue is did he do it on purpose or did he do it by accident? That was the biggest part of it. Honestly, I think that's a big part of why we got 50/50, is I think the jury wasn't sure.

Michael Cowen:

Well, no, I think we got 50/50, because he caused the crash.

Malorie Peacock:

He did lose control over it, yeah.

Michael Cowen:

We admitted that he lost control of the forklift. He caused the crash. I really think that we were there on how it got caused, because you had two different expert witnesses saying two different things. But if you looked at the X-rays, you looked at the foot, you could see on either side of the foot where it was deformed.

You could also see the X-rays, you can see how all the bones were pushed one direction, which would come from a side to side. The front to back the defense had didn't really make sense. I really think we lost it because he was operating it when he wasn't certified, even though his employer told him to, and he lost control and caused the crash. I think that's probably why they went 50/50.

Malorie Peacock:

Yeah. Yeah.

Michael Cowen:

They didn't stick around and talk to us afterwards, so we don't know for sure.

Malorie Peacock:

No, I think they were sick of it. It was a long trial and it was a long deliberation too, so they weren't [inaudible 00:36:14].

Michael Cowen:

Yeah. They were out till nine o'clock one night and they came back the next day, and they came in a little after lunchtime the next day. They did deliberate for seven, eight hours.

Malorie Peacock:

Now, you mentioned that our client was uncertified. How did that play a role in the overall trial?

Michael Cowen:

Yeah, so it was a double-edged sword. They tried to claim that this was not the intended use of the forklift. Because the intended use of forklift was it was supposed to only be used by certified and trained operators, and therefore, they couldn't be liable. We tried to turn around that our client thought he was certified because he had been taught at Home Depot, a prior employer, how he got certified on a different model of stand-up forklift.

I think that's actually why he got hurt and lost control, because they each handle different. Let's say you steer like four inches on one, it's going to turn more than if you steer four inches on the other. I think this one, probably he tried to make a quick steer to go around something in the aisle, and it steered more than he thought he would. Then when he tried to make up for it, he just lost his balance and crashed.

We tried to turn it around saying, "Hey, it's not fair to hold him responsible for his employer's mix-up." The employer wasn't on the jury charge. We couldn't sue him. They had comp and the defense didn't do what they would've had to do to submit them. It's what's called a responsible third party or to let the employer's negligence be considered. We said, "Hey, it's not fair to blame him for what the employer did."

Yes, we agreed the employer should have trained him. He shouldn't have been operating this. But we also know that hundreds of people, who were certified and trained, have had similar injuries, so let's fix the design.

Malorie Peacock:

Yeah.

Michael Cowen:

But I think owning that was also important. If we went in there and claimed, "Well, he really was certified, he really was trained." We could have argued that, we could find an expert to say that, because OSHA regs are not as clear as the defense was making them out to be that you have to be certified on the particular forklift.

I think you do, honestly, for safety reasons, I think it's a better rule. But again, we could have fought that fight, but instead, we thought why don't we just embrace it and say, "Okay. Yeah, he wasn't trained, but he thought he was. He didn't know the rules. His supervisor told him to do it, and so how's that his fault? He's just a 21-year-old kid trying to be a good worker."

I think that had we fought that issue, we may have lost credibility and ended up with more than 50%. In Texas, 51% or more, you're out. You get nothing. We were as close to the line as we could and still won the case.

Malorie Peacock:

One of the other defenses, I don't think we've talked about it too much, you talked about it in passing, was there's basically no way he could have lost control. They say this is a very safe machine.

It doesn't go very fast. It doesn't stop very fast. We couldn't replicate some kind of mechanical failure that caused it to go off course and hit a racking system. How did that come up in the trial and how did they try to use it?

Michael Cowen:

Yeah. Well, so they got really experienced operators to go do a bunch of maneuvers in the forklift, and of course, they didn't lose any control. They're anticipating those movements and they measured the g-forces, so it's interesting. There's two sets of studies, one that's mainly done by the defense people. That when you put someone that knows what they're doing and they anticipate the force they're about to experience.

Let's say you steer and you know that's how much steering you're going to get. You brake, you know that's how much braking you're going to get. You do just fine. You're not going to lose control. It's not going to make you lose your balance. But we had some studies that showed if you don't expect it, if it's a level of force you're not expecting, either because you didn't realize you took your foot off the brake or you're trying to catch yourself when you pull back and hit the brakes.

Or you steer and it steers more than you think it did, then that is enough to make you lose your balance. Then when you do lose the balance, of people in the studies step to the left with their left foot, just like our guy stepped. I think that was the big fight is whether it was, of course, they were fighting us saying, "Ours are wrong. There's no way you could lose your balance."

We just had to make a big point about if you're experienced and you're anticipating it, yes, you're not going to lose your balance, but if it's unanticipated, you are. By the way, if it was so hard to lose your balance, how have hundreds of people lost your legs?

Malorie Peacock:

It's something that I've been saying for a long time and you have too, but I think it's just a real big takeaway from this case that I think listeners can take away.

Even if they don't have forklift product liability cases, you have to read the literature that they cite. It rarely says what they say that it says.

Michael Cowen:

Yeah.

Malorie Peacock:

Once you dig into the data from the literature, there's a lot of reasons that they're using the literature in the wrong way. That was, I think, a really big lesson learned in this case.

Michael Cowen:

Yeah. Not only that, but well, two things. One, their experts, they criticized our expert, our expert doesn't know anything. He's never designed a forklift. But yet their experts had relied on our expert's peer-reviewed, published literature, a couple had cited it in their reports. We're like, Dr. Gwen, who was their biomechanics, "You cited this one paper, right? That was by Ben Railsback, isn't it?"

Well, he's the same person that testified a couple of days ago for the plaintiff. Are you aware of that? You reviewed his report in this case and you've relied on literature he's written in your opinions. I think that kind of helped us bolster. The other thing, when they had a paper that was really bad for us, we would go show who wrote it. Well, this was written by Exponent.

You're aware that the people at Exponent that wrote the paper, they also testify for forklift manufacturers. They also get paid to come to lawsuits. I think that helped diffuse some of the defense stuff, at least showing that they would misrepresent what it said. None of the literature they cited said it was impossible to lose your balance.

It just said, "If you are anticipating it and you're a trained operator, you're not going to lose your balance."

Malorie Peacock:

I think it was too, they did a test that just this one to me was just the silliest test. They got experienced forklift operator, who'd been operating Hyster-Yale.

He was employed by Hyster-Yale, Hyster-Yale specific forklifts for 40 years is what they said. He was also part of the risk management team.

Michael Cowen:

Yeah.

Malorie Peacock:

That was their test subject. Then they said, "Look at him drive it. Look how great, look it is to drive. Look how you could never lose control."

Michael was able to ask questions like, "Okay, but this guy is someone that defends them in lawsuits, also been doing this for 40 years on this specific machine. He's the only test subject you used." That was a fun cross-examination I thought.

Michael Cowen:

It was a lot of fun. I think we needed to do that to make them the bad guys, to show that they were cheating and they were misrepresenting. Because the problem is we can't get experts from industry because they've got the industry all tied up.

Those people won't testify against forklift manufacturers. You have to get more of a general safety engineer. Our guy had done a bunch of research in published, peer-reviewed papers going back, I think to at least 15, maybe 20 years.

Malorie Peacock:

A long time, yeah.

Michael Cowen:

It's not like he wasn't an expert, but he had never worked in the forklift industry, so it made it a little tougher.

I think when we showed that they were misrepresenting and they were cheating in their testing, I think that really helped.

Malorie Peacock:

The actual standard, they call it the AMSI standard, that was a really big theme in their case, that we complied with the AMSI standard.

How could it be defective if we're complying with the industry standard? How did you deal with that, Michael?

Michael Cowen:

Well, a couple ways. One, we almost became a government standard until luckily, Robert Disque, another lawyer in our office, read because there's an OSHA regulation to governing forklifts. It says that the forklift must comply with the ANSI standard. Texas has a law saying if you comply with the governmental standard, that you are presumed not to be defective, unless we can put basically the government on trial and show the government's standard's no good.

But luckily, Robert read it closely and he noticed that it was a 1969 version of the standard, not the 2009 version that they were talking about, that was adopted by the government. When we got the old '69 standard, and it didn't address the issue of whether or not to put a door on or the open occupant compartment. We threw out, and they eventually gave up after we briefed the issue, on whether it being a government standard. Now we just have an industry standard.

What I had to do is really what I called, show how bias of a standard, show what that really was. It used to be ANSI got the American Society of Mechanical Engineers to get a committee together to get the standard. For decades, the standard did not address our issue at all. In 2004, the committee voted to change the standard. I was able to show that at the time, there were people on the committee, that a lot of people on there worked for forklift manufacturers.

I was able to show that the person who was on the committee for our defendant, was the same person that was in that rigged test, who was in their risk management department. Not one of their design engineers, but one of their lawsuit defense people was there. The so-called independent experts that were on the committee, were people that testified in lawsuits for forklift manufacturers in this type of lawsuit.

We were able to just be able to show that people were getting hurt, they knew people were getting hurt, and instead of fixing it, they just went and rigged the committee. I think it also helped, and I don't know if there's any relationship or not, I just mentioned the temporal relationship. But 2004, they issued the updated standard saying, "Use an open back, don't use a dock." 2005, the American Society of Mechanical Engineers would no longer sponsor the committee.

They formed a whole new organization, I think, it was like the Industrial Truck Standards Development Foundation or something like that. That we were able to go online and look, because it was a nonprofit, of their filings, and they were almost fully funded by the Forklift Manufacturing Lobbying Association. Basically, the industry created their own association to write these standards, and their people that they pick are doing the meetings.

They were well aware of the litigation involving these injuries when they changed the standard to support their position. I think that was a big thing. I think the other thing that made the standard less effective for them, is on one hand they said, "Well, the standard says not to use a door." But then they also point out, "But we did offer a door if you wanted one, and the employer chose not to have one. Therefore, that's not on us."

I'm like, "Well, how can you offer the door if it's not safe to have a door on there?" I think that was a confusing one. We got them to admit that the one with the door did comply with the standard, or they wouldn't have sold it. That the model they sold in Europe, where you could actually sit down and have a

seatbelt on, that complied with the standard. That if not, you wouldn't have sold it. I think the standard ended up being a lot less of an issue than we thought it was going to be.

Malorie Peacock:

Yeah. We ended up, just so that we're clear, we had two alternative designs that we offered to the jury. There's two ways you can solve this problem.

You could put a door on it or you can put a seat in there, instead of having a stand-up forklift. Those were the two alternative designs. Why two instead of just one?

Michael Cowen:

Well, if I could have had more than two, we would've had more than two. The other ones our expert came up with we didn't like, and so we didn't push really at trial.

But no matter what you say, they're going to come up with a reason not to. If you say, "Well, you have to put a seat and a seatbelt." Well, for some reason or another, they're arguing against seatbelts, which I never understood.

Malorie Peacock:

I didn't understand that the whole case.

Michael Cowen:

But they're going to say, "Well, you're trying to ban motorcycles." You're saying, "Well, you should only be able to have a car. There's reasons that employers might want a stand-up forklift." They didn't go into it. The reason they'd given us in deposition is, "Well, it takes a little bit longer if you have to sit down. You can get in and out of the forklift quicker if you're standing up." I'm like, "Okay, for a few seconds a day, you're going to sacrifice a leg, but whatever."

But I didn't like just going with one. Then the door, well, people had lost 20 something cases in a row on the door being the alternative design, so we didn't want that to be our only alternative. Then you got the problem with the tip overs and the off-docks. I thought the seat with the seatbelt was safer than trying to jump off, or trying to hold yourself in while you're standing up. But if they didn't like the seat or seatbelt because it's too big of a change, then we can say, "Well, then put a door but do something."

But I really think we turned it around on them, because we were able to show one of their retained experts first looked at this issue by doing some work in 1987. It happened to be the work was for this particular manufacturer. We were able to say, "Look, by the time they built this product, we know for a fact at least 25 years from when he did their first report for them to the time they built this, they've known about the problem."

We were able to show that during those 25 years, they never once assigned an engineer to try to solve it. They would fight the door thing and say, "We don't want to put a door. Here's all the reasons we don't want to put a door." But they never asked one of their people, "Hey, is there a way you can protect legs without risking brains, and tip overs and off-docks?" I pointed out, I even had my clients bring an old VHS tape from home.

I said, "Remember 1987? You were alive in 1987. If you wanted to watch a movie, there wasn't even Blockbuster yet. You had to go to your neighborhood video store and you'd have something like this, and you'd pull out the VHS. By 2012, we had Netflix and stream video, but that's because companies assigned engineers to solve problems and they did miracles."

Then I went from the Commodore 64 and the suitcase phone, to the old cellphones that were like a suitcase, briefcase with you, to the iPhone. We just talked about all the incredible developments they had during those 25 years. So just asking, "You're trying to tell me that if they gave you 25 years and a budget and assignment, you couldn't have figured this out?" I think that was a hard thing for them.

Malorie Peacock:

One of the things that you really wanted to find, and I think rightfully so, was a motivation. Why haven't they fixed the problem?

If it's really that dangerous, do they just not care? What's the issue? Ultimately, how did you answer that question?

Michael Cowen:

Yeah. To me, the motivation, and I don't know if I said it explicitly, but I certainly implied it in my questioning. Is that they had made so many of these things already, and they were just locked into the defense because they knew that there's all these people losing their legs.

If they admitted that there was a problem or a solution, then they'd have to go pay all those people. They were more it's not that they didn't care at all about people's legs, but they cared about their money a lot more. To protect the company's money, they were just willing to manufacture excuses rather than solutions.

Malorie Peacock:

Why do you think having, even though it's not an explicit motivation that we said in our minds, understanding why we think they did it? Why was that important for the case?

Michael Cowen:

Because otherwise, it makes no sense. Why wouldn't they fix this problem? Also, they had an explanation for why they didn't fix the problem. According to them, if you put a door on there and it goes off a dock or tips over, people are going to get killed or have catastrophic brain injuries or get paralyzed. They said, "Look, these foot injuries are very unfortunate, but they're all caused by employees who misuse the product.

"The only alternative is to have people killed or brain damage. We're just making the best possible choice in a tough situation." That's a really hard thing to overcome. I think we had to show that's a bunch of crap. That's not true. You didn't look for a solution. You didn't want to find a solution. You actually, in Europe had solved the problem, you just chose not to offer the solution in the US.

Malorie Peacock:

Which I still don't understand why that was not offered. They never explained that.

Michael Cowen:

They never had a good enough question.

Malorie Peacock:

I don't know what.

Michael Cowen:

It wasn't recent, they had sold it in Europe since the 1990s. It wasn't like a recent change.

Malorie Peacock:

Yeah, it wasn't even [inaudible 00:50:59] sold here. I don't know, but that's awful.

Michael Cowen:

I think the risk management people were just so in on defending these lawsuits, that none of them wanted to, and the industry is working together in defending the lawsuits. Nobody wants to solve the problem, because then your buddies and the other companies are going to get hit.

You're all trying to have solidarity because you don't want to get hit with all these lawsuits. I think that just you get that mentality that you get so much worried about the lawsuits, that you stop worrying about the safety of your customers.

Malorie Peacock:

One of the challenges we had, and this is the same challenge we're having on this podcast, is most jurors aren't super familiar with forklifts or how they work, or what they look like, or any of that kind of stuff.

We really struggled with visuals for this case. What did we want to use? How could we use it? Michael, why don't you tell us about all the iterations of visuals that we had here?

Michael Cowen:

Yeah. We ended up using a lot of photographs and just putting the PowerPoint bootprint icon to show where feet were. That's what we ended up doing. What we ended up doing was super simple, I think effective. But it was really clear, really simple, using real photographs of either our forklift or of other forklifts, our videos of our forklift, or other forklifts and testing.

We had actually done other stuff. Our experts had done all this computer modeling. Problem with that is there's always some speculation. We don't know exactly how it happened. There was all these fights about what angle it was and what the exact speed was. You just get into all these side fights when you try to use one of those things. They're cartoons, the defense called them cartoons.

Malorie Peacock:

He did keep saying the word cartoons, yeah.

Michael Cowen:

Because we didn't really use them, the defense pulled them out and then used them to try to make fun of them to discredit our people, but we didn't really decide on the animations that much.

Actually, because we were hoping when we're getting ready for trial, we were going to be able to bring out the fact that from 2015 to 2020, it was like 200 something feet lost, one every eight days.

We looked at, "Well, can we bring 277 model feet?" We found some really creepy stuff out. We went on Amazon and don't look for model feet on Amazon. There are some creepy people out there, buying some weird foot products.

Malorie Peacock:

I still get weird ads for it, because I looked that one time on my phone, and now every once in a while, I'll get some foot.

Michael Cowen:

Creepy pervert, silicon foot ad? Yeah.

Malorie Peacock:

I'm like, "It's not for me, it's just not. It's for a case."

Michael Cowen:

Yeah. We also found the non-pervy foot models were going to be way too expensive to buy hundreds of them. Then we had someone print a giant banner with 277 feet printed on it and work boots, and we're going to go unroll it with our expert and show how many feet were used. We ended up not doing that for two reasons. One, the judge wasn't going to let us get the number in.

But even if they had, the courtroom was too small and awkwardly shaped, we never wouldn't have able to pull it off. We had our exhibit person build three life-size forklift compartments, one the way it was, one with the seatbelt, one with a door. We had a huge fight over them. We eventually agreed that we wouldn't use the one with the door, but we'd use the other two.

We got an agreement that we'd be able to use them, but then we couldn't get them in the courtroom. They wouldn't fit through the door, lesson learned. If you measured the doorway, it would fit through, but when you open the door, it's one of those glass doors that had a metal thing you pushed on. That metal thing blocked it and we couldn't get them in the courtroom.

Spent a bunch of money and couldn't use them. Lesson learned, but I think it worked. I think it worked just fine with, like I said, just pictures and then annotating the pictures. Putting bootprints where the feet were, circling things, highlighting things. I think we also really did a good job of taking the literature that we used and putting up the whole page, so the jury could tell we weren't taking things out of context.

But then pulling up the sentences and the parts we wanted to talk about, so they could look at it bit by bit, one piece by one piece. Or if you had a whole paragraph, highlighting one on one slide, highlighting the next sentence on the next slide, the next sentence. So we could go through them slowly enough where the jury can understand them, but we're also letting them read it for themselves, so they know that we're not misrepresenting it.

I think that was really effective on using the learned treatises and the literature that way, but it was really a video and photograph-driven trial.

Malorie Peacock:

Yeah, our visuals were simple. Honestly, sometimes when your visuals are so complicated, then the jury thinks, "Oh, this is a really complicated case." What we wanted the jury to know, is this is actually a really simple case and you don't need to have all these crazy animations to understand it.

You don't need to have all these weird angle measurements and all this complex stuff, to understand this case. When you're telling the jury it's simple and then you're making it look really complicated, they don't know what to think about what you're telling them.

Michael Cowen:

In fact, we chose not to, because it didn't really matter to us. We chose not to fight them on the angle of impact.

Malorie Peacock:

For the speed.

Michael Cowen:

They did all this testing to show that our experts said it was 3.9 miles an hour, but it was probably three miles an hour, not 3.9. Our experts said that it came in at 15 degrees and they said it was 31 degrees. None of which mattered if he lost balance, if that's our theory. They've spent all this time going through that, and we're like, "Okay, and does that change anything? From our theories, no."

I think not getting sucked into just having to prove everything they say is wrong and trusting the jury they can figure that out, I think, was really important. Because if we got sucked into every argument the defense made, the case would've been so confusing. Just knowing when we could say, "Yes, maybe you're right about that. Or yes, you are right about that, but it doesn't change the outcome of this case for this reason."

Malorie Peacock:

Right.

Michael Cowen:

Maybe this a much simpler case to understand.

Malorie Peacock:

I think that's important too, when you were cross-examining their witnesses, you didn't cross-examinee them on every point that they made, because we're not fighting where they want to fight. We're fighting where we want to fight. A lot of your cross-examinations were written in advance, and they didn't change too much based on what they said because we didn't care what they said.

We cared about making our points through the cross-examination. I think it's something that it's easy to get sucked in to what they're doing, especially when they're saying stuff that we know they can't really prove, but what does it matter? You got to weigh those things, especially when they're making these really dramatic, over-the-top proclamations. I think one of the witnesses just kept saying, "See, it's common sense."

I was just like, "The more you have to say it's common sense, the less it seems like it's common sense." But you didn't even talk to her about common sense, because that's not what we were there to talk about. We could have talked about it, but why? Sometimes when you cross-examine on a point, the jury then thinks that's the important thing that they should take away.

You're worried about it. You're concerned about it, that they made a good point and we have to bring it up. If you don't bring it up, then the jury thinks, "Oh, okay. Well, that wasn't even important then."

Michael Cowen:

Yep. I think the other thing that was important, liability is just not only bringing out the fact that they'd known about the problem for 35 years by the time we got the injury. More than that, by the time of trial, over 40. I'm sorry. It was over 40 by the time of trial.

Malorie Peacock:

Yeah, because the product was manufactured in 2012.

Michael Cowen:

Yeah, but they've known about this for decades about the problem.

Malorie Peacock:

Right.

Michael Cowen:

Not only had they not looked for a solution for all these decades, but they weren't planning on making any changes.

Malorie Peacock:

They said that repeatedly.

Michael Cowen:

They said that repeatedly that they were not going to make any changes.

Malorie Peacock:

It gave the jury a task.

Michael Cowen:

I was able to tell them, "35 years from now." We'll get into this a little bit more with the damages, so it could be put more in context.

But 35 years from now, are people still going to be losing their legs, or is something going to change in 2023? That's your decision. I guess it worked.

Malorie Peacock:

Yeah, yeah. All right. Well, I think we've been going for about an hour, so I think everybody has to wait until the next episode to talk about damages.

Michael Cowen:

Yeah. Next time we're going to talk about the damages case. It's going to be more of me interviewing you, and all the great things you did on damages. How we made it a story of not just despair but hope and love, and striving and overcoming. I think it's going to be really good. I was really impressed with the job you did on that. Thank you all for listening.

I hope this was useful. I don't want to just sit here and brag about what we did, but I want to actually, hopefully provide things that you can use in your trials so that you can go get some nice verdicts. One last thing, I've got a book that's out now. September 19th it went to print. If you go to trialguides.com, you can get my book, Big Rig Justice: A Comprehensive Guide to Maximizing Value in Truck Accident Cases.

It's a mouthful, but that's what the SEO people wanted, but it's five years of my life. It was everything I knew as of six months ago about trucking cases. I encourage you all to buy it. If you do buy it and read it,

and you like it, if you can go on to trialguides.com, give me a five-star review. That helps other people learn about it, buy it, I'd really appreciate it.

Well, thank you and look forward to talking to you all next time on Trial Lawyer Nation. Thank you for joining us on Trial Lawyer Nation. I hope you enjoyed our show. If you'd like to receive updates, insider information, and more from Trial Lawyer Nation, sign up for our mailing list at triallawyernation.com. You could also visit our episodes page on the website for show notes and direct links to any resources in this or any past episode.

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Voiceover:

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