

Michael Cowen:

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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:

Welcome to today's Trial Lawyer Nation. I'm here again with my partner, Mallory Peacock. Mallory, how are you doing today?

Malorie Peacock:

I'm doing good. Finally, it got sunny again. I was feeling really tired because of the weather.

Michael Cowen:

And Mallory and I are going to do part two, a debrief on our latest verdict. And this is really going to be the Mallory show because we're going to talk about damages and Mallory handled the damages part of the trial. But before we dive in, I just want to say a thank you to Law Pods. Law Pods is the company that produces this podcast. They make it really easy for us, so we have to do a show up and talk. They do all the editing, all the cutting of the promotional clips, everything else we need to do. If you're thinking about doing a podcast, I really recommend Law Pods. That being said, Mallory, let's get right in there. You handled the damages, I handled the liability. How was that? Just the breakup, first of all, breaking up the trial that way.

Malorie Peacock:

For people who are just tuning in. There's a previous episode where Michael talked about what he did to handle the liability of portion of the product liability case that he and I tried, and by now it's about two months ago. Yeah, we split it up 50-50 completely. Michael did all the liability, I did all the damages. Honestly, I feel like we got to do that again. It worked really, really well for us and it felt like I could do a deep dive, get all the way into all the damages and not have to worry about whether you had your exhibits and whether you were ready for your liability piece. I think vice versa. You didn't have to get too involved in how I was presenting the damages case and what visuals I wanted to use and we could really go all in on our specific tasks. I liked it a lot.

Michael Cowen:

Yeah, I think it was a lot easier that we've been trying cases together. We hit our 10-year work anniversary during the trial. I think if we had not tried so many cases together, it probably would've been a little bit more need for constant communication to make sure we're all on the same page. But I think with you and I, we just have a rhythm.

Malorie Peacock:

Yeah, I think that's right. I mean, not to say that we weren't in constant communication. I mean we would debrief every night, kind of go through what the next day was going to look like, but it was actually very general what we talked about. Were there any strategy decisions generally or overall that needed to be made. Not so much the nitty-gritty, "What exhibits are you going to use tomorrow?" Or, "How are you going to play your video of X?" Or anything like that. It was more just a, "Here's my strategy for tomorrow. Any thoughts or comments or anything like that?"

Michael Cowen:

Before we dive into the trial, just tell us a little bit about what was the damages story in the case?

Malorie Peacock:

The damages in the case were pretty catastrophic, so that made it a little bit of an easier case to try than some of the other cases that we've tried in the past. They're catastrophic and they were obvious. Our client's foot was crushed between the forklift and a racking system in a warehouse. The crush to the foot ultimately resulted in a below knee amputation of his leg and they tried to save it at Brook Army Medical Center here in San Antonio, and they just couldn't, it was too badly crushed and the bones were sort of all over the place, and so it had to be amputated. They decided to amputate below the knee as opposed to at the ankle kind of where the foot was crushed because there were a lot more prosthetic options for a lower leg than just for an ankle foot prosthetic. Ultimately, it was a below knee amputation on a 21-year-old kid.

Michael Cowen:

Wow, that's a lot. What did you do before the trial to discover the client's story?

Malorie Peacock:

So this was a relationship that was formed with this client over the course of five years. It took us a long time to get to trial, not because we didn't want to go, but we were ready to go right when covid hit. Then it just kept getting delayed because of covid delays, not because of anything else. There was a longer time for me to form a relationship with a client than I normally have, but it also kind of helped me as time went on, felt like I was developing the damages story even better just because I got to know him better, I got to know his family better. Because we were ready for trial so many times before we actually got to go, I had had multiple, multiple conversations with witnesses over the course of a number of years.

I saw how his damages developed from the beginning and how his life changed throughout the course of those five years because we were ready so many times I had to get bumped, but if that wasn't the case, so if it was needed to be ready on the first try, the things that we did before that were, we spent a whole day with the client that was really important. We actually hired Pat Montez in this case to come in and do some psychodrama work with the client, which was important because we had a client that was really

hesitant to talk about his limitations, especially in front of other people. He was a really proud guy and he was really proud of the work that he did to overcome some really dark periods in his life. It was hard for him to talk about the bad parts because he was trying so hard to move forward and not focus on the times that he felt extreme depression and things like that.

We had actually spent a day with Pat and a couple family members. This was a couple of years ago before the trial, but that helped me because it gave me a framework for what are all of the areas of our client's life that we needed to address and what witnesses were available to address that.

Michael Cowen:

Pat Montez is such a secret weapon. I mean there are so many trials where you have really big verdicts then you find out later that Pat Montez was involved in doing the prep. She is so awesome. So I want to talk a little bit about some of the choices you made. So first of all, we chose to split the entire trial 50 50, and that started with jury selection. Usually you just have one person do jury selection, but this time we had to really work together to make sure I didn't take up all the time since I went first and I addressed the liability issues and you addressed the damages issues. How did that work?

Malorie Peacock:

Honestly, when you proposed it I didn't think it was going to work, just honest with you. I thought, "God, this might be a little awkward." We only had an hour too. That was the other thing. It wasn't like we had unlimited time to talk to the jury. I was worried that it was going to feel rushed or that I would have to interrupt you or I would only have a couple of minutes. But somehow it worked out really, really well. You kept a timer. You also got into a little bit of the damages stuff kind of in your part, so you went through, they call them those scaled questions. On a scale of one to five, how much do you agree with this statement? The statements were related to damages. Right? On a scale of one to five, do you believe that lawsuits are making the cost of goods go up or something like that?

It got me some information about the jurors before I even stood up because we had those scaled questions. So that helped. The scaled questions are tricky. I don't know if it was me or the court reporter, someone had to tell you to slow down because you're saying the numbers so quickly trying to get through everybody. Anyways, but it worked out because I had information before I even stood up to do my part of the [inaudible 00:08:05] so I could really focus on what I needed to focus on. Honestly, I didn't get through all the things I wanted to, the court told me I was out of time, but we got enough information to get enough people, the bad ones off for cause.

Michael Cowen:

Yeah, and I think it really helped. Well, two reasons. One, selfishly I'd like you to have the opportunity to get board certified in personal injury trial law. They don't count you being co-lead counsel unless you do the jury selection and either open it or closing. Even if you do everything else, it doesn't count, which I don't agree with, but we don't make the rules. But the other thing is really if you are going to ask the jury for money in closing, if you're going to put on the damages part, even do the damages part of the opening, you need to have a relationship with that jury. That relationship starts in jury selection. I thought it was really important you had the opportunity to form that relationship.

Malorie Peacock:

Yeah, I think too because all of the numbers were going to come from me in the trial and so came from me in voir dire too. Michael and I both, at least right now, maybe we'll change our mind later, but right now we both strongly believe in saying the number in voir dire if you can in your state, because it gets it

out there early, it takes the shock out of it and it gets the jurors that can't even consider it off for cause, which is important if people are just so horrified by the number, you don't want them on your jury.

Michael Cowen:

Absolutely. At least in some states can. There's a good Texas case that lets them get off for cause if they said they could never consider it no matter what the evidence was. That was really helpful. I think the jury selection was really important. It set the tone, it made it where a number was not shocking at the end. I think if we had waited and given, they didn't give us everything we asked for, but it was like we asked for 30 something got 17 and a half, but if you had waited until the end of the trial, they may have been shocked by that. By then they were all weighing the evidence against that, and I think they understood why we're asking for that much. Let's go to opening statement. How did you present the damages in opening?

Malorie Peacock:

Opening statement was, what I didn't want to do in opening statement is look like I was already trying to get sympathy. It was really not, generic is not the right word, but it was just really factual. It was just here's what happened. Here's the injury that it is, here's who the witnesses are, you're going to hear from not so much about what they're going to say, but just so you know, here's who you're going to hear from and then here's the amount of money we're going to be asking for at the end. So it was just really factual without going into the details about the pain or the suffering or the mental anguish that we would get into later, just because I didn't want it to look like we were already trying to pull at the heartstrings when they hadn't heard anything.

Michael Cowen:

Yeah, I think we were really worried the jury would be suspicious of us and until we sold them on liability and brought them on board about this company deserving to pay that if we pressed too hard on the damages, they were already pretty obvious. The poor kid didn't have the leg from below the knee, that it would look like we were trying to manipulate them and maybe we'd get resistance on the liability part.

Malorie Peacock:

I think if we go back and we'll have to go back and look at the transcript I guess, but it felt like we definitely weighted the opening statement more towards liability than we did towards damages. I think if we were to estimate, I think you probably spent two-thirds of the time on liability, and I probably only spent one-third of the time on damages. That one-third of the time was more about, "Okay, just this is what happened to him." More than here's all the other stuff, the non-economic piece of it.

Michael Cowen:

Which I think was appropriate. It was a product liability case and we had to teach the rules for designing a product, what the company should have done, what they did wrong, what they've known about it. Frankly, liability was much more of a challenge than damages. Not to say you didn't take brilliant lawyering to get an eight figure result on the case. There's a lot of cases probably that don't get eight figure results with these kind of damages. But at the same time, they had won every case for 20 something years on the other side. We had to really work on the liability too. Then you get your direct exams and you've got to tell our client's story. But before I go into that, you made some choices as to what elements of damages to put in and what elements of damages not to put in. Can you tell us about that?

Malorie Peacock:

Yeah, so just like in every state, in Texas there's economic damages and there's non-economic damages. They're called different things in different states. But ultimately the only element of economic damages that we put in were future medical bills. We decided not to ask for past medical bills or any form of lost earnings or lost earning capacity, lost wages, whatever you call it in your state. But we decided not to ask for those. The reason for lost wages is simple is that he was a really smart kid going to school to get an engineering degree and getting an engineering degree and using his brain had nothing to do with his loss of a limb. He was not someone that was so far in his career working in a warehouse or something like that where he could never find another job or something. We didn't put in lost wages.

Michael Cowen:

It did slow down his education. He still hasn't graduated age of 26. I mean we could have proven up a hundred, \$150,000 in lost wages and a few hundred thousand dollars in past medical bills. Why didn't you want to put those in there?

Malorie Peacock:

There's a concept that's called anchoring, which is when you mention low numbers, jurors think about low numbers, and when you mention high numbers, they think of high numbers. You have to be careful if you're talking about a dollar here, a dollar there, a hundred dollars here, a hundred dollars there if you're asking for millions and millions of dollars. The other thing is that medical bills are easier for jurors to fight over than non-economic damages.

If you put in a low number for medical bills, let's say it's a hundred thousand dollars, it's easy for a jury to say, "Okay, we have an easy number. Let's just fill in that easy number for the rest of these. We already know what that number is. Let's just put a hundred thousand dollars in for the rest of these and be done with it." And that would not have been a fair verdict, that would not have been fair to our client to get a hundred thousand dollars for disfigurement or pain or mental anguish or any of those other things because those were the bigger damages in the case. The medical bills weren't very big. They were paid by workers' compensation, which pays doctors almost nothing to treat people. A lot of doctors can't just have a workers' comp clinic because they pay nothing. I mean,

Michael Cowen:

Your strategy really worked because you use a seven figure number for the economics and we got a seven figure number for every element of non economics, you could really see the effect.

Malorie Peacock:

Right. Yeah, that's absolutely true. There wasn't anything that was in the hundreds of thousands of dollars for any blank on the jury charge.

Michael Cowen:

I think that there's a lot to it, and it's not a law school exam. Just because you can put in evidence of loss of earning capacity and you can put in evidence of past medical bills, it doesn't mean that it's in the client's best interest to do it.

Malorie Peacock:

Yeah. It is a conversation that you do have to have with your client. You can't just do it unilaterally because it is giving up an element of their damages. You're giving up on it, and the reality is that it's not like it's not still owed. He still does owe those medical bills, so it would still have to be paid out of the verdict. But having that conversation with the client and why you want to do it and having the trust with the client for them to be able to accept your advice, it's important to build that up over time and explain it well to your client so they'll let you do what's in their best interest.

Michael Cowen:

When it came time to your direct exams, how did you tell the client's story?

Malorie Peacock:

I decided that I wanted our client to be a strong superhero. I wanted him to tell us about how he's overcome his obstacles, how he's celebrated victories, how not all is lost. But the reality is he's the only one who also really knew about the deep, dark mental suffering that he went through. We had to talk about that too, but I still wanted to talk about it in a positive light as there was this terrible suffering, but we're moving forward from it and there's light on the horizon, there's hope in the future. In his direct examination, I really focused with him on three things. One, telling all of the ways he's overcome his injury. Two, teaching the jury about his injury so people aren't familiar with what does it mean to be an amputee. We had him walk through the struggles he has just with ordinary things like getting up and downstairs or taking a shower.

Then we had him do kind of a show and tell with his legs. We didn't actually have him put on a leg or anything, but hold up the leg and say, "Okay, here's all of the things that go in to just putting this leg on in the morning and taking it off and making sure it fits." And things like that. So he was kind of a teacher for the jury. Then we did have to talk about some of the darker stuff too, but I really used his other witnesses, so the other people in his life to talk about the harder stuff.

Michael Cowen:

Why is that?

Malorie Peacock:

Because I wanted him to be a hero. I wanted him to be hopeful. I wanted him to be someone that the jury doesn't think is just complaining or just whining or just waiting for a big payout. I wanted him to be someone that's, despite the hand he's been dealt, he is trying his best to move forward the best that he can. I really feel like that about this client too. This is not a client who was a complainer or was letting this injury hold him back. He was doing everything that he could to try to get better and to move forward and to continue to live his life. I wanted the jury to see that.

Michael Cowen:

What other witnesses did you use to tell this story?

Malorie Peacock:

One thing I loved about this client is I asked him for what we call in our offices before and after witnesses, but it's really just anybody that knows anything about his injury, anything about who he was before, anything about who he is after, anything about his character. We just asked for anybody that knows you basically, and then we'll talk to them. He gave us a list of about 50 people, which I love. I was

so excited when I saw his list, I thought, "Ooh, I get to choose the best ones out of these 50." Because I do have clients that say, "Well, there's only four people in this world that know me."

Michael Cowen:

Yeah.

Malorie Peacock:

And then you're just stuck with those four, but you got to actually pick from a group of 50 people. And so we probably didn't talk to all 50. I did go through with the client and say, "Okay, when was the last time this person really saw you? Let's choose our best first." I probably ended up talking to 25 or so and then choosing the best ones and the best ones being people who could tell the hard parts of the story because I knew the client was going to do a good job telling the optimistic or the hopeful parts of the story. I actually in this case, needed people that were a little bit closer to him than you would in a back injury case where you're just trying to show, even though the injury is not obvious, this person's really suffering.

Here we had an obvious injury, so I didn't need the pastor to come in and support the story as much as I really needed the deep details. I called his mom and dad, his two brothers, I called his high school wrestling coach, a friend, a family friend that's known him for his whole life, and then that's it, and then the doctor, and that was it. That was all the damages witnesses.

Michael Cowen:

Yeah. I think another thing you did so well is you found a different story for each witness to tell instead of them all saying the same things over and over again.

Malorie Peacock:

Yeah, yeah, that's important because you don't want the jury to get bored. You need to make sure that you're using your time in front of the jury wisely and that they feel like you're giving them another piece of the puzzle for them to fill in. So each witness had almost like an assigned topic. In Texas, our elements of non-economic damages are physical pain, mental anguish, physical impairment and disfigurement. Each of the witnesses, they talk a little bit about each of them, but each of them had a main focus. You dad are going to talk about physical pain and all the ways he's in pain. You brother are going to talk about his mental anguish. You, wrestling coach, are going to talk about physical impairment. Each of them sort of had general topic and then we explored stories within that topic so that we're not repeating ourselves over and over about the same thing.

Michael Cowen:

And then when you were questioning them, you got up and we have the king flip chart, like the double wide flip chart you were writing on the flip chart. Can you tell us about that?

Malorie Peacock:

Yeah. First of all, if you're going to write on a flip chart, you need to get yourself a king flip chart. They're really good. They're easy to write on because they're really stable, so you don't feel like you're going to knock it over and they're huge. You have a lot of space to write on. But each page of my flip chart had a different element of the damages and each witness had their own color. This is something that I actually learned from Pat, which is do things in different colors because it creates an association in your mind.

There's some psychology behind it, but there's some psychology behind if mom is pink, everything that's pink is mom. Then when they're going back and remembering, okay, the pink words were this, okay, that was mom, okay. Because they don't get to take my demonstrative writing back with them.

But what I would do is I'd write key phrases or just a word that I thought I wanted the jury to remember. I'd write physical pain really big on the top of one of the pages, and then someone would say, "Phantom pain." So I'd write down phantom pain, and then I'd say, "Well, what is phantom pain like?" And someone would say, "Well, it's a pain memory of when the leg was amputated." I'd write down pain memory. I'd write down words that I thought were powerful words. I wanted the jurors to remember. I wouldn't write down entire sentences, entire phrases, and it was a way to keep notes. It was a way to keep the jurors interested and it was a way to make sure that I wasn't repeating myself. So someone's already talked about phantom pain, it's already on the board, we don't need to talk about it again. It was all of those things, I think.

Michael Cowen:

And then you went and used those in your closing.

Malorie Peacock:

Right. I actually didn't initially have the plan for that until it came together so nicely. I got some really great phrases and words from the witnesses that were really powerful that I wanted to repeat in closing. But I wanted to show the jury that they aren't my words, they're the words of the witnesses. The reason for that again, is because they think we're all playing lawyer tricks on them, that we're just trying to get sympathy that this is just lawyers saying whatever to get us to do something. What I wanted my words to be in closing we're the words that people actually said in testimony during the trial. I was able to pull back up those sheets and say, "I can't." Or, "I'm not good enough." Those were the words that the client actually said.

Voiceover:

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Michael Cowen:

The things you did in this trial that I think were brilliant was your use of visuals. So I want to start with the visuals you used when you had people testifying in direct.

Malorie Peacock:

Yes, it's funny. We represented a 21-year-old kid, and so with all clients, I say, give me some pictures of your life because I don't know you from anybody and neither does the jury. So give me some pictures of the things you love to do before, give me some pictures of you doing things afterwards just so that I could have a baseline for who you are. Usually what I tell clients is if I were to make a scrapbook of your life, which pictures would you want me to include? Those pictures may have you in it, they may have other things in it, other people pets. It could be anything. But if I were going to make a scrapbook, give me all the pictures you'd want in your scrapbook. Some clients, most clients don't do a very good job of this. They give me five pictures, and this client was the same. He gave me five pictures.



Then I called his parents and said, "I really need these pictures because I need to be able to show who this young man was before." Of course, mom had a million pictures of him, so she sent me a bunch of pictures of him before and then a bunch of pictures of him after. But I wanted there to be more than just pictures. I wasn't quite sure how to do it, because what I didn't want to do is have them create videos or create content or do something just for the litigation because I felt like the jury would be able to tell. The day in the life videos are really great for a client who can't speak for themselves, but I don't think they work as well for clients that can get on the stand and talk.

I didn't want it to look crafted by me. So I was talking to my paralegal about it and she said, "You know what? I think he has a TikTok and seen him post videos on TikTok before of him trying out his new leg or trying to exercise in the gym. Why don't I go and download some of those and see if you want to use any of those?" And then sure enough, this was just a gold mine of great stuff because it was just his own personal content. He wasn't making it for the lawsuit, he was making it for his TikTok, and it had some really real moments on it. I think that's something that we can all take away of representing either millennials or generation Z clients is the tough stuff they also put on social media. This client was no different. He was putting his struggles out there just as much as his accomplishments.

We got some great videos from his TikTok of him struggling to run with his new leg or learning how to walk at the physical therapist's office or just playing football on the beach with his prosthetic, giving him some trouble. All of those were really, I thought, very powerful videos that we used on direct with witnesses.

Michael Cowen:

And he never told us about it,

Malorie Peacock:

Right. No, no, no. This is my paralegal who was just, we do a little bit of a social media search of people just to see when we first get the case, just the purpose of it usually is to tell them, "Okay, don't post anything weird." Right? "Don't be weird. They're looking at your social media." She just knew about it because she had talked to him just generally about what kind of social media do you have? And it was her idea, brilliant, and gave us some of the best exhibits we had for damages in the trial.

Michael Cowen:

Absolutely. Tell me a little bit, you had to really walk the balance between, you have to put in the evidence for mental anguish. You have to show how bad it was, how long it was, when it was, frequency, duration, extent of the mental anguish, but then you don't want to create this, "Oh, woe is me." Thing in trial, and you really wanted to have hope and showing someone who's overcoming, and if you help him, he'll keep going. How did you balance that out?

Malorie Peacock:

It's a really hard balance. It worked out in this case, I don't think because of anything that I necessarily did, I think it just worked out because I had a client who really did have hope. If your client doesn't have hope, it's hard to pretend they do. Luckily, we had a client that was hopeful for the future and is excited about where his life is going and thinks that there's more that's going to happen for him and this isn't it. Right? This isn't the extent of who he is or how his life has to be. He talked about it in a really positive way, which helped. Mostly, I got the really bad stuff from other people, so not from him. His brother ended up being the best witness in terms of his mental anguish because he was able to say what the

client wasn't able to say. What was nice about it played well, and again, not on purpose. It wasn't like a lawyer strategy, it just is the way that this young man was during his testimony.

The jury could feel him right up on the edge of saying something really sad or really devastating or really depressing. Then he just couldn't push himself. He couldn't push himself there, he couldn't get there. He couldn't bring himself to testify, and the jury could see that reservation and then we could bring in the brother and say, "Hey, Christopher had a hard time talking about this, but we need you to be his voice here, so tell us the truth of it." And he did. It worked out well, like I said, but I don't think it's necessarily anything I planned, it just was the client.

Michael Cowen:

Well, one thing you did do a really good job on, and I know it's something that Pat Montez helps us with, is coming up with good analogies or descriptions of the problems. I remember the phantom limb pain. A lot of clients would say, "Well, it hurts. It hurts bad." and what did he say? He said, "It hurt like it's getting crushed all over again, like my foot's being crushed between two cars." There was something really graphic, really descriptive. "I feel like my foot is being crushed between two cars, but it's not there, so there's nothing I can do about it." I know it's real but to have someone come up with how to put it into words that other people can understand so that his words paint a picture in the jury's mind. I think that work you did was so important.

Malorie Peacock:

And I think that's work that you can't do one-on-one with a client. It's work that requires another sounding board or two. That's why Pat Ez always says, bring other people. Don't just bring your client, bring other people in their life because they know how your client really talks. I mean, they know what resonates with them. I can give people examples of all day of what other clients have said about their pain of what they've said about their limitations, but if it's not in their own voice, it doesn't resonate. The work that we did with Christopher, this was not with Pat, but this was before trial with Christopher and his dad specifically helped identify and describe the injuries the best. But we prepared. That wasn't something I just asked him on the stand without ever having asked him before. I mean, it was something that we had talked about in advance. I had him think about it. I had him think about all the different ways that we could describe it, what made the most sense. It was work to get there.

Michael Cowen:

Something else I think that you did that was key to getting the verdict was saying no to some witnesses who wanted to testify. We might not want to name names because we do have a client and a family who might get mad at us, but can you tell me the logic between, you could have called other people. We had other people asking to testify. We actually were meeting with them. They were originally on our list. Tell us a little bit about that.

Malorie Peacock:

Yeah, I mean, fortunately for this client, he has a huge support system and he just has a bunch of people in the community and in his family that love him so much and just really wanted to help. But there were two things I was worried about. One, I wanted to make sure we weren't being repetitive. I wanted to make sure we weren't telling the same stories over and over again or similar stories. If we already told a story about him struggling to get up the stairs, we don't need another story about him struggling to get up the stairs on a different day, we get it. We already got it. We don't need to keep repeating the same kind of thing over and over again either. Then some people too just weren't good storytellers. They were

too nervous or they were too generic or they just couldn't get the details. The details are what make the stories and the testimony believable and real for the jury.

If you're just going to generically say, "He's in pain." That doesn't help move the case forward. It doesn't help move the ball forward unless you can give me a really good description of what that pain looks like or how that pain makes him feel, or how that pain makes you the witness feel. The witness's feelings about seeing their loved ones struggle, while they don't get any compensation for it, it's important to get that testimony out because it makes the jury understand that the testimony is real. It's not just something made up. There were quite a few people that we ended up meeting with a couple of times, and even the night before they were supposed to testify, I ended up calling it off and saying, "Okay, well we're not going to need you after all." And there were some that were a little bit upset about it, but we needed to do what was best for the case. Luckily the client understood that. He was on board with us doing what was right for the case.

Michael Cowen:

There's one, if I remember right, that was going to be too negative as far as almost trying to argue his case for him and going on and on about how horrible this was. I think you made the wise choice of not calling that particular witness because it was inconsistent with our story of hope and we didn't want witnesses that looked like they were trying to be advocates.

Malorie Peacock:

Right, right. Yep. There was one that was like that, and I was really on the fence about it too, because I thought that that person was a nice person and meant well and really did want to help, just loved our client so much, but it didn't play right in my mind for the story.

Michael Cowen:

Let's talk a little bit about your closing. In the same year as our trial came out, we had the Texas Supreme Court come out with a lovely case that said that the kind of arguments that historically have actually worked, like saying "This fighter jet costs \$300 million, but if it's going to go down, we have the pilot eject because people are worth so much more than \$300 million. This piece of art is sold for \$80 million, but what does that compare to the beauty of a human leg?" That kind of thing. And those were effective arguments, and the Texas Supreme Court has now said that those are automatic reversible error. That if you make one, the judge is supposed to immediately stop the trial, admonish you and possibly do a mistrial. We knew we couldn't use those. You had to make sure that whatever argument you had actually related to the evidence we had in the case, it was based off that.

First of all, how did you come up with how to do the ask? How to come up with a way to ask for the amount of money that would be enough to compensate a client for his loss, but would also be tied to the evidence and it wouldn't make sense and be persuasive.

Malorie Peacock:

What we gathered from the Supreme Court's case is that you can do per diem arguments. You can say the cost of pain is \$10 an hour. Whatever it is, it seems like you could do those arguments. That's what we decided our strategy was going to be is that it was going to be a per diem argument, but we wanted to make sure is that one, it wasn't such a precise per diem that the jury felt like it was fitting a round peg into a square hole. You're just making something up. It was precise in that it was still a per diem, but it was more about what we would have to pay someone to go through what our client went through. It's a

technique that people have used before. It's not my technique or anything. Is it Rick Friedman, Michael? I'm pretty sure that's who it is.

Michael Cowen:

Even before Rick Friedman I mean there's the old Jim Purdue book. I mean the wanted ad is what you did, if we had to put a wanted ad for someone to go through that, what would it have to pay? It's been around for a long time, but it worked.

Malorie Peacock:

It was as simple as that. It was if Heister Yale, who was the defendant, were to place an ad in the newspaper and say, "Wanted a 21-year-old kid, no younger, no older to come and have their foot crushed in a really, really painful way then to later be amputated and you to never get your foot back and you have to live the rest of your life, all the rest of those 54 years as a disabled amputee." How much money would they have to pay so that someone would answer that ad and say, "Okay, that's fair compensation for that." We had already talked about compensation a little bit in voir dire, a little bit in opening. The idea of compensation was already out there, but talking about it in that way, we really talked about that mostly in closing. Then what I ended up calculating is there were, I guess it was six years in the past that he had, and then 54 years that he had to live in the future.

I had suggested a million dollars a year in the past for each item of damages and a hundred thousand dollars per year in the future for each item of damages because over time it gets a little bit easier. It's never going to be easy. It's never going to be what it was before, which is why you should be compensated, but it's not what you went through in the past either. That's what I did. Also, we talked about anchoring a little bit earlier. I made sure that I was still anchoring high. Even though I said a hundred thousand dollars per year for 54 years, it's still \$5,400,000. But I also talked about the number of seconds that is, the number of minutes that is, so that we were talking about billions of seconds, millions of minutes, so that we were still talking about really big numbers as opposed to talking about just years. Even though we did a per diem in terms of years, we didn't only talk about the number of years, we talked about days, minutes, seconds too.

Michael Cowen:

Then when you were arguing each element of damages, you used some really nice visual aids. I mean, one, you went back into your notes that you took. Why did you do that?

Malorie Peacock:

Well, I really wanted to make sure that the jury didn't feel like I was just making lawyer arguments. I wanted them to feel like what I was telling them was just the evidence that they heard. I was just repeating evidence that they heard it wasn't just lawyer stuff. I chose phrases from those big flip charts that the witnesses actually said. I showed the flip charts in my closing to prove to the jury that that's what they said. They saw me write it down. This was from what you guys all witnessed here. Then I had a couple of little visuals. I took all the pictures that we used, all the videos that we used, and made basically little collages of his life before, his life kind of in the last six years, and then what his life could look like and the future.

What do we hope for him? We ended on a note of hope, which was we wanted to make sure that the jury thought that by giving him money, we're giving him a better life and a better life because he's gone through something really terrible. What we didn't want is for it to look like he's just sitting around

waiting for a big payday, which he wasn't. I mean, he's not, and I think we were successful in portraying that.

Michael Cowen:

I think the other thing you did nicely, I think sometimes we call them gummy boards, but can you describe kind of the silhouette figures that you did?

Malorie Peacock:

Yeah, this is really basic. It's real basic, but I think it's really powerful because it's so basic and it's something that we learned from Brandi Jew, but it's these little silhouette images of things people do in their ordinary lives that are hard or impossible for your client now, and hard meaning you can do them with pain or it just takes you a long time and impossible, meaning they're just not possible. I got little images of someone walking upstairs or someone in a wheelchair because our client had to use a wheelchair sometimes and crutches sometimes. I got one of someone kneeling down. He testified that he can't kneel anymore because of where the prosthetic sits on his knee. We got an image of someone running. There were different little images and they were all on one board.

What you want to do is you want to make it look like a lot of things. Right? So you need to fill up the board with all of these little silhouettes of limitations, and it's our physical impairment board. Here's the impairments that this person has and it needs to be full. If it's only two things, you don't make the board. It needs to be full of a bunch of things that he has problems with. It's just another visual way to communicate what you're saying orally, but you want to make sure everything you're communicating is both visual and oral as people learn in different ways.

Michael Cowen:

So how did it feel at the very end? We've been trying cases together for a long time. Are you the case? You do the ask for an eight figure verdict, jury comes back with an eight figure verdict. How did that feel?

Malorie Peacock:

I'm going to be honest to our podcast listeners because I think that's the right move here. I won't say I felt disappointed, but I felt a little, well, I think I felt a little bit disappointed. I really believed in my heart that our client deserved \$38 million or I wouldn't have asked for it. I was completely convinced that's what he deserved, and I was convinced that he didn't deserve a penny less than \$38 million. When it was less than \$38 million, there was a fleeting moment of feeling disappointed a little bit because I had lived this case.

I had convinced myself that this was right and this was what justice looked like, and anything less wasn't justice and then let it sink in after an hour or two and I started to feel a lot better about it and thought, this is still okay. This is still right, this is still good. This is still a great result for him. This will still help him get the medical care he needs. This will still help compensate for the loss that he suffered. This isn't bad, but if I'm being honest with the podcast fans, there was a fleeting moment for me of disappointment.

Michael Cowen:

Thank you for telling the truth on that. Most trial lawyers just want to brag about how great they are. And when you do love your client, it does hurt to not get every little penny, even though I mean it beat the heck out of the 50,000 bucks they offered him. It beats the dozens of similar product defect cases that had been lost in a row on this theory. It was a great result. I think what happened is you convinced

some of the jurors that was the right number. Other jurors I think were, they put 50-50 on the proportionate fault. I think even though there's a jury instruction saying, "Don't reduce the amount of damages." I think that they do, I think that that's just part of human nature. I think the ones that wanted to find him more at fault probably argued the damages down.

Malorie Peacock:

Right.

Michael Cowen:

It worked out. It was a great result. I'm so proud of you. I'm so happy that I got to try the case with you and I'm really looking forward to trying the next one with you.

Malorie Peacock:

Me too. Hopefully we have some coming up at the beginning of next year, unless they, people get scared and settle too.

Michael Cowen:

Either way, it's fine as long. One way where our client makes so much of money, the other way we get to go try a case. Either way is fine. That being said, thank you all for joining us today on Trial Lawyer Nation. Just a reminder, my book, Big Rig Justice is out. You can get it from [trialguides.com](http://trialguides.com). Put five years of my life into it. I'm really proud of it. I encourage you all to not only read it, but to go on there and give it a five star review so that I look good with Trial Guides. It's just my personal favor I'm asking you for. Thank you all. Join us next time on Trial Lawyer Nation.

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Voiceover:

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