Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Speaker 2:

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

Speaker 3:

When you figure out your theory, never deviate.

Speaker 4:

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

Speaker 5:

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

Speaker 6:

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

Speaker 7:

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

Speaker 8:

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

Speaker 9:

Whatever you've got to do to make it real, you've got to do to make it real. But the person who needs convincing is you.

voiceover:

Welcome to the award-winning podcast, Trial Lawyer Nation, your source to win bigger verdicts, get more cases, and manage your law firm. And now here's your host, noteworthy author, sought-after speaker, and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Welcome to Trial Lawyer Nation. I'm joined once again by my partner Malorie Peacock. Malorie, how are you doing today?

Malorie Peacock:

I'm doing good. I'm coming off of what we're going to talk about today, a big trial win, and just trying to get caught back up with everything.

Michael Cowen:

Yeah, we tried a case, a case with no pretrial offers where our client rear ended the rear of a tractor-trailer, although liability was better than that, but that's how the defense pitched it. We ended up with a $4 million verdict and only 10% of the fault put on our client for rear ending the tractor-trailer. It was a challenging case, but a fun trial and a righteous case and we thought we'd come and talk about it today.

Malorie Peacock:

Yeah. Yeah. No, I'm excited to talk about it. So it just happened last week, so it's still very fresh. It's a perfect time to talk about it.

Michael Cowen:

Absolutely. And before we jump in, I have to as always, thank LawPods. LawPods is our sponsor. They produce this podcast for us, so you and I just have to sit here and talk about the trial. They do all the rest of the chopping it up, making us sound good. Even though I'm recording this from a hotel room on vacation in Italy, they still somehow are going to make it sound somewhat professional.

They do all the editing, make the little video clips for us to put it out on social media and promote it. Just really, really a joy to work with. So if anyone thinks about doing your own podcast, I do recommend working with LawPods. So Malorie, I gave a 30,000-foot view of the case. Tell us a little bit more about that.

Malorie Peacock:

Yeah, so this is a case where a driver of an 18 wheeler had ran over something in a roadway that disconnected her air lines to her braking system in her truck. We'll talk a little bit more about air brakes and the braking system I think as we talk about this case. But ultimately she panicked and stopped her vehicle on 635, which is a major highway in Dallas at 10:00 o'clock at night in the dark and just parked right there and waited. She was out there for at least five minutes, maybe longer, when our client's son came up behind her and ran into her. He didn't see her in the roadway and he died unfortunately.

Michael Cowen:

And we had a few challenges. One is she claimed all of her brakes locked up and she could not move out of the roadway. She claimed she had her four-way flashers on and it was too dangerous to put out triangles because of the traffic on the road. The police believed her and found our decedent 100% at fault and did not blame her whatsoever. And so that was the posture of the case when we came into it.

Of course, a lot of that stuff wasn't true, but it took a lot of work to prove the truth of the case. So let's just kind of before we go, no, let's talk about some of the pre-trial work. So I guess no settlement offers, there was kind of an unofficial before the first trial setting, like, would you take half a million? But according to the adjuster, there's never a former offer. There was a mediation, there was a mediation proposal. We accepted it. They didn't. We made, three different times, we offered to settle for the million dollar policy. They never offered anything. And then finally right before jury selection, they offered $750,000. It was actually, why was it such an easy decision to turn down the 750, Malorie?

Malorie Peacock:

Well, I mean the main reason it was easy is because our clients really didn't want to take it. At that point, unfortunately, they felt very jerked around by the system and by the way that everything shook out and the way that everything played out and they just wanted to push forward with trial. So I don't know that

they would've taken any offer. I don't know when we didn't get that far, but they definitely weren't going to take 750.

The other reason it was easy to reject it is because we had practiced a lot. And we were getting really good results in practice for what people thought about the case, what people's perspective was on the case, how we were presenting it. And so we felt very confident going in that we could do better. The other kind of additional side effect of doing all this work before we got to trial is that we had a lot of money out on the case. And so the clients wouldn't really get that much with a 750 offer.

Michael Cowen:

No, I mean I think if they'd offered the million, the policy limits, it may have been a different discussion, but we never got to have that discussion. Not only did we do the rehearsals, and I'll get into that in a minute, but we also focus grouped the case. I think we worked with Kelly Raymond, she's a jury consultant, does focus group works, helps us pick juries. And did that increase your confidence?

Malorie Peacock:

It did. It did. This was a case where the defense's perspective was that they had no liability at all. And we had a theory of the case, and I obviously still very much believe our theory of the case, and the jury ultimately did too. But it was either the jury was going to go with us or they were really not going to go with us. And so we really needed to know that in advance.

And so the focus group work really, really helped. When we did the focus group, we weighted everything against us. Right. So there were some issues with what evidence was going to come in, there was some things like that. So we assumed everything that we thought shouldn't come in was going to come in when we did the focus group and we still got a really good result. So that helped with the confidence level too. But I would suggest when people are doing these focus groups, you need to make those assumptions to really get good value from them because you don't know always how the pre-trial rulings are going to go.

Michael Cowen:

And it did make it so much better because we knew that while we argued things as hard as we could and on the [inaudible 00:06:39] matters and we won some, we didn't win all. But we also knew that no matter what the judge ruled, we could still win the case. And that while it wasn't necessarily going to be the biggest verdict of all time, it definitely, we could, fairly confident that even after comparative fault, we were going to beat the million-dollar policy limit and definitely beat the 750 offer.

Malorie Peacock:

Right. So we were feeling really good going into jury selection. I think that was one of the more challenging jury selections that we've done before.

Michael Cowen:

Absolutely. Let's talk a little bit about rehearsals and then I want to get into jury selections. So we built a courtroom and then we did multiple rehearsals of both the jury selection and the opening statement. How did that help you?

Malorie Peacock:

So one, in order to be smooth, to be as seamless as you can and to avoid using a bunch of notes for an opening statement, you have to practice, or at least I do. I can't memorize something just reading it once or just practicing it once or even just doing it by myself in front of the mirror. It's not the same as actually practicing, making eye contact with jurors, telling them the story and reacting to what kind of feedback they're giving me. Are they making eye contact? Are they nodding? Do they look like they're getting it? Do they look like they're not getting it? How do I pivot from there?

So that kind of practicing really helps so that when you're in there with your real jury, if you need to pivot, you've already practiced how to do that. If you need to explain something a little more because it looks like they're not getting it, you've already practiced that because it's not going to be completely scripted once you get in there. So it really helped, and it helped too because this wasn't intentional, but when we practiced, things went wrong. Right. The PowerPoint didn't work one of the times we practiced and so we just had to do it without the PowerPoint. And one time we had some kind of interruption where someone was and we had to stop and then get back going towards it. And so that happens in real trial. And so practicing that and keeping your flow and keeping your energy up, all of that takes practice.

Michael Cowen:

I agree. I think the rules were just so different and we did both, just practicing with people in the office and bringing in kind of mock jurors. And I think it's important that when we did the actual focus groups in the case, we did them in Dallas County because the case was in Dallas County. We wanted to have a representative sample. When we did our rehearsals, we were really testing for do people understand us? Is our theory convincing? Is our story persuasive? So we weren't really testing whether we're going to win or lose the case. We were kind of testing the advocacy. So we were able to just do that there in San Antonio. I think the bigger challenge rather than recruiting the mock jurors was when you're working with lawyers, having them coaching your audience basically saying, look, when you're being a practice juror, the feedback we want to hear is, am I clear? Am I not clear? Does this make sense? Does it not make sense? Not how could you work up the case differently? What are your questions? Why would the judge ever let this in? Like stop. That's not helpful.

Malorie Peacock:

Right.

Michael Cowen:

We're two weeks out from trial, we cannot go redo the case. The judge isn't going to reconsider these rulings. You just have to deal with it. And our people were really good once we explained what it was. But in the past, that's been an issue when we've done rehearsals, is that the lawyers want to get into the weeds on things and are not helpful when you're getting ready for trial. So sometimes it helps to use non-lawyers as your practice people for your opening and your jury selection.

Malorie Peacock:

Yeah. And it is really important. I know a lot of lawyers out there practice in front of other lawyers and that is important because the purpose of practicing, especially like your opening, is to build up your confidence so that you're ready, you feel ready, you feel like you're clear, you feel enthusiastic about it. And if they're just tearing you down piece by piece, that's not effectuating the goal of being ready, energized, prepared. It's actually making you more nervous and doing the opposite of what you're trying to do with your practice.

Michael Cowen:

So then we get to the actual trial. We've practiced, we've rehearsed, but then there's always things that don't go the way you expected them. So let's talk a little bit about our jury selection. So one, our judge and just for the listeners, we actually split both jury selection and opening. I did the liability parts, you did the damages parts. It's the second time we've done that. It seems to work pretty well for us and the judges so far, as long as we use our time. She gave us 45 minutes for jury selection and 30 minutes for opening and didn't really care how we split it. But I want to talk about some of the challenges in opening and I want to make it clear I'm not at all critical of the judge. I respect her a lot. She's very smart, she worked hard, she read things, but she has her own opinions on what is and isn't appropriate in jury selection. Her opinions may be different than mine, but she got elected judge and I didn't.

So we just had to just have a positive mindset and follow the court's orders. So the biggest one is not only could we not talk about the facts of the case, which is appropriate for voir dire, but it was to the point that we could not say it was a trucking case. We could not say it was a wrongful death case. We had to ask some pretty abstract questions. And then every time a juror spoke, we had 60 potential jurors. They were spread out because this judge also still follows COVID restrictions. So they were social distancing between them. We would have to wait between jurors to pass them a microphone. So it did make it more of a challenge.

Malorie Peacock:

Yeah.

Michael Cowen:

You couldn't really get any cross talk or group formation going. How did you deal with that?

Malorie Peacock:

I did the best that I could. So the way we practiced jury selection was not the way that we ended up being able to do jury selection because of the judge's rules and restrictions and because of just the way that it was set up. We ended up being in the central jury room in Dallas. It's a big, big room. Everybody's very spread out. It was hard to see everybody, all of that. You couldn't really see their faces. We had to be up on a podium. So you weren't connecting at eye level with the jurors like I usually would like to do in voir dire where you're really making a connection with them. And so that was sort of lost. So we ended up doing almost a more traditional, let's see who we can get off for cause type jury selection, which is not my favorite kind of jury selection, but that's what we had to do because that was the hand that we were dealt.

So we were ready to pivot and that's what we ended up doing. So Michael ended up doing the first part of voir dire and he asked a bunch of scaled questions that we had on a big PowerPoint and got people to rank themselves. I strongly agree with this statement or I strongly disagree with this statement. And then I was taking notes and I ended up writing down the people that looked like they were going to be bad for us on certain statements, that I could ask follow-up questions of those specific people. And it worked well that way because then I at least had a couple of minutes to digest what people had said to Michael before I had to get up and start asking questions. So that's kind of the way we ended up structuring it, even though that's not usually how we do voir dire.

Michael Cowen:

Yeah. Then we had an extra curve ball in that I had a stomach bug. I thought I was over it and made the mistake of eating dinner the night before and found out that about three in the morning I was not over

it. And so I actually sent you a text, what at about seven in the morning saying, "I don't know if I can do my part in voir dire. You might have to do the whole thing." How did you handle that?

Malorie Peacock:

Well, I mean I was just going to do it. You had not been feeling well. So I did know that in advance and I knew that it was a possibility, that you weren't going to be up for, even though you kept telling me it was going to be fine, in the back of my mind, I knew it was a possibility that you weren't going to be up for voir dire and maybe even not opening. So I had already prepared myself, even though we had practiced splitting it, I had prepared myself to do all of it just in case I had to. I mean, trial is dynamic thing and you got to be ready to just do what you're faced with, right?

Michael Cowen:

Yeah.

Malorie Peacock:

Do whatever is there. So I was ready to do it. And even when Michael started at seven o'clock, he had texted me. I think we were going to pick a jury at nine or something like that. So by eight o'clock you still weren't feeling good. Then 8:30 you walk into the courthouse and I said, "What are you doing here?" And he said, "Well, I'm feeling better. I think I can do it." And I said, "Michael, you really don't have to." And he said, "I'm not going to let you have all the fun. I want to do it if I can." I was like, "Okay." So you were able to do some of it.

Michael Cowen:

I'm lucky that we split the voir dire. I don't think I could. I was eating ammonium and downing Pepto-Bismol like it was candy, but it wasn't working very well. But I was able to make it through 15 minutes, which was my part of the voir dire. And you had the other 30. Luckily we're in the big jury room, the jury couldn't see me. I was behind them. I was not able to stay continuously in the courtroom and then I just had to learn I just couldn't eat. So for the next two days of trial, I just didn't eat. And that worked pretty well. When I had just no food in my system, I didn't have stomach issues as bad and,-

Malorie Peacock:

Yeah.

Michael Cowen:

Was able to go and try the case.

Malorie Peacock:

Yeah.

Michael Cowen:

By the end of it, I was feeling all right, but it was an extra curve ball in there and you just have to go with it. In trial, you just have to be ready and just accept the fact that things are never going to be perfect or are never going to be the way we planned it. But we didn't want to do that. We didn't want a continuance the poor clients. We were supposed to try this case in February.

Malorie Peacock:

Yeah, February.

Michael Cowen:

And then a defense lawyer put in a doctor's note saying he was too sick. Although that particular lawyer didn't show up to try the case. I don't know if that was BS or not. And clients had to wait another three months, four months. The clients had to wait another four months and who knows how long it would've been had we not gone. So we just had to push forward. I want to talk about opening too because we had a couple of hiccups in opening.

Malorie Peacock:

Yes.

Michael Cowen:

Every time I rehearsed, I had this big, we call it the king flip chart. It's like a double wide giant flip chart. And I practiced writing on the flip chart and that both slowed me down, it let the jury see what I was doing. Part of it's like, do your job. In this case you have to learn some things. And I would write down one, you have to learn how trucks, some of the ways that trucks are different than cars.

Two, you have to learn more about one of those ways, which is about air brakes. And I had practiced it each time. And then the judge first said she would not let me put at first the flip chart behind me because it had to be where she could see it and the jurors could see it and the defense counsel could see it. So she made me put it kind of to the side of all the jurors where they don't have to turn right to see it. But then when I started writing on it, one of the alternate jurors had a smaller seat and couldn't see over. She was sitting as far away from me as possible and she could not see the flip chart. And so about a minute and a half into my opening, the judge says, "Oh, you need to move the flip chart. That one jury can't see it." Well, I'm not going to move the flip. I'm not going to take, like one person can't carry this by themselves. It's too big.

Malorie Peacock:

Right.

Michael Cowen:

I'm not going to go interrupt my opening to go move a flip chart. So I just had to do the opening without the flip chart. And so that kind of, I don't think it messed me up, but I just had to stay calm and keep telling my story. And then the other thing I noted is when I was teaching the jury about air brakes, maybe it's because I didn't have the flip chart. I was at the point where we rehearsed it where I was supposed to move on to how trucks are different, more about air brakes, the safety rule, the fact that you need to, yeah, the safety rules, the fact that you have to have a CDL and know the safety rules were my four things you have to know.

When I was at the park where I was supposed to move to my safety rules, I could tell by the look on the jurors faces that they didn't get air brakes. And so I had to go back and just re-explain air brakes. I said, "I don't think I've made this clear enough. Let me try this again." And so it changed up our timing a little bit, but it still worked out.

Malorie Peacock:

It worked out. I mean, when you're practicing, you also want to make sure that you're not just practicing a script. Like I said before, you need to practice being dynamic and you need to practice pivoting if you need to. And so all the timing is a little bit in flux. Sometimes you talk slower than you thought you would, sometimes you talk faster than you thought you would. So all of that kind of plays into it too.

Michael Cowen:

Yeah. And then you sent me a little note about time, so I knew that I had to make another pivot and leave a little part out towards the end that was of lesser importance because the whole point of this case is when you hit something and rip on an air brake line, it will lock up one brake, but not all the brakes, which means you can keep driving the truck. And that was our case. And the fact is the defense story was physically impossible.

Malorie Peacock:

Right.

Michael Cowen:

All your brakes would just instantly lock up and you'd be stuck there. That just doesn't happen. But I mean, I didn't know that before this case and I've been doing trucking cases for a long time. The jurors definitely weren't going to know that. And so I had to really make sure that, that was like the most important thing. And I think maybe 10 years ago I would've been more worried about sticking to my script and being smooth. And I think with maturity, I've learned its cases about the jurors. It's not about me. If you can see on their face that they don't get something, go back and get your most important point instead of trying to make every point.

Malorie Peacock:

Right. And you were able to do that in opening. And I think it worked well. I think it was, definitely we got the points out that we needed to make. And opening is an introduction to the case too. You don't have to explain every single thing that you're going to show. And we didn't. I mean, that was not the goal of opening, was to say everything about everything. It was to say only a certain amount about some things.

Michael Cowen:

Yeah. And the other thing that we did, another reason, and I'm want to kind of jump into the evidence now, but I thought the opening was so important on the teaching part of the opening. We were going to call the defendant driver first knowing that she was going to say things that were physically impossible, but not obviously physical. We knew they were physically impossible because all the work we'd done on the case. They were also inconsistent with things like the black box, some other physical evidence, but a jury that didn't have some knowledge already wouldn't necessarily get that. And there was a real risk of calling her first if the jury didn't already understand certain concepts because then they might just believe her and then we'd have an uphill battle. But we also knew that one of the, for the focus groups, one of the value drivers in the case was someone saying something that's just absolutely not true and doubling down on it.

And we were worried that if we put on all the other evidence first and she's sitting there listening to it, she would come up with yet another pivot and we would not have it all locked in. And then our expert would've already testified when she came up with yet another story. And yes, we could definitely cross

examine her on her prior inconsistent statements, but it's not the same power as having her locked in on and swearing things that are true that we're able to show were not true.

Okay. Well let's go on to the first witness. We actually called the defendant driver first. And I think one of the things is that we couldn't call her a liar. The jury needed to, through the course of the trial, come to their own conclusion that she was not telling the truth. But one thing I did that I think it ended up working very well is that when I got her to say things that I knew that we were going to be able to absolutely disprove, I got that king flip chart and this time the judge let me put it right in the middle of the courtroom where I wanted to put it to start with, but I would write them down saying, Newkirk is a defendant company, Newkirk's driver says, and then I would write it down, like the engine download will show that she was hitting the gas and it wouldn't go forward.

The engine download will show that she never went over 45 to 50 miles an hour. All my brakes locked up, different things we knew that, but my air pressure was good and the warning light never came on. The buzzer never came on showing that there was low air pressure. And I wrote all those things down on the big flip chart, which the jurors said, okay, he's writing this down for a reason. Why is he writing this down? Then go back with other witnesses. And it really worked out because the last witness was the defense's crash reconstructionist, and I got him to say that her statements were, I think, what was the phrase I got use? Inconsistent.

Malorie Peacock:

Incorrect.

Michael Cowen:

Incorrect. Her sworn testimony was incorrect. We didn't want to use the word lie, but that her sworn statements were incorrect. And I think that was really powerful how it all came around. I mean, it was one thing to get our experts saying it, but when we got their own expert to say multiple times her sworn testimony, which we wrote down was incorrect, it really worked out. And it was a lot of fun.

Malorie Peacock:

Yeah. And just for the people listening, Michael, this was planned out. This is stuff that you planned in advance. And Michael knew just from her deposition what she was going to say about these certain things and which things we could prove were physically impossible or were just not true based on dash cam footage from police officers or something like that. So we knew what she was going to say, and so he already knew which points he wanted to write on the king flip chart because one, we knew we could disprove them. He wasn't just writing down everything she said, right? It was just the things that we knew we were going to disprove based on physical evidence, or other testimony, or cam footage, or photos, or something like that.

Michael Cowen:

And we had to be selective about it. They couldn't be things that were kind of sort of untrue or arguable. There had to be things that absolutely 100%, like she said, she never went over 45, 50 at the most. She was going 59, she said that she was hitting the gas and it wouldn't go. Well the download from the engine computer showed that never happened in the 90 seconds before she hit. She said that she tried to hit the gas and go after she stopped. Well the download said that didn't happen, that her foot stayed on the brakes for the next 30 seconds. So there were big things.

There were probably 20 things we had to choose from, but we chose four or five. And things that were cases positive, things that were absolutely showing that she was not having all the problems she claimed

to have with the vehicle, that she had the ability to get the vehicle off the road because the more and more, the defense wanted this case to be about the few seconds she had between when she first felt that there was something wrong with the vehicle when what we think happened is that one break locked up of the 10 brakes on the 18 wheeler and the time she came to a complete stop. Whereas we want to make it at least the five minutes plus that she had while she's sitting out there on the road, that at any time she could have just hit the gas and gone off the road.

Malorie Peacock:

Proving things that she said were physically impossible that aren't necessarily obvious did require a lot of expert work in this case. This was an expert intense case because it had to do with air brakes, it had to do with how tractor-trailers operate, and the jury is just not going to have any familiarity with that. And so I don't usually love to have a bunch of expert testimony where we're just putting on experts and experts and experts because you always worry that the jury is going to think, well, you paid this person. They're going to say whatever you want. So how did we make sure that our experts were armed in a way that it wasn't going to be in the jury's minds? Well, they're just saying whatever they want because we paid them.

voiceover:

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Michael Cowen:

Two words, anchors and testing. So anchors are authoritative publications that don't come from our expert, and so we use the Federal Motor Carrier Safety Regulations and that showed what you're supposed to do if you do get stopped, which is put out your flashers and put out triangles. We use something called the Preventable Accident Manual, which is a document that the United States Department of Transportation puts out there for trucking companies about how different kind of crashes occur and how to prevent them. And they say, don't stop on the roadway, get off the road and then put out your flashers and triangles. And if you do get stuck on the road, you get those triangles out immediately. You don't wait 10 minutes. We used the owner's manual from the truck, we used the commercial driver's license manual, and we used the defendant's safety manual, which they produced in discovery but never actually gave to their driver, which was something else we had a lot of fun with.

And so those were our main anchors. We used a couple other ones about training and having a CDL not being enough. And I did notice that we had a couple jurors like in closing weren't necessarily warm and fuzzy towards us as far as the energy we got, but whenever I went back to putting up anchors on the screen, they liked those. I could tell the difference in being receptive between what I was saying and when I was reading an anchor. So I think at least some of the jurors, I think that made a huge difference. And then testing. And we actually got an 18 wheeler with a tractor and a trailer, and then we pulled an air brake when it was going 50 something miles an hour to show that that would not make it just immediately come to a stop. Then we showed how long it would take for all the air to come out of the two huge storage tanks that are on there, where before all that, because the brakes aren't going to lock up until the air pressure and the whole system gets below a certain level.

It shows that way before that, that takes at least three to five minutes, that before that happens, you're going to hear a buzzer, the air pressure gauge is going to go down, you're going to have a warning light come on. And so her testimony was at the time of the crash, the buzzer still hadn't come on, the light wasn't on, and the air pressure was good, which meant that at any point she could have pulled it off. And then we showed that even from a stop, you could, with one brake locked up, you could just keep driving around. That did not have her stuck in the middle of the road.

And that really helped because they really didn't have a way to come back from that. In fact, their own expert ended up not pretrial, but on the witness stand, their own expert ended up admitting that if it was only one brake locked up, that she could indeed have pulled off the road and had minutes to do that. And if her testimony was correct, that the air pressure still showed good, there was no buzzer and no warning light, that at any time she could have pulled off the road. And getting that from their expert to end our cross was really powerful.

Malorie Peacock:

And it happened to be the last witness. So it was,-

Michael Cowen:

It was really nice.

Malorie Peacock:

Yeah.

Michael Cowen:

But I'm betting, had we not done that testing, he would've been, well, you don't know. It could have.

Malorie Peacock:

Right.

Michael Cowen:

And they didn't do any of their own testing, which they couldn't have because our physics. I mean, it takes time for error to come out of a system.

Malorie Peacock:

Right. If they did do their testing, they wouldn't have been able to recreate it. And what was so cool about our testing is that we created all pieces of it, even down to the skid mark that the truck left on the roadway.

Michael Cowen:

Yeah.

Malorie Peacock:

We were able to recreate that too, so.

Michael Cowen:

Yeah, I was going to say one of the big things is they claimed all the brakes locked up, but there was only a skid mark on the right side, whereas if all the brakes had locked up, they'd have skid marks on both sides. And so the forensic evidence was really there for us. Another thing, it wasn't testing we did that was case specific, but it's something else that I think was really effective, especially when I used it in rebuttal, but also when we used it with our crash reconstruction expert. We've got a comparative fault problem. I mean, our client did rear end an 18 wheeler.

Malorie Peacock:

Right.

Michael Cowen:

And he never hit the brakes, he never steered. And in Texas, if you're 51% or more at fault, you get nothing. And if you're 50% or less, you get discounted by your percentage. So I wanted to show how dangerous it was, how much more dangerous it was to stop a tractor-trailer in the middle of the road.

And so we talked about it being bigger, it being heavier, but there's a thing called underride where the tractor-trailer, because it's up higher, that when it gets hit in the rear by a car, the bar that's supposed to be the underride bar guard at the back just kind of collapses and the vehicle goes underneath the trailer. It doesn't engage the bumper, it doesn't engage the frame. The trailer goes right through the windshield, so your seatbelt and your air bag does no good and hit you in the head. That's what happened in our case. And so we got some crash tests from the Insurance Institute from Highway Safety and use those as a demonstrative to show what happens with underride and why this is dangerous and not recreating our crash. There were different vehicles, different speeds, but just showing what underride is, and I think that really helped explain why this is such a dangerous thing to do.

Malorie Peacock:

Yeah, I think so too. I think it was very powerful and it was I think important too to see that underride crashes happen and people get killed at fairly low speeds. I mean fairly low, meaning less than highway speeds. And we were on highway here, so there was an issue about the speed of our client, how fast he was going, whether that was speeding. It's a whole nother topic I guess, but it was useful to be able to show that this is dangerous in all kinds of situations, not just at highway speeds.

Michael Cowen:

So you had the challenge of establishing damages, so it was a wrongful death case. He was what? 24.

Malorie Peacock:

24.

Michael Cowen:

24 years old. We represented his parents. Never married, no children, no economic damages because kids don't make us money. They cost us money. Although, I mean that is what it is. But so other than having the clients testify, what did you do to show their losses and motivate a jury to give multiple millions of dollars on this?

Malorie Peacock:

Well, I didn't just have the parents testify. I had a list of probably 25 people that knew the parents, knew the man who was killed before all of that kind of stuff. And so basically I interviewed everybody to figure out who was going to fit into my idea of what a damage model looks like. So what you want to do is have enough witnesses to tell your story, but not so much that it's repetitive and not so much that it's emotionally exhausting for the jury, especially in a wrongful death case. And it is emotionally exhausting to see people on the stands crying, to hear about this tragedy. It just is emotional for anybody listening to it. And if you exhaust the jury, they get annoyed with you, but also then they just kind of get used to it, right? It's not as shocking. It's not as horrible. It's not as traumatic if they have to hear the same thing over and over and over again and they just get annoyed by it. Right.

So it was a real challenge. We ended up putting on, I think it was seven total people. There was the brother of the deceased, so their other son, there was the brothers of both of the parents, there was a friend of the mom. There was anyway different people in their lives all to tell something a little bit different about them. But what we kept in mind when we're putting on these witnesses is we had to keep reminding the jury, we're not just putting these people on the stand to cry in front of you. So the way that I did that, because you can't just say that, right?

So the way that I did that is I kept reminding the jury we're here to put on evidence of the loss of the relationship and the anguish that the parents have gone through. Because the two elements of damages that we're going to be asking for is loss of society and companionship, which I was calling the loss of a relationship and mental anguish. So those were the two elements. But at the beginning of each witness, I would ask the witness, the two things that the jury needs to learn about are the relationship between the deceased and his parents. I didn't say it like that, but I don't know if I should use names in the situation because it's very raw for them still.

So the deceased and his parents and then what is the suffering that his parents have gone through since they died? Is that something witness that you can help us with? And they'd of course say yes. But at the beginning of each witness, I'd say that just to remind the jury, I'm not just doing this one, to torture these people or two, to torture you, the jury. I'm doing this because I have to put evidence in front of you.

Michael Cowen:

Yeah, I think you got really good specific stories too. They weren't just saying yes, they're devastated, they lost their kid, they're sad, they loved him, but you had very, very specific, like on Saturday night, he would, and the parents were divorced. It made it an extra challenge because we had to tell two separate stories of a relationship. On Saturday nights, he would go to his dad's house with his brother and they would watch UFC and then he would spend the night. Then they would all watch the Raiders play football the next day. And that was like a huge bonding thing. And with the mom, she would come home from work late, he would come home from work late, she would still make him dinner, she would DVR Survivor and they'd all watch Survivor together, the little things. But it just really showed a lot about their relationship, especially with a 24-year-old because a lot of 24-year-olds aren't watching Survivor with their mom and eating dinner together most nights. And then he worked with his dad and talked about working together and the relationship they were building there.

So I think you did a really good job of coming up with specific stories. Unfortunately, we didn't have as many photos as we wanted. We had some, but they weren't a family that was taking a bunch of photos. And that's okay. It is what it is, but it really did. I think it really helped. How long did we put on our case-in-chief? Let's see. We picked the jury Wednesday, we did opening Thursday and started evidence. And then we did not have trial Friday. And then was it Monday we finished?

Malorie Peacock:

Yep, we finished on Monday and we finished Monday probably at three or so because then after that we had directed verdict hearings the rest of the day. So yeah, so it was two days, a day and a half really, I mean...

Michael Cowen:

Of our testimony. And then the defense put on their case and then we had more legal arguments. And then,-

Malorie Peacock:

Right.

Michael Cowen:

So how did we put on all the evidence in a wrongful death case in less than two full days?

Malorie Peacock:

Well, and that goes back to the point that I was making before. For the jury, they want you to consider and care about their time. They don't want to feel like you're wasting their time, but you have to get on all your evidence too. And so being very efficient, being ready, and also making sure that you said everything that needed to be said, but no more than what needed to be said. And so each of our damages witnesses took 15, 20 minutes. I mean, they were very short, but each of them had a task. Right. Your task is to tell this story and this other story. Right. And so you tell those stories and then that's it. Right. We're not going to tell every story that you know about them or tell a start from birth to death of all of his life history or anything like that. Right. We're telling little isolated stories for each of the damages witnesses. And so I think it ultimately, with all of the witnesses all together, was it I think 15 witnesses in our case-in-chief,-

Michael Cowen:

Yeah.

Malorie Peacock:

That we put on in a day and a half? And so it was the same with the expert witnesses. We gave the information and gave all of the information, but we moved on. I mean, we moved forward, we moved on. We didn't waste the jury's time. We were ready with our exhibits, we had them on our computer, we were ready to pop them up on the screen, ready to show the jury. And we weren't fumbling for things. We weren't trying to find our witnesses in the hallway. Everybody was ready to go, so that helps too.

Michael Cowen:

Yeah, I think we also really pared down the case and the focus group really helped too because we knew what our strongest points were on liability, and we just went with those. I mean, we had other issues that we could have brought up that were not as, we were right, but there was more of an argument.

Malorie Peacock:

Right.

Michael Cowen:

And we didn't need those to win. But it's getting that practice and that confidence that this is what I need to win. And also looking at the appellate standards, not only is this what I need to win with the jury, this is what I need to keep the verdict on appeal. And so for example, mental anguish, you had to put on evidence of how bad it was, how long it lasted, substantial disruption with the everyday life that the clients had. And you did. But then you also didn't just have someone that's just sitting there torturing the jury crying for an hour. And I think it just takes so much more work with our witnesses to get them to be able to testify in a shorter period of time because you have to really distill it down. You have to practice with them, you have to convince them you don't need to go into everything.

Malorie Peacock:

Right.

Michael Cowen:

They'll just cross, and then there's not as much to cross examine them on because they're shorter directs.

Malorie Peacock:

And the defense did, I mean, they did cross examine our damages witnesses in this case. So that was,-

Michael Cowen:

Yeah.

Malorie Peacock:

Even with cross examination, it still took us only that amount of time.

Michael Cowen:

So then we had to do some stuff in closing and closing in this case was a lot of fun. So I'm want to talk about two things in closing. One's me and one's you. And so I'd like to talk about how we argued the comparative fault and then, which is me, and then I want to talk about how you argued damages because I thought it was really effective.

Malorie Peacock:

Okay.

Michael Cowen:

So my biggest challenge is how do I get as little? I think our expert was probably right, that our guy was speeding a little bit. He was going 68 in a 55. Not crazy speed, but he never hit the brakes. He never tried to steer. Well, I think our expert was right that he did not have time to avoid it. He definitely could have hit the brakes, even though I think he still would've died. But we had to acknowledge that that was an issue. So I was thinking, how do we get as little of a percentage as possible on him? And so what I thought a fair way to do it and what turned out to be fairly persuasive was how much time did each person our company have? And so even if you take the defense expert at his word, our paid opinion witnesses, I like to call them, our person had 10 seconds between the time he could have perceived,

according to the defense, could have perceived there was a stop vehicle and when he was killed. That's not a whole lot of time.

Yes, maybe that's enough time to stop or swerve, but that's not a whole lot of time. The defendant driver at best case scenario, had three minutes sitting out there where she could have, I said, look, give her the, she panicked, something weird happened with the vehicle. She didn't know what was going on. She came to complete stop. Give that to her. Once she stopped, she had at least three minutes, probably five minutes where she could have pulled off the road at any time. Well, that's 180 to 300 seconds.

Well, let's look at the trucking company. The trucking company did not properly train this person. They've actually violated the specific federal regulations because Greg said that she shall be instructed on certain things including what to do in the situation, and they never instructed her on it. And when she got out there, she panicked. Well, they had two months that she was working there. I did the math, that's over 5 million seconds. So the company had a bunch of time, their driver had a lot more time, and our person had comparatively little time. And so I argued for a zero to 5% on ours, and the jury went with 10. I guess I could have been more persuasive, but I'll take it.

Malorie Peacock:

No, no, I think it worked really well. And Michael actually had some really great slides that he used for this to just show the difference in time. And I'm sure he'd be happy to share them with anybody who asks.

Michael Cowen:

Or come to Big Rig Bootcamp, and you can see them on the screen July 12th here in San Antonio. We are going to present our theory of opening and use this case, the opening, the slides and the opening as an example. I'm going to talk about our theory for how you put on expert witnesses. And again, we're going to use this case as an example with a live witness and we'll share some other things, but I would be glad to put the slides on as a show note. We need them go through and make sure that we take anything that's confidential because this is really raw for the clients and they don't want stuff flown out there on the internet. How about damages? You did something pretty effective with a picture.

Malorie Peacock:

Yeah. So in a wrongful death case, I actually found this very challenging to present damages because in my mind it was obvious. Right. It was kind like, of course there are damages, right? I mean, he died and it was their son and they loved him very much. And it was actually very emotional for me too. I have a son and I was away from my son during this trial, and I felt very connected to it, and I felt very connected to the story. So for me, it was emotional. And so that made it even more challenging for me to figure out how do I present this because it's obvious to me. So one of the things, I was kind of laying in bed the night before closing and I told Michael I was going to try it and then he loved it. But I had a picture that we had introduced into evidence of the deceased and his younger brother on his 24th birthday, which was just three or four months before he died.

So it was a recent new picture. And so I said in closing, "When Newkirk's driver parked an 18 wheeler at night on 635, they ripped out, I won't say their name, the parents' heart." And then I ripped the picture in half. So I had one half that had the living brother, one half that had the deceased brother. And then as I talked about each of the damages, the loss of the relationship. So for each thing, I ripped the picture even more to illustrate that now everything is just in pieces. Right. That was just an illustration. But I think it moved slowly and deliberately, which was important. But also I think it gave a visual picture to the jury of how this loss has, it's not just one loss, that initial rip. It's every time they have to hear about

someone else's son getting married. It's every time they have to see grandchildren that their friends have that they'll never have. It's every time they have to pretend to be happy for someone else when they're just dying inside. So I think that was a powerful illustration for the jury.

Michael Cowen:

I do too. And you could just see it when every time you ripped it again, you felt it. And not only was it effective, but it also, it was true. And another thing I experienced in this trial, not the first time this has happened when we've tried a wrongful death case, it's just I'm always scared that the trial is going to be traumatic for our clients because it is stressful, it is hard, but there is a healing aspect even before the verdict of having your story told and seeing people fight for you because the father of the young man that was killed. Big strong guy, bald guy, real tough guy. And then I actually left right after closing because my family was already on their way to Italy for vacation, and I had to take another flight and join them late. I was hoping to catch the flight they were on. So I said goodbye to the client and he just grabbed me and hugged me and was crying and thanking me, and we ended up just hugging for five minutes, which is, like I said, not his normal, that's more me. That's not as much as what you'd expect from, he's just a big manly man and not a big hugger, and definitely not a big crier.

But there was just something about seeing someone fight for him, seeing jurors listen, having been so disrespected through the whole trial to get that respect. And I'm sure the verdict helps too, but just the experience. I think that we underestimate our clients sometimes when we're so scared for them. I think that they already survived a loss. They can handle the trial, but I think that the healing aspect of being heard is valuable.

Malorie Peacock:

Yeah. And I think for them too, the most important thing that they got out of this was that someone said, yes, this was not your son's fault. And they had been saying that for years and felt like nobody was hearing them and nobody was listening. And finally someone listened.

Michael Cowen:

Yep. And that's important. Well, Malorie, I didn't realize this till after trial, but I can't say it for me because not all my trials have been multi-million dollar results in the last few years, but that's five in a row for us as a trial team, that have been a seven or eight figure result. We had on a broken leg, $125,000 offer, which actually we totally like to take. And luckily we were wrong, and it turned out to be a million a quarter.

Malorie Peacock:

Yeah.

Michael Cowen:

We got I think, was it 3.7 something million on a wrongful death case with I think an offer of a $100,000? We tried one and it ended up settling for a million dollars more than our demand was the week before on another case. Then we had our 17 half million dollar verdict and we had this $4 million verdict.

Malorie Peacock:

Yeah.

Michael Cowen:

You're doing something right. I'm having so much fun trying cases with you, and it is fun. And it's interesting. I actually had Kelly Raymond again, who's a brilliant jury consultant. She helped us pick the jury and makes it really easy. Actually, she happened to be in Florence the same time as me this last weekend. And so we were actually having drinks on a rooftop bar in Florence, and she's like, "I've never seen someone so relaxed in trial as [inaudible 00:47:42]." And I said, "Yeah, because it's fun." You give up on the things you can't control. I said, "It's taking a lot of work to be that relaxed and have that much fun in trial," but I do think that part of the secret to our success is not just the work, but just the joy we have doing it together.

Malorie Peacock:

Yeah. It was fun to try the case and it was meaningful too.

Michael Cowen:

Well, thank you. I really enjoyed trying the case with you. I'm looking forward to our next trial, whenever that is, and hopefully people will come join us on July 12th at the Big Rig Boot Camp in San Antonio to learn more about it and how you can get these verdicts yourself. Sign up is bigrigbootcamp.com. Well, thank you all so much for listening, and please join us next time on Trial Lawyer Nation.

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voiceover:

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