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The plaintiff appears to be fine and there's a sympathetic defendant

STRATEGIES FROM VOIR DIRE TO EXAMINATION

Trials are all about perception and storytelling. How you present your case to the jury affects how the jury understands what your client has gone through, and what kind of verdict the jury determines to render. But not every case involves noticeable, catastrophic injuries or evil corporate defendants. Often, you will have a plaintiff who does not appear to be injured, a "sympathetic" individual defendant, or both. So, what can you do to maximize the value of your case at trial under these circumstances? This article will discuss how to handle both the non-injured-appearing plaintiff and the "sympathetic" defendant from voir dire through examination.

Should I have my client present during trial?

The age-old debate is common for all of us preparing for trial: "Should I have my client present at trial?" There are many schools of thought on this, and certainly no magic, 100% correct answer; however, it's important to understand the root of the concern. It basically comes down to this: "Will the jury punish us or our client because she is not present while they are forced to sit for a trial?" To answer, you need to look at three types of plaintiffs: the non-injured-appearing plaintiff (no visually apparent disabilities or injuries), the visibly injured plaintiff (has a limp, cane, scar, etc.), and the catastrophically injured plaintiff (in a wheelchair, severe facial burns, etc.).

For our purposes in this article, we will only be focusing on the non-injured-appearing plaintiff. For these plaintiffs, the jury may not care about your client's presence as much as you might think. Most jurors are hyper focused on the task at hand. Certainly, they may wonder why the plaintiff is not present throughout trial, but at the end of the day, they will weigh the evidence and judge your client based on the testimony of doctors and before-and-after witnesses.

The downside is far greater if the plaintiff is present day in and day out. The jurors will see her getting in and out of her car, walking up and down stairs without assistance, standing up, sitting down, and so on without any issues. And they will dissect every move, as it will be in their faces all day long. The more they are confronted with your plaintiff's presence, the harder it will be to get a larger number for non-economic damages.

We think the best decision for the non-injured-appearing plaintiff is to have her present for the mini-opening, then at the start of plaintiff's voir dire to have her stand up and walk out of the room while all the jurors watch. Then, have your plaintiff show up only at the time of her direct and then again in closing argument. This allows the jurors to focus on everyone else telling her story without the jurors dissecting her every move.

How to deal with the non-injured-appearing plaintiff during voir dire

When developing the topics to address in voir dire, you always want to start with your warts or danger points. These are the scary parts of our cases that keep us up at night. For example, the non-injured-appearing plaintiff is certainly a danger point when we are asking for damages that fully compensate.

Here are some sample questions to open up the discussion:

- What are your thoughts on whether someone could have chronic pain and still appear normal to someone who doesn't know them well just by looking at them?
- Are you already looking at plaintiff and sort of concluding she can't be seriously hurt or disabled?
- Brutal honesty – would you only feel millions are warranted if someone is in a wheelchair?
- Who feels that someone with serious life-changing injuries could never do activities?
- Even strenuous ones?
- Does anyone here try to keep living your life despite the pain it may cause?
- Does anyone know anyone who does?
- Who is already having trouble with the concept of awarding millions of dollars for someone who has no visible injuries like Mr. Smith?

How to deal with sympathetic individual defendants in voir dire

The other major danger point we want to address is the non-corporate, individual defendant. Particularly the ones that appear and are likable and relatable to the jury. This is a danger point you want to hit head on like this: "The defendant, as you can see is not a large corporation such as Amazon or FedEx, instead it is just Ms. Jones, a nice

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mother of three. I am worried that even if we prove that the loss of the quality of life to Mr. Smith is in the many millions of dollars, some of you may feel a little sympathy for Ms. Jones because your judgment would be in the many millions of dollars. Does anyone feel that way even a little bit right off the bat?"

If jurors start saying they are concerned how the verdict would get paid, you may want to throw it back at them and start introducing insurance into the equation, such as: "Do you know how the verdict will get paid? Do you know if the defendants will have to pay themselves or if someone or something else will pay? Should it matter either way? Will it matter to you?"

Here is a real exchange on this topic in our recent trial:

> Prospective juror: Yeah. I mean, I think I kind of agree with him as well and also with the fact that it's just – it just seems so subjective to, like, put a number – put a number on human suffering, as terrible as it is with what happened. But I guess I can't help – I mean, as terrible as I feel for the plaintiff, I can't but empathize a little bit, wondering if for some reason this couple had a target on their back. Like, compared to maybe if the defendant had – had no money, like, how would that be different? I'm just wondering if maybe – maybe the plaintiff's lawyers, as soon as she reached out to a lawyer, found out that maybe they're worth something and decided, "okay. We're going to go after them."
> Mr. Kramer: Okay. That's a fear of mine, too. That's a fear of mine that you guys are going to think that way. And naturally, I think you're going to feel sympathy, you know, for – sometimes you hear about people feeling sympathy for the injured party, but oftentimes, you know, people feel sympathy for the defendant. This is not Amazon sitting over there or Microsoft.
> Prospective juror: Right. Right.
> Mr. Kramer: And – but my concern, what I worry about all the time in these type of cases is, like, if the true value is in the millions of dollars, are jurors going to hesitate to award the full value because they see a nice couple on the other side? And you're not allowed to consider where the money comes from: insurance or whether it's from, you know, a corporation or wealth or poverty or any part. You can't consider that. But I think as human beings it's hard not to, and so it – that's kind of what I'm hearing from you a little bit, is that even if the value is proven, the full value is in the millions of dollars, would it be hard for you to award that?
> Prospective juror: Yeah, I think so.
> Mr. Kramer: Because the defendant is just a couple and not a big corporation?
> Prospective juror: Yes, that's right.
> Mr. Kramer: So, we, the plaintiff, would be starting behind the defense before you even hear any evidence, because you feel some sympathy for the defendants?
> Prospective juror: That's correct.
> Mr. Kramer: Anyone else that we have not talked to on this topic? Anyone – you know, even if the value does prove to be a high amount, is anyone going to try to feel sympathy for the defendant because it's not a big corporation, besides the people I've already talked to?

By addressing this issue during voir dire, we were able to identify the potential jurors who would have felt sympathy for the defendant and keep them off the jury.

Witnesses can build up the non-injured-appearing plaintiff

Your client's story should not just come from your client. In fact, it is often stronger and more compelling when it comes from friends, family, or even acquaintances. This is especially the case when you are dealing with a non-injured-appearing plaintiff, because these witnesses will really be able to set the scene for the person your client was before the incident, and the changes they have seen since. That way, by the time your client gets on the stand, the jury will already be thinking about everything your client has lost and view your client through that lens.

Starting early in your case, have your client begin thinking of people who could testify on his or her behalf so that you can start gathering stories. Often, clients may be resistant to this idea, or it might be hard for them to think of people on the spot outside of close family members. Explain to your client the importance of having these "independent" witnesses testify at trial, and brainstorm with them to really think outside of the box and come up with a list. This could include former coworkers or supervisors; friends; acquaintances met through social or sports groups; spiritual leaders; teachers; even former partners (in a 2021 trial, we had the client's ex-girlfriend testify on his behalf!).

Reach out to these witnesses to learn what they know about your client, and what your client has gone through since the incident, digging deep for specific memories they have of a time where they saw your client in pain, or where they really noticed how your client has changed. These witnesses do not necessarily need to know everything about your client's losses; often it is better to think of these witnesses as providing very specific "snapshots" from different periods throughout your client's life.

You should reach out to these witnesses again close to trial to ensure they are ready to testify, but outside of getting the story from them, and providing them with general information about what to expect at trial, there is no need for extensive preparation of these witnesses as you want the testimony to be genuine and natural, and never rehearsed or memorized.

For example, in our August 2022 trial, we had three different witnesses testify about our client: (1) her former dance partner, with whom she had lost touch until just months before the crash when she went on a strenuous dance tour around Turkey; (2) her yoga instructor, who had seen the plaintiff weekly at the studio up until the crash and was able to

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testify to her skill level; and (3) the owner of the dance studio the plaintiff had attended for years, who testified that the plaintiff had been training to be in the annual Nutcracker ballet right up until the crash and how passionate the plaintiff was about dance.

These witnesses testified for no more than 15 minutes each but were very effective in terms of explaining how active and driven the plaintiff was before the crash. All of this testimony was put into perspective when the client took the stand and talked about how she could no longer dance, and how painful it was to do yoga now, given the extent of her injuries. The jury then could understand what these activities meant to the plaintiff, and what it meant to lose the ability to do them.

None of these witnesses could be considered extremely close personal friends of the plaintiff, and while we also had testimony of family members who saw the plaintiff through every step of her recovery from the crash, the testimony of these more "independent" witnesses was compelling in that these witnesses truly stood to gain nothing from a plaintiff's verdict and their credibility could not be impeached on that ground.

When putting all these witnesses' names on the witness list, you should anticipate a possible motion in limine or objection on the grounds that all these witnesses are cumulative and subject to exclusion. Most judges, however, should be receptive to allowing at least a few of these witnesses to testify once you explain the brevity of their testimony and how there will not be overlap in subject matter. The jury will also appreciate that you are not wasting their time, by keeping this testimony short and sweet.

Carefully cross-examining the sympathetic defendant

Cross-examining a sympathetic-looking defendant is a delicate business where the name of the game is setting the stage for them to take an unreasonable position, while keeping your hands as clean as possible. This requires a significant amount of pre-trial preparation, starting with discovery. Be a stickler for the rules of written discovery to ensure you have solid, non-evasive answers to questions. While you can't use RFA denials as evidence in trial, you can use their form interrogatory 17.1 justifications for denials, so make sure to pin them down on their facts in support and don't acquiesce to sub-par responses. Meeting and conferring takes time but is worth it when you can display some ridiculous responses at trial. (See Code Civ. Proc., § 2030.410.)

Adopt the same mentality at the defendant's deposition. Attempt to elicit good, solid testimony (without objections where possible) that locks them into their position on liability and causation. Ask them about their discovery responses, if they have read them, and if, at the time of deposition, they feel they want to make any changes to their answers.

It likely goes without saying but make sure to send supplemental discovery at the end of the discovery period asking, once again, if they wish to change their answers. If they do not, then display these supplemental responses at trial, as well, to reinforce how the defense is doubling down. This is an effective way to introduce the defendants' position to the jury before any testimony is elicited from the defendants.

Often, as soon as the opening statements are concluded, we will begin our case in chief by displaying defendants' discovery responses to the jury, just to set the scene as to how absurd their position is if they are denying liability or causation.

Once you call the defendant to the stand, questions should be brief, specific, and designed to provoke highly inflammatory and unreasonable positions without doing any editorializing during the questioning. In our recent August 2022 trial with a very sympathetic-looking defendant, she had taken the outrageous position that our client was 100% to blame for her own injuries sustained when defendant hit her while she was lawfully crossing the street within a marked crosswalk.

Alexander Eisner cross-examined this defendant, and ultimately pared down his questions to refrain from attacking her with the many ridiculous positions she had taken in the case. Most of the questions were taken directly from the defendant's discovery responses and deposition testimony and were delivered as non-accusingly as possible. Our job was to show the jury that she wasn't as innocent as she initially appeared without making it look like he was attacking a sweet older lady. We were able to accomplish this by asking non-inflammatory questions and at times, even repeating back some of the defendant's more illogical statements, which had the effect of emphasizing the ridiculousness of her position without being seen as badgering or mischaracterizing her:

> Mr. Eisner: Okay. And how fast were you going when you hit her?
> Defendant: You know, I've been asked that and asked that and asked that. And I only can say that it seemed like it was 2 to 5 miles. The reason for that is that I don't race around ever, especially, especially in a situation where I'm turning left. And in that situation, I don't – see, I – I'm just a person that – I don't get tickets, nothing ever happens to me, and all of a sudden, this disaster. This is a disaster.
> Mr. Eisner: This disaster happened to you?
> Defendant: This is a disaster that happened to me. I care about people.

It should be noted that at this point in the defendant's examination, Alex felt comfortable to push a bit harder on his questions. This is because once a defendant begins to say inflammatory things and the room starts coming around to the idea that this sympathetic-looking defendant isn't quite the person they thought she was, you gain the leeway to push a bit harder. It was with that added leeway that the following exchange then occurred:

> Defendant: And – I mean, she – none of us would be here if she would have just walked where she – where it was

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safe. It was even a sidewalk running along all the way around the restaurant.
Mr. Eisner: Due respect, but we also wouldn't be here if you hadn't hit her in the – with your car; right?
Defendant: No, I agree.

Ultimately examining a sympathetic defendant boils down to doing the prep work necessary to be able to give the witness a couple of simple questions and being confident that the witness will do the work of undermining their credibility for you. Remember that if the responses you're getting are angering you, chances are they are angering the jurors, so there is no need to drive the point home and risk juror sympathy for the defendant.

Sympathetic defendants represent an uphill battle regarding their credibility, but once the jurors see them for who they really are, their reactions are often that of betrayal and anger and it can work to your advantage more so than an unsympathetic defendant simply living up to the already-low expectations jurors may have formed about them.

Conclusion

A non-injured-appearing plaintiff and "sympathetic" defendant may not be the best facts of your case, but with some thoughtful planning, they can be turned into strengths. By setting the stage in voir dire, calling strategic character witnesses, and letting sympathetic-looking defendants hurt their own credibility, you can take control of some of the more difficult elements in your trial and use them to your client's advantage.

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