Order of putting on your witnesses: How to script the play

By Casey Kaufman

Introduction

A trial lawyer wears many hats, and this article will discuss the trial lawyer as “director.” A trial is your time to tell a story to the jury through the presentation of evidence in its many variations – photos, verbal testimony, simulations, demonstrations, blow ups, Power Points, etc. A trial lawyer frames the issue to the jury through this presentation. I urge you to take advantage of all that you control as the plaintiff lawyer and recognize the crucial importance of not only what is presented but when, because it impacts the jury’s perspective.

We all put so much time into preparing opening statement, closing argument, direct and cross examinations, but often order of witnesses revolves more around their schedules than what works best for the plaintiff’s case. Try to avoid letting someone’s schedule dictate how your evidence is presented. Rather, at trial, be the storyteller and use all of the tools available to you so that your client’s story is told in the most effective and compelling way.

General Considerations

First, the theme of any trial should be conduct, conduct, and conduct. This takes the spotlight off the plaintiff and directs it properly on the defendant as the wrong-doer who has forced the trial by not accepting responsibility. Focusing on the defendant’s conduct also helps keep the distractions to a minimum – such as irrelevant character issues and any other negative evidence a defendant may seek to use to cast the plaintiff as undeserving. Focusing on conduct also lets the jury see the inevitability of the event, which proper conduct could have prevented.

Second, wherever possible tell the story around the plaintiff in a way that does not require the plaintiff to be the sole source of crucial information. Conduct of the defense is presented in plaintiff’s case, often through testimony of defense witnesses via the provisions of California Evidence Code § 776. Facts of the incident are presented through witnesses or first responders. Causation can be shown through experts where necessary. Injuries are presented through medical care providers showing the factual underpinnings of the disabilities and pain, and then loved ones talking of changes and residual disabilities. Under this scenario the plaintiff is among the last of the witnesses to testify, and then only to affirm what others have already said or to provide only those items that cannot be learned from any other source. This may seem contrary to common sense, but there is a logical reason. The propaganda vilifying trial lawyers and people who bring lawsuits has been very successful and we must act within that reality. As a result, we should assume that the members of the jury are predisposed to be suspicious of us and our clients, regardless of what they say in voir dire. Therefore, we must minimize the chance of the plaintiff to be portrayed as a complainer or solely out for secondary gain.

Below I discuss specific scenarios in which the order of witnesses, and therefore the order of introduced evidence, may play a large role.

Product Liability Actions

Often in product liability cases there is a dual theme: 1) This was an event waiting to happen (through defective design or manufacture combined with notice to the defendant who still failed to provide adequate warnings); and, 2) in making choices, it was clear that the corporation valued profits over safety.

Initially, you need to educate the jury as to what the product is, how it is made, what warnings were used, and how it was marketed. In so doing use the words of the risk benefit and consumer expectation tests of Barker v. Lull Engineering (1978) 20 Cal.3d 413 and CACI 1203 and 1204.

In telling this story, focus on what the defendant knew about the product’s dangers, when this was known, and what, if anything, was done or said about the problems. This evidence comes from the company’s employees, its records, its advertisements and product literature, adverse events,
testing or lack thereof, warnings, and industry experts. Follow the guidelines of the jury instructions. While plaintiff is not technically required to come up with better alternatives under strict product liability, experience shows that juries want to hear the “fix” from the plaintiff and the simplicity of the “fix” may further highlight the defendants’ misconduct.

This part of the trial establishes a back story for the product, the problem, and the corporate knowledge. With this information, both aspects of the product liability theme are introduced. First, knowledge of the product and the prior notice to the company support the notion that the subject incident was expected and predictable. Second, an examination of the company’s notice or warnings as to this issue sets up an argument that in doing nothing or deciding not to recall a product, the company valued profits over people’s safety.

After this is done, turn to the incident itself. First, you must make the link between the story of the defect as told thus far and what happened to the plaintiff. Depending on the product involved, you may need an expert to provide the causative link. Once liability and causation are established, now you can turn to damages.

**Public Entity Actions**

A public entity case for dangerous condition of public property is essentially a product liability case where the product is a road or other type of public property. However, there are some important differences in these cases. First, notice is a necessary part of the statutory liability scheme in the Government Code so the recitation of past accidents/complaints is essential and should be the centerpiece of the liability presentation. Therefore, the issue of notice may precede an in-depth discussion of the alleged dangerous condition. This can be done by using testimony of those living near a dangerous condition, first responders, tow truck drivers or persons involved in other incidents in the location.

Second, a theme of profits over people is not applicable in a dangerous condition action. Inaction in the face of available information regarding public safety is the theme. Once again, using the testimony of the public entity’s own employees and their documents is essential to show indifference.

**Elder Abuse Actions**

The analysis in an elder abuse case is similar to that of a product liability where the “product” that is defective is elder or dependent adult care. Evidence of past citations and deficiencies support the “notice” requirement. Otherwise, the general approach is similar to that of a product liability action in which profits over safety is a common occurrence.

**Automobile Collision Actions**

These cases are quite different than those outlined above because prior incidents or accident are usually excluded as character evidence. In these cases, we usually start plaintiff’s case by calling the defendant driver to the stand pursuant to Evidence Code § 776. With the defendant on the stand first, you shape the testimony that you want, highlighting inconsistencies that are later going to be the focus of plaintiff’s case. After the driver leaves the stand, call any eyewitnesses or police officers (who were not in the courtroom during the defendant’s testimony) and start pointing out the inconsistencies.

Now the time is ripe to call your accident reconstruction expert. This witness will tell the whole story of what happened based upon prior testimony, evidence at the scene (physical/ police officer testimony), plaintiff’s deposition testimony, and their own opinion. Also, this expert has the opportunity to directly dispute the defendant’s testimony and recollection of events based upon scientific principles.

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By doing this, when the plaintiff testifies the jury already has a view of what happened and the plaintiff can confirm through their personal observations and recollections.

**Damages**

As a jury will not award damages before it finds liability and causation, your presentation at trial should avoid prematurely jumping ahead to discuss plaintiff’s damages. To establish physical injuries you should rely on treating doctors and/or hired experts to explain to the jury how this event physically injured the plaintiff and to describe what lies ahead for the future.

Once liability, causation, and physical injuries have been established, plaintiff’s case can turn to general damages to address the psychological and emotional effects of
the incident. It can be difficult to provide evidence to the jury of plaintiff’s emotional distress. General damages are a hot button issue with regard to pre-existing juror bias, and hopefully thoroughly vetted through voir dire, and how this topic is presented is going to be closely scrutinized by the jury.

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In order to minimize the effect of these pre-existing biases, try to present emotional distress evidence through the testimony of those close to the plaintiff. For example, call spouses, children, close friends co-workers or others to testify as to how this incident changed plaintiff and their ability to function. This type of testimony is invaluable. It is a less controversial way to tell the story of what happened to plaintiff while minimizing the chance that it can be perceived as complaining or whining. It is a vehicle to get the emotional distress evidence in front of the jury without placing the burden on the plaintiff. It may even be useful to have an expert psychologist or psychiatrist examine the plaintiff and tell the jury their story, its impact, and why it is so difficult for the plaintiff to deal with their situation.

Last, call plaintiff to the stand to attach a face and voice to the incident. One way to think about plaintiff testimony is as follows: Introduce as little new information through the plaintiff as possible. By the time the plaintiff testifies, the jury should already know about every important aspect of the case, and the plaintiff’s testimony should be used to confirm the evidence as opposed to educating the jury.

Conclusion

There is no one size fits all approach to presenting a case at trial. There are situations where any general practice should be rejected given the specific circumstances of the case. I suggest you use the discussion above as just one more opinion in deciding how to best present your case. Good luck!