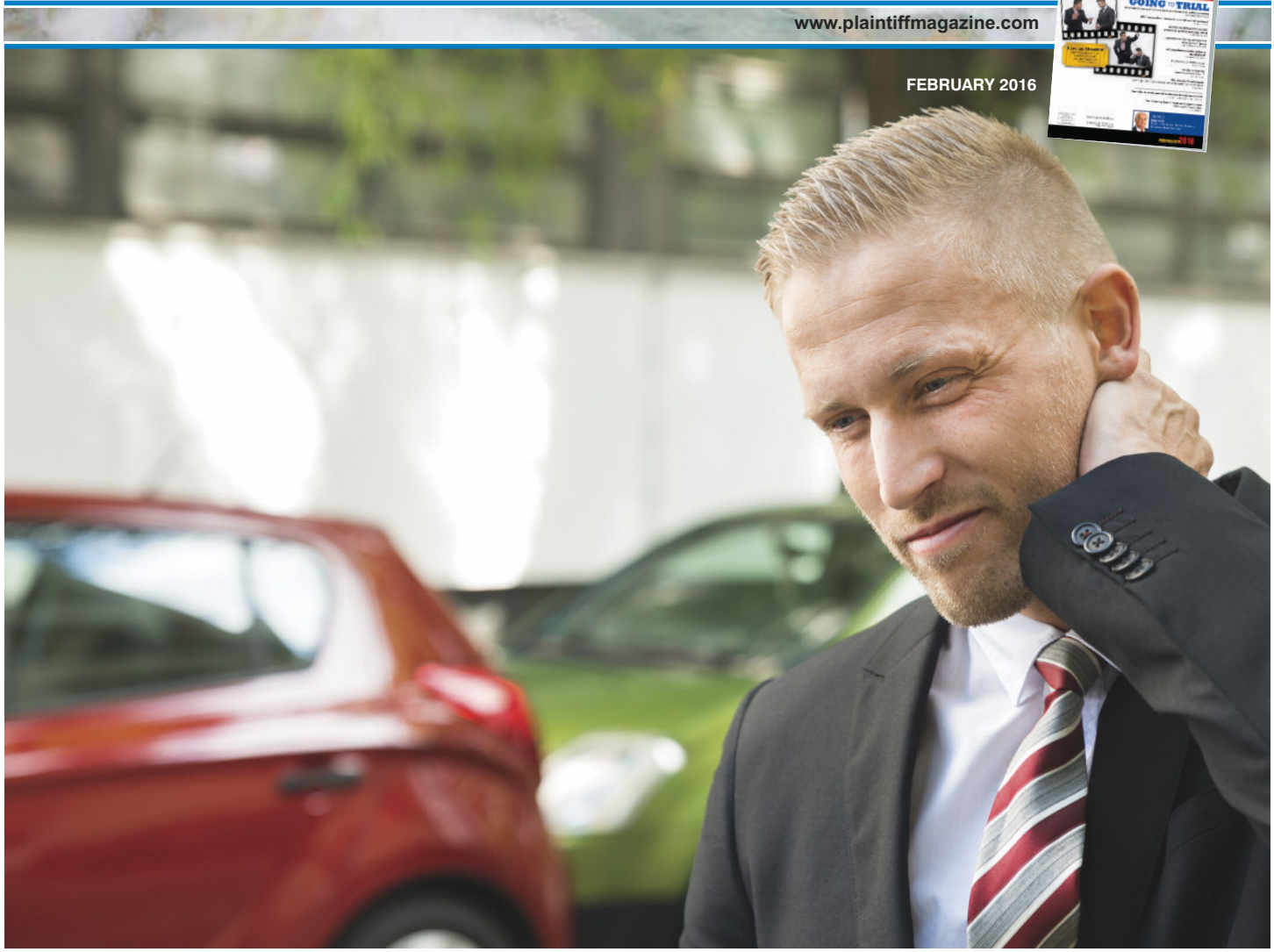


Lessons from trials with minimal medical treatment

Tips and techniques for pushing back on the defense of "minor impact, no injury"

By Jonathan Howell

Insurance companies often make unreasonably low offers when there is minimal medical treatment. A fair settlement can be nearly impossible when you add a low impact and "soft tissue" injury. Many lawyers do not have the time or resources to try a case with minimal medical treatment while insurance companies have in-house lawyers and defense-oriented experts. The goal, therefore, is to try these cases efficiently and maximize the recovery for the client. The following are a few lessons learned from recent trials involving minor to moderate impacts and "soft tissue" (also known as MIST cases) injuries with minimal medical treatment.

Be up front with the jury

It is often said a trial is a race to credibility. In a low-impact case involving soft-tissue injuries, the physical evidence supporting damages is not in your favor. Frequently, the damage to the vehicles is minimal, your client is likely not visibly injured, in a wheelchair or on crutches and the medical records are not extensive.

The prospective jury will be skeptical upon hearing the short statement of your case. Discussing the negative aspects of your case early in voir dire can help you gain credibility. It can also help you find those jurors who will not be persuaded in your client's favor.

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During voir dire, the courts are required to permit, "liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case." (Code Civ. Proc., § 222.5). When the court is exercising its discretion as to the subject matter of the voir dire questions, the trial judge should consider "the individual responses or conduct of jurors, which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in that particular case." (*Ibid.*) On the other hand, the court will not permit improper questions, which, "as its dominant purpose, attempt to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law." (*Ibid.*) "A question that is fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of peremptory challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury… The potential for anticipatory argument… is an unavoidable consequence of voir dire jury examination." (*People v. Williams* (1981) 29 Cal.3d at 408).

For example, in *People v. Ranney* (1931) 213 Cal. 70, the defendant was charged with 21 counts of grand theft. During voir dire, defense counsel was restricted from asking prospective jurors whether the fact the defendant had been twice convicted of a felony would bias or prejudice them to the extent that they would be unable to fairly weigh the evidence. The Supreme Court of California found that the refusal of the trial court to permit defense counsel to examine prospective jurors on that issue was improper. "He is entitled to be tried by a fair and impartial jury, wholly free from bias or prejudice. Defendant knew that the fact of his previous convictions would be brought to the attention of the jury if they did not already know of it. . . .There was no fact more fundamental to his defense than that he should select a jury which would not be biased by this fact, and regard it as evidence in the case from which they might find or presume his guilt of the charges upon which he was being tried. He had a right to inquire of the panel fully as to the existence of any such bias to enable him to secure his constitutional right of trial before a legally qualified jury."(*Id.* at 76. (internal citations omitted)).

Don't hide negative aspects of your case

Similar to the prior convictions in the *Ranney* case, the trial court should permit counsel for plaintiff to inquire into potentially negative aspects of the case to determine a prospective juror's bias or prejudice.

Make a list of defense's strongest arguments and ask the jury about those issues. These can include the low property damage, the gaps in treatment, the fluctuations in pain, the not getting a certain treatment, liens, the lack of emergency treatment, and a pre-existing condition. For example if your client did not take an ambulance to an emergency room, but sought treatment with the primary care doctor a week after the accident, ask the jury in voir dire whether they feel a person can be hurt and feel pain from a car collision even though they didn't go to the emergency room. Would they be able to keep an open mind about that issue? Be sure to follow up with open ended questions like "why?" Some jurors may share a personal experience and can relate to your client. Others may feel emergency treatment is the real test for an injury. Ask the jury pool whether anyone else agrees with that juror. Hopefully, now that that prospective juror has spoken her mind, other jurors will be more comfortable to come forward and express their feelings. Do not argue with the jurors but instead invite them to freely discuss the issue.

Another good topic during voir dire is the burden of proof applicable to your case. It is generally improper to ask prospective jurors whether they agree or disagree with certain propositions of law. (*People v. Mitchell* (1964) 61 Cal.2d 353, 366). On the other hand, it is proper to ask a prospective juror for their commitment to apply the law as instructed, such as the burden of proof. (*People v. Tolbert* (1969) 70 Cal.2d 790, 811). However, to avoid objection that your statement of the law is incorrect, it may be best to ask the judge to state it.

The court may have strict time limits on voir dire, particularly for smaller cases, so be sure to discuss other issues like damages including the concept of awarding money for pain and suffering. For a more comprehensive discussion on damages in voir dire see David Ball on Damages.

Continue being honest about the problem areas in your case throughout the trial. Gain credibility by discussing them in opening and in direct examination with your client, lay witnesses, and your experts. Prepare your clients and witnesses to explain the defense's strong points. For example, the gap in treatment may be because the client was concerned about mounting medical costs and she tried to manage the pain on her own. Or perhaps your client didn't go to the emergency room because she was hoping the pain would go away. Mounting medical costs could also be an explanation for not undergoing prescribed treatment like an epidural or even surgery. Your medical expert can explain that property damage photos and repair estimates are not diagnostic tools for treating patients.

Credibility can be earned from the very beginning of your case in voir dire. Be honest with the jury about your case and talk to them about its weaknesses. By failing to discuss these issues early on, you lose the opportunity to gain credibility and lose the opportunity to find biased jurors who will be unable to fairly weigh the evidence.

Keep it simple

The story of your client's case can often be told with a few exhibits and

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witness testimony. Yet, even in a case with minimal medical treatment there can be a large amount of documents like physical therapy records, urgent care visits, orthopedic visits, imaging studies, photographs, and bills. Some treatment records may not be helpful to your case. There may be a physical therapy or chiropractor note with a statement that can be taken out of context. The statement itself may not even be admissible as an exception to the hearsay rule. Other medical records may reference irrelevant medical history. Likewise, the bills can be hard to understand with references to insurance.

Instead of entering into a blanket stipulation with defense counsel to make all the medical records and bills admissible, select a few key exhibits. Much of what is in the medical records can be better explained through your client and expert witness on direct examination. The defense attorney will then have the burden of trying to admit medical records with hearsay statements into evidence.

Another way to keep it simple is to use summaries of medical bills instead of the actual bills. Like the medical records, the bills can contain prejudicial or irrelevant information. For example, if the bill was for treatment provided on a lien, the attorney's name and address may appear on the bill. It may contain a reference to insurance or your client's home address. Redacting the bill and having it admitted may pique the juror's curiosity. A summary of the bills can exclude irrelevant and prejudicial information.

Jogging the memory

A bill summary can also be used to refresh a witness's recollection about those bills. A writing can be used to refresh memory either before or during a witness' testimony. (Cal. Evid. Code, § 771(a)). Notably, any writing can be used to refresh memory; the writing does not have to be prepared by the witness or under his direction. The testimony will likely have more weight if the summary used to refresh memory was created by the witness. In the example of medical expenses, your client can refresh her memory using a table of expenses prepared by the questioning attorney and the witness.

A summary is a writing and it must be authenticated before it is received into evidence. (Cal. Evid. Code, §§ 250, 1400-1401). Authenticating a summary means introducing evidence that it is a correct representation of what it purports to depict. Typically, a witness will testify that she created the summary based on her review of documents or from some other source. That source must be independently admissible.

A witness can also summarize medical bills when it consists of "numerous accounts of other writings that cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole." (Cal. Evid. Code, § 1523(d)). For example, in *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.* (1972) 24 Cal.App.3d 410, a singer and her record company sought damages and injunctive relief against a defendant that was marketing an unlicensed recording of one of her performances. During the trial the court admitted a summary of sales invoices into evidence because it was a summary of business records consisting of numerous accounts or other writings that cannot be examined in court without a great loss of time. Notably, the witness who testified about the summary did not actually prepare it but directed its preparation. (*Id*. at 419).

A simple table showing the provider, date and the amount that is either owed or paid focuses the jury onto the real issue, the medical damages that your client suffered and not any of the extraneous information that might be included on the bills. This summary is a demonstrative exhibit, a compilation under the evidence code, and can be used to refresh your client's recollection. This can be handy when your client hasn't memorized the amounts of the bills incurred. On the other hand, having your client and expert flip through the actual bills and tally them in front of the jury can be inefficient and tedious.

Although a summary can be used as an aid while a witness testifies about bills, it can be used to summarize any testimony that would aid the jury. For example, a district attorney used two summaries as exhibits in trial summarizing the defendant's criminal history and institution misconduct. (*People v. Schuller* WL1565559 (Unpublished opinion)).

Although the example is from an unpublished opinion, it demonstrates how the district attorney condensed important testimony into a summary that was admitted into evidence. The jury could rely on the summary during deliberation rather than relying on their notes and memory.

Courts should not find a summary inadmissible just because it has an error or does not contain certain information. In *Wolfen v. Clinical Data, Inc.* (1993) 16 Cal.App.4th 171, a property owner brought an action against a tenant for the cost to repair construction in violation of building codes. At trial, the owner submitted into evidence an itemized summary of damages. The tenant objected to the summary on the grounds that it was not a complete summary, that it contained an error, and that it was not provided to the tenant with sufficient time to review. The Court of Appeal was not persuaded by any of the arguments. The summary contained relevant information to the property and it was acceptable to exclude irrelevant information.

Otherwise, the summary would have lost its value. Since a witness's testimony explained the error, the error did not render the summary inadmissible. The error affected the weight, not the admissibility, of the damage summary. (*Id.* at 183). The Court also found that even though the summary was provided during the trial, the tenant had sufficient time to review it.

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Help the jury understand the importance of your case

Every trial has an impact on our society, but juries may have trouble understanding the implications of its verdict for a "routine" automobile collision. At the same time, it is improper to overly appeal to the juror's self-interest. (*Brokopp v. Ford Motor Company* (1977) 71 Cal.App.3d 841, 861). It is also important to be careful when asking for a verdict to "send a message" in order to inflate damages. (*Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 305).

In *Nishihama, supra*, the plaintiff sued the City of San Francisco for damages resulting from a trip and fall due to a dangerous condition on public property. During closing argument, plaintiff's counsel argued that the jury should send a message to the city and hold the city accountable. The plaintiff's counsel argued that the city's actions amounted to torture of its citizens. He argued that the jury verdict would decide how the city should be run and how the city should do its job. He also argued that no one would choose to trade places with the plaintiff and that the city was gambling with the safety of all of its citizens. The defendant argued that such arguments were improper and violated the Golden Rule on appeal.

The Court of Appeal disagreed and found no evidence of a Golden Rule argument. However, it did find some of counsel's arguments bordered on improper. "Any suggestion that the jury should send a message by inflating its award of damages, however, would be improper where, as here, punitive damages may not be awarded." (*Ibid.*) The use of terms of torture as well as aligning the plaintiff with "our families, our children," tend to deflect the jury from their task, which was to render a verdict based solely on the evidence admitted at trial. The court found, however, that even if counsel's comments were improper, they did not warrant a reversal. In light of the evidence and the case as a whole, the plaintiff's counsel's arguments were not particularly egregious. "The message "simply" was that the city should be held liable for failing to repair noticeable, dangerous conditions." (*Id*. at 305-306).

Of course, you cannot tell the jury that insurance companies use low verdicts as an excuse to make unreasonably low offers on other claims which can directly affect them. Instead, remind the jury that even though this case is not going to be in the newspapers or on television, cases like this one are tried every day in courthouses across the county. Defense firms and defense attorneys hire the same experts over and over again to dispute the nature and reasonableness of people's injuries. Verdicts, like the one they will be rendering, are reported and collectively form a standard for what is reasonable and how the community values a person's time and health.

Finally, do not be afraid to ask for help. The consumer attorney associations are rich with resources including sample motions, closing arguments, and trial transcripts. Many top trial lawyers are willing to share their experience, thoughts and advice regarding cases, even small ones.

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