the Verdict

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LESSONS LEARNED FROM LISTENING TO REAL PEOPLE

MENTORSHIP REVISTED: *10 years later*

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LESSONS LEARNED FROM LISTENING TO REAL PEOPLE

BY JEFFREY BOYD

I have been a trial lawyer for 37 years. In addition, since 1998, I have been involved in a wide range of trial consulting - helping other plaintiff's lawyers improve their cases. I have conducted hundreds of interactive focus groups in over 60 jurisdictions across the county. I have learned that if you have the courage to expose your case to real people and are willing to listen to what they say, you can gather the information you need to create a presentation at trial that provides the foundation for a great result. The following are some of the most important things I have learned by spending thousands of hours talking to jurors.

1. JURORS DO NOT THINK LIKE LAWYERS. THEY THINK LIKE PEOPLE.

You, as a lawyer, with your legal education and constant immersion in the profession, are on one side of a bridge that crosses the river of justice. Jurors are on the other side. Do not expect them to come to your side. You need to go where they are.

> Jurors have a magnificent ability to make wise and fair decisions when they are given the information they need to make decisions in a case.

But we as trial lawyers must ask ourselves: are we willing to put aside our prejudices, and deal with jurors as they are, not as we think they should be?

Jurors do not stay in the box that is defined by admitted evidence and jury instructions. They often attach great importance to facts that lawyers do not feel are relevant. They have their own ideas about "the law." They see your trial through their personal experiences. You have to accept this and work with it. At the end of the day, real people fill out the verdict forms, not lawyers or judges.

Focus groups can be used to evaluate a case and to find out if the existing case, as presented, is a winner. However, the far better use is to learn:

- How a jury fits the facts of your case into the mental boxes we call "liability" and "damages;"
- What people need to know that you did not know they need to know, including "legally insignificant facts";[1]
- What problems your case has from their perspective, and how to fix those problems;
- How they feel about your witnesses and exhibits.

You can take that knowledge and improve your presentation to get a great verdict. I tell the lawyers I work with that "I can make you feel good or I can help you to find out how to get a better result, but I can not do both." You have to be willing to look the ugly in the eye and lose the case at the focus group to find out how to win at trial.

2. SIMPLE = STRONG.

> The biggest mistake plaintiff's lawyers make is that they allow their case to become too complicated.

We drown in the endless parade of facts and experts that has become the modern negligence case. Complexity favours the defence. Time and time again in focus groups I see defendants win cases because the plaintiff doesn't clearly and simply make the case for why they should win.

Do not over-try your case. There are only a few things in any case that matter. Use focus groups to find out what those are and stick to those issues. Also, do not underestimate the fact that jurors do not "get it" if they hear "it" only one time. Repeat, repeat, repeat. If it is important, bring it up again and again, in jury selection, in opening, with every relevant witness, in closing, and in rebuttal.

3. "WHY" NOT "WHAT"

Lawyers are great at talking about what happened: the defendant went left of centre into the oncoming car, the company did not follow its own maintenance rules, the drug manufacturer sold a drug that killed people.

What is easy. As lawyers, we are taught (with limited exceptions) that what is the thing that matters. The defendant went left of centre into an oncoming car. There are three witnesses and a video that prove it. Summary judgment or directed verdict, right? Who cares why! We are done here.

"Yeah, I hear you, but why did this happen?" ask the jurors. "Why did that nice lady sitting in the courtroom go left of centre?" Was she on her way to the hospital with her sick son? Was she texting? Drunk? Was there snow on the road? What may look like summary judgment facts to lawyers may look like a forgivable act of God to jurors. It matters because jurors value the case accordingly. Damages awards are built on the strength of the liability evidence.

Jurors judge cases and make compensatory damages awards based on their perception of the relative moral fault of the parties. To do that, they need to know why something happened. And

the plaintiff's conduct goes on the scales, too.

4. THE "BIG 4" QUESTIONS.

Make these questions the core of your case. I cannot tell you how many times I have talked to good lawyers who are months or years into their case and yet they struggle to give clear and simple answers to these questions. Jurors are only going to give you so much mental energy. The "shotgun" approach to presenting your case is a formula for frustration and loss. Build your case around these questions:

1. **What did the defendant do (that the plaintiff thinks was wrong)?**
2. **Why was it wrong/who says it was wrong?**
3. **What was the alternative – what should the defendant have done?**
4. **What difference did the defendant's conduct make?**

You can have more than one "set" of these (e.g. negligent training, and speeding, as your theories in a trucking case), but you have to answer all four for each set.

5. WHICH VERDICT IS BETTER FOR ME?

In this world, a juror's self-interest is a huge factor and a prime driver behind verdicts. Jurors cannot help but see the results of the case as having an effect on their lives; they are filtering the case through the question "**will it be better for me if the plaintiff wins or will it be better for me if the defendant wins?**" This is most easily seen in medical negligence cases, where jurors are weighing concerns that a plaintiff's verdict will make it harder for them to access medical care versus the principal that holding bad doctors accountable will increase the quality of care. This weighing of personal interests is in the background in every case.

Make it clear that what's at stake is the jurors' world: safer products, the moral comfort of enforcing rules of the road on a bad actor, the idea that they have a voice in how the world works.

The juror has to decide that if they do not vote against the defendant, the conduct will happen again, and that they or someone they love will be harmed.

6. JURORS DO NOT KNOW WHAT THEIR JOB IS.

When prospective jurors walk in the door, there are two questions on their minds: "What am I supposed to do?" and "How am I supposed to do it?" Jurors often do not know, do not understand, and do not accept the differences between a civil case and a criminal case. At least 90% of their "experience" with the law is popular culture's depictions of criminal law. Then we come in and start talking about "preponderance" and "standard of care" and "compensatory non-economic damages."[2] Put another way, most prospective civil jurors do not know what their job will be – that they will be asked to decide fault, causation, and damages based upon the civil standards for those issues.

Think about this – my experience is that many, if not most, prospective jurors are surprised to find that they will be asked to decide damage issues. Many are downright perplexed to find that "pain and suffering" is compensable, let alone that they have to "put a value" on it. Do not assume. Teach, starting very early in jury selection. Introduce and educate about the job of a civil juror. They will be grateful. The worst thing you can do at trial is to make a juror feel stupid.

7. PERSONAL EXPERIENCES

Jurors see and judge everything that happens in the courtroom through the filter of their personal experiences. Few real facts override what they think they know. In jury selection, ask about jurors' personal experiences with the key issues in your case. Do they ride a motorcycle (or refuse to ride one)? Have they ever worked on a construction site? Have they or someone close to them had the kind of surgery, taken the kind of drug, or experienced the kind of procedures in the hospital that are going to come up in your trial? If so, you need to know what that was like for them. Let them tell you their stories. Listen.

Be very wary of jurors with strong emotional connections to their stories. Strong or emotionally involved jurors have an enormous influence in the jury room. Beware, especially, of the "expert witness" juror; a juror who has some familiarity with key concepts in your case that the other members do not have. They will "testify" in deliberations and you will have no idea which way they will spin the story.

8. FACTS, NOT EMOTIONS

Tailor your case presentation toward jurors who are interested in facts, not emotions. Trial lawyers tend to be emotional people, driven by important causes. The jurors that end up on a panel after jury selection are usually people who are quiet, steady, and conscientious. Why? Since they are less assertive and talk less during jury selection, they are less likely to be kicked off. These people are sympathetic and cooperative; helpful people who like working behind the scenes, performing in predictable and consistent ways, being good listeners, and avoiding conflict. Their priorities are cooperation, stability, quality, and analysis. They want data, not drama. They are turned off by harsh trial tactics and emotional appeals.

9. LIABILITY DRIVES DAMAGES.

The most important thing you will learn in focus groups is that jurors never stop talking about liability. Unlike lawyers, real people do not think of fault as a "yes" or "no" decision, but as a long sliding scale of the relative moral fault of anyone involved. Those factors include the evidence and the jury instructions, but in the decision-making continuum, those sacred pillars are often secondary to the jurors' personal life experiences and moral values. What happened to Uncle Joe or what they learned in Sabbath School will carry more weight than the instructions that Judge Smith reads to them at the end of the case.[3]

Jurors evaluate damages only through the context of liability. Gruesome X-rays and million-dollar life care plans mean nothing if the jury thinks the injuries were caused by an "accident." Juries spend 80% of their time discussing liability and 20% of their time discussing damages, even in cases where liability is admitted.[4]

If lawyers explain their case in the language of the juror's moral beliefs about liability issues, they will get greater damage awards. You should constantly talk about what the defendant did wrong, even in cases where liability is admitted or seems obvious.

Any juror will tell you that they want to award a "fair" amount for damages. The problem is that they do not really decide what an injury is worth, they decide what the defendant's fault is worth.[5]

10. ANCHOR YOUR DAMAGES

The vast majority of jurors have no idea what a case is "worth." As lawyers, we take it for granted that cases have "value," and we like to think that we know what factors affect that value. However, we do not pay enough attention to the fact that most jurors have no idea what a case is "worth."

The key here is to give the jurors an "anchor".[6] In the old days, we used to think it was rude or presumptuous to ask the jury for a specific number or a range. Modern juries will actually punish you if you do not. Over and over in focus groups I see this: we run the case with no guidance as to the value or what the plaintiff is seeking, which results in a crazy patchwork of values all over the map. We then run the case and tell the jurors how the parties value the case. Almost every time, this results in the numbers being higher than with no anchor, and closer together – a much better base for deliberations and consensus.

A juror in a wrongful death focus group once told me that she decided the life of a long-married man with children was worth $10,000 "because that is what a really nice dog would cost." That was her anchor. You can do better than that. Jurors need an anchor, starting early in the case. I favour giving a range in jury selection ("I want you to know that I will be asking you for several hundred thousand dollars in this case. . .") rather than a hard number, but do give a hard number in closing.

11. "CHOICE" VS. "FAILURE."

I often hear negligence expressed as a series of "failures": the defendant failed to train, failed to adjust their speed for the weather, failed to test the design. However, jurors tell me that "failures can be forgiven," that "everyone fails" or that you "learn by failing." That is not what you want them to be thinking.

It is my experience that bad choices are the stronger frames[7]: the defendant chose to put untrained workers in the field, chose to keep driving at the speed limit even as the snow fell, chose to put an untested design on the market. You want to present what happened as the (inevitable) result of a series of the defendants' bad choices. Choices are intentional; failures are an accident. You want intentional.

12. BLAME THE SYSTEM, NOT THE INDIVIDUAL (WHERE YOU CAN).

Define your client's negligence as the result of a systemic problem.[8] Jurors are reluctant to judge the behaviour of individuals – it feels too personal. However, bad choices made by an entity are easier targets for blame. Systemic problems (or the lack of systems that would avoid problems) are also more threatening to the jurors.

Dig deep – and back up the negligence in time so that your presentation is based on the months or years of a system that was doomed to fail instead of what happened in the minutes or seconds just before the harm. Think about the difference between the negligence that allows a commercial driver to be put behind the wheel without a background check versus a driver "who did everything he could do" to avoid a wreck at the last minute. The system failure is harder to defend.

13. WHY ARE WE NOT TALKING ABOUT INSURANCE?

Ask for a preliminary jury instruction about insurance. Insurance is relevant to jurors, period. They expect to hear about the defendants' liability insurance, and about whether the plaintiff had insurance. When they do not hear about that at trial, it creates a blank spot in the trial narrative that they fill in with guesses that are almost always wrong, and which mostly favour the defendant, ie "The doctor must not have insurance or we would have heard about it," or "The insurance company must have already paid but the plaintiff wants more."

Because most courts will not allow you to address this directly, you should ask for a strong preliminary jury instruction that says, in essence, "insurance is not relevant so do not consider it." This instruction does not take insurance out of the conversation in deliberations, but it does explain why the parties are not talking about it, and gives jurors who follow the law ammunition to fight back against jurors who keep bringing it up.

14. DIFFICULTY UNDERSTANDING OR ACCEPTING NON-ECONOMIC DAMAGES

Lawyers accept that damages are a way to compensate for a loss. Many jurors are fixated on the idea that "no amount of money will bring back the deceased plaintiff," and the idea that it is wrong to "profit" from a loss. You have to educate them as to the morality, purpose, and validity of non-economic damages, and you have to "anchor" their evaluations with your credible valuation of the case.

15. BE VISUAL

Use visuals at trial for all important facts and concepts. Cognitive research has shown that people process information in this order: (1) colour; (2) pictures; (3) shape and symbol; (4) printed word; (5) spoken word.[9] But what do lawyers use most often? Number 5.

Nowhere in a juror's life are they asked to absorb important information based on lectures (opening and closing) and question-and-answer sessions without extensive visual support. Give it to them. Simple timelines. Pictures and diagrams. Even just an outline of who the key witnesses are and what they are going to talk about, with a headshot picture to introduce and remind the jurors who these people are. You can never have too many visuals.

CONCLUSION

Trials are not won over fights about the 28th page of the 14th deposition.

> Today's jurors want a clear, short statement of what's right and wrong and what they should do about it.

Put aside what you think about a case, and get in touch with what matters to the real people who will decide it. V

1. E.g., "was the plaintiff's car red or blue?" Although that may have no legal significance, if it matters to the jurors, it matters, and these factors often drive the verdict. If you know what the jury needs to know, you can get them that information.
2. All fairly meaningless terms to nearly all jurors, unless the plaintiff's lawyer takes the time and effort to comfortably educate them at trial.
3. Try to get your jury instructions read as early as possible in the case. The jury needs to know what the legal standards are before they know what to think of your evidence. Am I the only one who thinks it is madness to have a jury sit there day after day without knowing, for example, the legal standard for a property owner, or that the law imputes the conduct of an employee to her employer? All that time they are uninformed, they are guessing about those things, and it is my experience that most guessing works against the plaintiff.
4. Believe me, jurors discuss fault in stipulated liability cases. They just do not have as many facts to work from, and so make up more facts, again, usually to the detriment of the plaintiff. Admitting liability refocuses the case on the plaintiff, instead of the bad conduct of the defendant. That is not good for the plaintiff's case.
5. This is not to say that bad injuries do not get greater awards than minor injuries. It is to say that bad injuries will be valued higher when you have bad actors doing bad things.
6. Chapman & Bornstein, *The More You Ask for, the More You Get, Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOLOGY 519, 538 (1996); Campbell, et al., *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, IOWA LAW REVIEW, Vol. 101.543.
7. I highly recommend the two excellent books by Mark Mandell about Case Framing
8. Often referred to as a "systems failure," but, see Section 10, above.
9. See, www.exhibitography.com, with thanks to Amy Gallaher Hall.