Problematic Witnesses and Actual Damages

Excessive Damages Awards and Tactics for Containment

by George R. Speckart and Lyndon L. McLennan, Jr.

In 1984, the Agent Orange settlement of $180 million was the largest in the history of litigation at the time. In 1999, a North Texas jury gave $296 million in compensatory damages to the father of a teenage girl killed in a pipeline explosion. By 2000, a Florida jury had awarded $144 billion in a class action lawsuit against cigarette manufacturers. Dozens of other juries have recently awarded hundreds of millions, and even billions of dollars, many of them in cases involving actual damages amounting to only tiny fractions of these awards. Since the 1980s, an inflationary trend has occurred in civil jury damage awards that cannot be explained solely by economic factors.

To be sure, there are sociological trends at work in the last two decades that have undoubtedly served to inflate damage awards by juries. Population changes in inner city venues; indignation over CEO salaries; frustration with a stagnant minimum wage; and other events linked to historical, demographic and socioeconomic factors have very likely contributed to the sentiments of jurors as expressed in their damage awards. Additional trends may have been set in motion by the Enron, WorldCom, and other corporate scandals.

What can defense litigators do to mitigate tendencies by juries to give increasingly enormous damage awards? While defense trial teams cannot counteract sociological forces, they can take tactical measures to manage risk, minimize a defendant's exposure, and suppress damages in most cases.

This article is the first part of a two-part examination of the causes of excessive damages awards and effective tactics for their containment. The series will focus on factors that impinge directly on the litigation scenario, and that, for the most part, are within the defense counsel's realm of influence. The second part will appear in the November issue of *For The Defense*.

Identifying the origins of excessive damage awards can enable the detection of a potentially dangerous case in its early stages and assist in steering it to a resolution at minimal cost. Knowledge of the explicit conditions that lead to a runaway jury verdict may also be used to formulate a checklist of "red flags," or indicators of excessive risk, to guide the litigation team as discovery unfolds. Awareness of such indicators can be instrumental in shaping the litigation team's development of effective strategy and ensuring ultimate preparedness for trial or settlement. In order to maximize such knowledge and awareness, this pair of articles outlines the conditions that lead to excessive damages awards generally, with an emphasis on punitive damages in particular.

The causes of inflated damage awards are considered here not from a legal point of view, but rather from the vantage point of jury psychology and overall trial preparation. Specifically, the present discussion is oriented toward illuminating the *non-legal* antecedents of excessive damage awards as a guide for defense litigators. In particular, it is concerned with the simple question, "Why do excessive jury awards occur?" and provides practical suggestions to ameliorate perception problems that are often found in runaway juries.

As we shall see, excessive damage awards may contain a punitive element, even though the label "punitive damages" is not used. As occurred in the $296 million North Texas verdict in 1999, when jurors are not given the chance to award punitive damages, some juries will increase the amounts of *compensatory* damages because they want to *punish* the defendant. From a psychological or non-legal perspective, therefore, it is difficult to disentangle compensatory and punitive damages, since they both may become inflated for the same reasons. Thus, the focus in this two-part article will be on "excessive damages" as a reference to awards that appear to be unreasonably high, and that are certainly unjustifiable from a purely economic point of view.

In trying to explain excessive damage awards, the two parts of this article will focus on: 1) the problematic witness; 2) actual damages; 3) attorney performance; 4) the punitive juror; and, 5) trial venues. In this first part, the problematic witness and actual damages will be covered. The other three factors will be treated in next month's magazine.

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The Problematic Witness

Studies have discovered a readily identifiable "cognitive map" that jurors utilize in order to determine verdict and damages. This cognitive map is essentially a step-wise progression that jurors follow in trying to understand the lawsuit. It is a progression that is virtually universal, that is, applicable across all types of cases for all types of venues.

Generally, the "map" is characterized by a "trail" that begins with two decisions: First, jurors formulate an impression of who the litigants are ("Who are these guys?"): What kind of people are they? Are they responsible, trustworthy, and likeable? What are their characteristics? What are their values and motives? Second, jurors come to a conclusion about their duties and responsibilities: What were these people supposed to do or not do? What were they morally or ethically obligated to do? How does this compare with their actual conduct?

The manner in which these two decisions are made by jurors tilts the psychological playing field for the entire trial. When these two questions are answered by jurors in a manner detrimental to the defense, a substantial damages award is a virtual certainty. The very first question—"Who are these guys?"—is answered by the witnesses, not by the defense attorney, nor by the corporate representative present during trial.

More than any other cause, the poor performance of witnesses appears to be a pivotal factor in producing inflated damages awards. There are two subsections within the general topic of problematic witness performance that warrant consideration: 1) inadequate training; and, 2) the incompetent witness.

Inadequate training will threaten effective objectives

Many witnesses enter a deposition, or take the witness stand at trial, without the skills needed to testify effectively. Inadequate training for depositions is perhaps the most

ubiquitous problem encountered in litigation. Although insufficient training for both deposition and trial testimony present tandem concerns, the authors' examination will concentrate on the problem of deposition training, since vulnerabilities in this area extend all the way through to trial in a more insidious manner.

Many deponents are never trained to understand that their testimony can, and likely will, be used at trial. They are often instructed to give minimal information, but are not given the tools to accomplish this in a manner that still appears to be cooperative and accommodating. The resulting deposition testimony, when reproduced at trial, may appear to be arrogant, dishonest, or at the very least, evasive.

Deponents are seldom taught how to detect and avoid common traps set up by skilled interrogators. Even when such teaching is given, however, witnesses are rarely subjected to rigorous practice and role-playing, using videotape and subsequent critiques, necessary to ensure that the teaching "sticks." Most witnesses absorb information during coaching and training, but then revert back to old habits under the pressure of the interrogation environment. Role-playing using videotape is essential to let a witness see his or her own mistakes, and then adopt more appropriate response options or demeanor at the actual deposition.

Most importantly, a witness is not prepared to testify unless he or she can articulate the *objectives* of his testimony in his own words. These objectives are directly connected with cornerstone themes that can serve as "buoys" defining a "safe harbor" for him. The themes are a limited set of "silver bullet" points around which the defense is organized.

The development of effective *objectives* for a given witness requires careful preparation by defense counsel. He or she must orchestrate the full range of defense themes among all of the defense witnesses that is 1) tailored to their unique backgrounds, knowledge, and expertise; and 2) organized in a manner that reinforces consistency and credibility for the defense team as a whole. Trial attorneys rarely implement explicit objectives for witness testimony in this fashion when depositions are taken. As a result, a given witness may not know where the boundaries are between safe and unsafe testimony, may not be equipped to competently challenge hidden premises in "loaded" questions, and may contradict documents, other testimony, or other aspects of the evidence.

There are three types of consistency for testifying witnesses:

- *Consistency between himself at Time A and himself at Time B.* Witnesses who contradict their own prior testimony, or who appear to be a "different person" under direct examination versus cross examination, lose their credibility almost instantly.
- *Consistency between himself and other witnesses.* Although inconsistency in this area can sometimes be explained by different backgrounds or experiences, it still represents a drag on the defense team's progress.
- *Consistency between himself and "hard evidence" (e.g., documents).* Problems in this area are extremely difficult to defuse, for obvious reasons. Jurors tend to conclude that anything in black-and-white is more likely to represent "truth" than what is said by a witness under the pressure of litigation.

When witness objectives are not clearly established early in discovery, defense attorneys are frequently forced to deal with trial testimony that is suddenly and unexpectedly at odds with their strategic position.

Achieving these three types of consistency cannot be accomplished by simply briefing the witness. Lack of consistency is a hallmark of the problematic witness in high damages cases. The inevitable conclusions to this scenario range from, at best, a compromised defense theory of the case, to, at worst, severe damage to the credibility of the entire defense effort.

When witness objectives are not clearly established early in discovery, defense attorneys are frequently forced to deal with trial testimony that is suddenly and unexpectedly at odds with their strategic position. At the hands of a skilled cross-examiner, the defense witness may be forced to recant or explain discrepant content from a deposition, diminishing his or her credibility, and putting the jury on the wrong trail on the "cognitive map." Once on that wrong trail, it is difficult to redirect the jury to the desired path.

The incompetent witness

Many litigators have a list of the "worst" witnesses that they have ever had on their teams. Indeed, the high damages verdict is nearly always characterized by the presence of one or more especially poor witnesses for the defense. Some witnesses "freeze up" out of fear, and, as a result, appear to be hiding something. Some have problems with anger, and others have distracting mannerisms. Some defense witnesses are simply too acquiescent, agreeing to virtually anything that a cross-examiner suggests. Many witnesses try to answer too many questions, speculate, or simply travel outside of their "safe harbor" without knowing that they have crossed the line. Others sit on their hands and give non-informative answers, or obstruct the line of questioning, causing the jury to judge them harshly. "Problem witnesses" should be tested in a courtroom environment repeatedly before going to trial.

A problem witness is not necessarily an unsuccessful or incompetent person. Some of the worst witnesses in the eyes of the jury come from the ranks of CEOs, engineers, and even attorneys. Unfortunately, these successful individuals are often the least likely to be willing to give the defense team the time needed to adequately prepare them for the courtroom, and they may resist training for various reasons.

The distinction between "inadequate training" and the "incompetent witness" can be-

come blurred. A witness who seems to be incapable of effective performance may be the witness that defense attorneys simply did not have the time to train and prepare properly. Other witnesses may seem to be hiding something; they may be unusually unresponsive to training. In such instances, the client company may be asked to intervene, and perhaps select a different person to testify.

Actual Damages

This section of the article considers how jury awards become inflated in cases that involve serious actual damages. They include the famous *Exxon Valdez* matter, as well as the $296 million pipeline explosion verdict mentioned above. The common feature underlying these cases is that severe harm to property, or to one or more persons, has occurred. In order to fully appreciate the factors that lead to excessive damages in such cases, it is helpful to consider some fundamental principles of jury psychology that illustrate how jurors construe evidence and testimony in the courtroom.

Hindsight bias

One psychological principle that gives rise to inflated awards is often referred to as *hindsight bias*. Hindsight bias causes juries to judge harshly behavior that results in disastrous consequences. *I.e.*, the jury is judging conduct by its putative results, rather than by looking at the conduct itself. For example, in criminal cases, studies have shown that police are less likely to be blamed for illegal search and seizure if hundreds of kilos of cocaine are recovered, compared to an illegal search in which nothing is recovered.

Hindsight bias is a virulent juror perception problem that is difficult to ameliorate when severe harm or injury (actual damages) has occurred. Suppose a pharmaceutical company falsifies testing data submitted to the FDA. This conduct will be viewed much more severely if the result is a series of patient deaths than if it simply leads to a few cases of skin allergy. Punitive damages are supposed to be directed toward only the conduct itself, but psychologically, a jury's award of punitives is based on *what comes after* the conduct. The *Exxon Valdez* case is perhaps the quintessential hindsight bias case, since it is doubtful that $5 billion in punitive damages would have been awarded had only a few hundred barrels of oil been spilled. Hindsight bias causes corporate defendants to be viewed in a more negative manner when actual damages are severe, leading to inflated jury awards.

Two additional jury psychology principles tend to operate in conjunction with hindsight bias to create excessive damages awards against corporate defendants:

Corporate Omniscience. Jurors tend to think that large corporations and their executives are, for all practical purposes, omniscient. That is, the more highly elevated a manager's position in the corporate hierarchy, the more he or she is presumed to know about everything that is going on in the company.

Corporate Omnipotence. The larger the corporation, the more it is seen as having ready and immediate access to a complete solution for any sort of technological, personnel, or management problem. Intellectual property, know-how, and abilities to implement improvements are seen as virtually unlimited.

Aside from the formidable challenges that these two distortions create in preparing corporate witnesses for testimony, they combine with hindsight bias to produce harsh judgments of corporate defendants in litigation involving serious injuries. For example, even when the evidence appears to point clearly to an unavoidable, blameless accident, jurors may infer motives by corporate representatives that are at best grossly negligent, and at worst, sinister or malevolent. While such judgments by jurors may stem from witness performance problems, they also arise from perceptual distortions that lead jurors to expect corporate defendants, their conduct, and their products and services to be, for all practical purposes, virtually perfect.

Here's an example from a product liability case. A small private airplane crashed, and the manufacturer was sued because its part had failed before the accident. The audiotapes of the last minute interactions between the pilot and the control tower were bone-chilling. Four tragic deaths were involved, including children. Despite the fact that there is no technology for replacing this part with one that is immune from wearing out and failing, the jury: 1) assumed that management knew that these types of accidents could and would occur, despite salient warnings to the airplane operator to routinely replace the part (corporate omniscience); 2) presumed that the corporate defendant could have devised a different type of part that would never wear out (corporate omnipotence); and 3) awarded punitive damages of a hundred million dollars against the manufacturer defendant, even though it was not clear that its conduct had contributed to the accident (hindsight bias).

Bad facts

The perceptual tendencies of jurors considered up to this point represent persistent hazards for defense litigators. These perceptual tendencies typically interact with "bad facts" of the case in a synergistic fashion, leading to damages awards that greatly exceed actual damages. Ironically, such "bad facts" are usually events that are only indirectly connected to the accident, transgression, or other harm-producing event that precipitated the lawsuit in the first place.

The "bad facts" characterizing high damages cases are apt to be a result of preventable management conduct that occurs before or after the damaging event that gave rise to the litigation. One essential strategy for damages suppression, therefore, is to minimize the number and potency of these "bad facts" surrounding the incident that actually caused the injury. This strategy requires proactive corporate management decisions that are made with jury psychology and the overall public image of the company in mind. Such tactics for damages containment can and must be made at the corporate management level.

Analyses of recent high damages verdicts reveals commonalities in "bad facts" that significantly increase the risk of catastrophic awards. Such commonalities include corporate behavior that suggests to jurors a breach of trust and fairness; lack of timeliness and responsiveness; indifference and callousness; and/or a failure to follow perceived

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protocols or standard of care. The following are just a few examples from actual cases in which "bad facts" increased the exposure of a defendant to levels substantially higher than they would have been as a result of the injury-producing event alone.

- In a railroad case, a boxcar slipped loose and rolled down a hill, killing the father of three young children. The railroad company believed that it was not at fault, since it had reason to conclude that a third party had irresponsibly loosened the brake. A corporate representative visited the grieving widow at her home the next day and told her, "We would be willing to pay for the funeral if the cost is reasonable."
- In a downtown metropolitan area, a large corporation was having a dispute with a contractor over how the office windows had been installed. Instead of having the windows adjusted properly, the company spent its efforts in obtaining reimbursement from the contractor. During this period of time, a window became detached in a windstorm and fatally lacerated a pedestrian on the sidewalk below. Naturally, in trial the plaintiff's attorney was able to paint a picture of a corporation that was more interested in profits than public safety.
- After a serious injury auto accident, a manager from the defendant corporation called the hospital claiming to be a witness to the accident, and stated that he wanted to find out how the victim was doing. He subsequently wrote an internal memo describing his surreptitious scheme to investigate the condition of the plaintiff, which was ultimately produced during discovery and shown to the jury.
- During a trial, a key defense witness who happened to be the CEO of the company was able to give a compelling account of his side of the case during the defense case-in-chief. At the end of the day, however, he was observed by jurors in the parking lot of the courthouse, where he was yelling at his assistant. He was trying to induce her to walk faster, while she carried two boxes and he carried none. In post-trial interviews, jurors stated that they believed they saw the "real" CEO in the parking lot, and awarded punitive damages.

Similar examples include: self-serving or incriminating communications, both internal and external; deceptive measures taken to attempt to undermine the plaintiff's case; lack of training, or resistance to training, by key witnesses; inappropriate conduct during trial that is visible to jurors; or any conduct that is seen as arrogant, callous, deceptive, or acting "above the law." Training and awareness of sensitivities to litigation-related issues at the management level can decrease the likelihood that "bad facts" and the resulting exposure to corporate defendants will occur.

Jury attitudes toward corporate defendants

Research indicates that jurors examine the conduct of both plaintiffs and defendants in making assessments as to whether the parties met their duties and responsibilities for appropriate conduct, but they are comparatively more forgiving of plaintiffs' mistakes. Jurors recognize that accidents happen; however, hindsight bias and the additional perceptual problems mentioned above result in particularly close scrutiny of the conduct of corporate defendants. Ultimately, the result of these assessments influences the character impressions of the parties formed by the jury. When breaches in pre-incident or post-incident conduct by a defendant have occurred, these character impressions then drive damage award levels to magnitudes that may far exceed those justified by the facts.

The defense often tries to reduce damages by asking the jury to see the events from a more "corporate" view. Themes such as the following have been tested in mock jury settings to attempt to minimize punitive damages:

- the subsidiary that is responsible for the accident is a different entity than the parent corporation ("corporate veil" defense);
- only shareholders would be hurt by a large damages award;
- a large punitive award would result in lost jobs at the company; and,
- a large punitive award would force the company to pull out of the region, creating overall economic losses for the community.

These themes are not only invariably ineffective, but they tend to create a backlash against the defendant—"Is this some kind of a threat?" They may raise the specter of an *increased* punitive damages award. Pre-trial research suggests that the following guidelines are more generally useful for minimizing the amounts of money awarded by jurors.

- Jurors want lawyers to "get real" with them. They do not want to hear ingenious arguments. Instead, they want the lawyers, and the corporate representatives, to look them in the eye, tell them they are sorry, and really mean it.
- Jurors need to know that other players in the industry, and perhaps even other industries, have "received the message" already—not just the defendant in the trial at hand. In some cases, jurors may want to be assured that the whole country has "received the message."
- The "corporate face" of the defendant plays a substantial role in the determination of damages awards. As a minimum requirement for suppressing damages, it is essential that the corporate defendant has done everything possible to assist and compensate any victims well before the lawsuit takes place—preferably, as soon as possible after the offending incident. (Forcing victims to sign waivers is another example of egregious post-incident conduct.)
- Building a favorable corporate image is a process that requires long and painstaking efforts. While a corporate defendant cannot build a concert hall in every county across the United States, it can contribute to visible charities, schools, and other community efforts in cost-effective but conspicuous manners.
- Many arguments that seem useful ("only the shareholders will be hurt") may be more clever than helpful. Indeed, some may increase the anger of the jury. Pre-trial simulations are essential to separate out those that work from those that do not.

The obstacles posed by the "actual damages" case, in which the true damages are indeed horrendous, and there is little chance of settlement, represent some of the most severe challenges to the suppression of punitive damages awards that a defense litigator is likely to face.

Conclusion

Consideration of the controllable factors discussed above will assist counsel in avoiding additional damage to a difficult case and in presenting the most positive face for the corporate defendant. Efforts to train witnesses, thus enabling them to achieve their potential as purveyors of the truth, will assist counsel in avoiding the creation of additional "bad facts" that undermine other defense efforts. All of these efforts will help to keep damages awarded in line with damages actually incurred. Discussion of how to address such non-controllable factors as venue and the punitive juror will be presented in the November issue of *For The Defense*. FD

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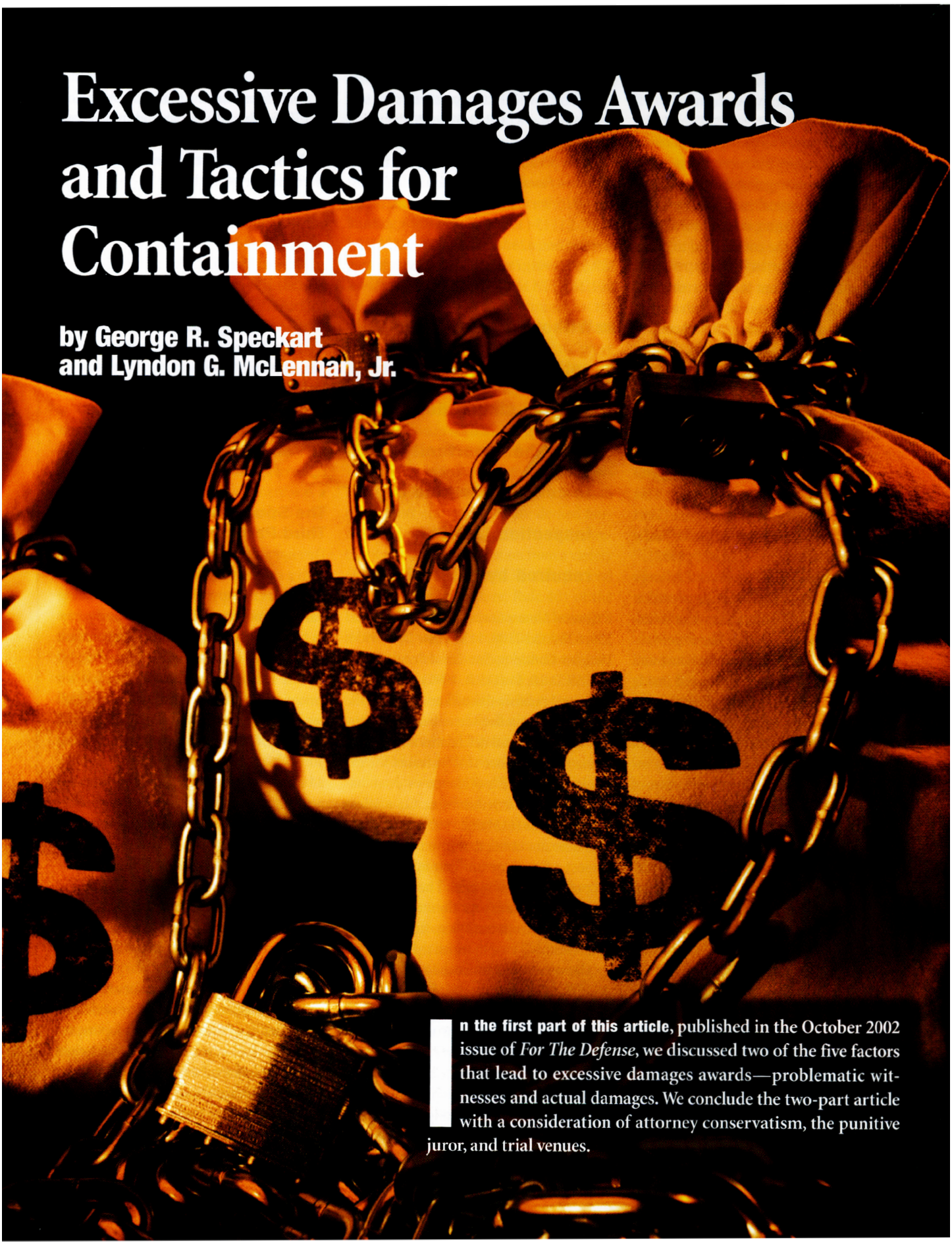

In the first part of this article, published in the October 2002 issue of *For The Defense*, we discussed two of the five factors that lead to excessive damages awards—problematic witnesses and actual damages. We conclude the two-part article with a consideration of attorney conservatism, the punitive juror, and trial venues.

Defense Attorney Conservatism

The topic of attorney performance is a broad one that encompasses many areas, including preparation issues. In addition to the deposition problems mentioned in the first part of this article, failure to prepare adequately can jeopardize the outcome of a trial. Preparation issues relate to discovery, production of creative graphics and visual exhibits, development of juror profiles and a supplemental juror questionnaire, and many other matters.

In this section, the authors will deal with the fact that too many defense lawyers are overly conservative in their approach to litigation, and less aggressive than their plaintiffs' counterparts, an attitude and performance that sometimes works to the detriment of the defense attorney.

Plaintiffs' attorneys have become more and more creative at stretching courtroom boundaries and artfully "crossing the line" on the courtroom floor to win the hearts and minds of the jury. They have also become more adept at exploiting jurors' inability to comprehend numbers like "a billion," and have innocuous ways to characterize such numbers as suitable punitive damages awards by portraying them as "just a week's pay for this corporation." In addition, plaintiffs' attorneys appear to understand the implications of research demonstrating that the more they ask for, the more they will get—and they readily capitalize on this phenomenon. See Sunstein, Hastie, Payne, Schkade & Viscusi, *Punitive Damages: How Juries Decide* (U. of Chicago Press 2002).

The scope of this article is limited to actual jury trial outcomes, and the inflated damages that have recently been associated with them. Appellate issues are not considered here. From the vantage point of the courtroom floor, a distinct impression emerges that plaintiffs' attorneys are more likely than defense attorneys to bend the rules in their zeal to sway the jury. The result has been a number of memorable jury verdicts in which plaintiffs' attorneys have forcefully worked their way toward enormous jury damage awards.

Observation of plaintiff and defense litigators reveals distinct differences in how they are motivated. Plaintiffs' attorneys are not trying to protect a client relationship. They are simply trying to win. They know that after the case, their client will be gone. In addition, plaintiffs' attorneys may be more interested in achieving fame (or, perhaps more appropriately, notoriety) and may not be as concerned as to whether an award will "stick." As a result, on the courtroom floor, they seem to continuously push the envelope by inserting arguments into opening statements, in speaking objections, and during cross-examination of witnesses. By the time actual closing arguments are presented, the plaintiff's lawyer needs merely to expand and reinforce the arguments that the jury has already heard for weeks throughout the trial.

Defense attorneys seem to be more conservative in their courtroom performance. More than plaintiffs' lawyers, they have a focus on protecting the record for appeal, and a comparatively lesser emphasis on winning the approval of the jury at trial. Defense attorneys may be encumbered by a myriad of political situations and extraneous considerations, including competition among the firm members or other law firms, relationships with corporate counsel, and maintaining the corporate client's loyalty to the firm. While it is not suggested that these considerations are trivial, it *is* suggested that they can compromise the ability to fight effectively against more nimble and aggressive opposing counsel in the courtroom jungle.

Many defense litigators save their argumentative material for the end of trial, during "actual" closing arguments. However, at this point in the trial, jurors may have already made up their minds. In many cases, defense counsel may overestimate the size of their "window of opportunity" for persuasion, thinking that, if closing arguments are sufficiently compelling, they can wrest the case from the jaws of disaster at the end of trial. Research clearly demonstrates, however, that jurors have already made up their minds at this point, and almost never change their minds during closing argument.

Defense attorneys are frequently more interested on winning over the long haul. Thus, while plaintiffs' attorneys may try to win "here and now," defense attorneys may be more concerned with the "win for all purposes." They may place extra effort on winning motions, such as for directed verdict and the like. Moreover, some cases cannot be won except at the appellate level. However, there is also a level of conservatism among many defense teams that extends beyond long-term strategic considerations and that severely compromises efforts to persuade a jury in the heat of battle.

A few noteworthy examples of overly conservative courtroom performance by defense lawyers that can jeopardize success at trial are presented here.

- In a fraud and breach of contract case, pre-trial research had indicated a strong antipathy in the venue between many African-American women and key defense witnesses. As a result, the defense team was advised during jury selection to use peremptory challenges on two particularly vociferous African-American women. Defense counsel declined, citing concern over a *Batson* challenge (*Batson v. Kentucky*, 476 U.S. 79 (1986)) and political "correctness" (the judge was also Hispanic). No African-Americans were stricken by the defense in this case. During deliberations, these two women led the charge against the defendant, in which

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hundreds of millions of dollars were awarded by the jury.

- In a trade secrets and misappropriation case, a corporate plaintiff was suing two individuals. In this trial, the roles of the attorneys were reversed: The plaintiff corporation was represented by attorneys who normally handled defense litigation, while the individual defendants were represented by lawyers who otherwise handled only plaintiffs' lawsuits.

  The corporation's lawyers were advised to provide a lengthy opening statement (well in excess of two hours) at the outset of trial. Lead trial counsel responded to this suggestion by declaring, "I can't do that—the judge won't let me." His subsequent opening lasted about one hundred minutes. Opposing counsel (normally plaintiffs' attorneys) subsequently gave an opening statement that lasted for two *days*. The judge simply watched while the corporation's case was buried in the avalanche. During the remainder of the seven-week trial, the corporation's attorneys (again, normally defense litigators) were never able to gain control of the trial, and ultimately lost the case.
- In a toxic substances case involving a gas processing plant, the defense team was advised to acquire photographic evidence in the locale of the plaintiffs' homes in order to show the jury the considerable distance between the homes and the plant. The defense team said: "We can't do that. Mrs. Wilkinson (one of the plaintiffs) is a maniac. She will see us because she is out there every day checking on who comes around." The defense team expressed concern that she would report to the media and others that "people from the gas company" were out there "snooping around." As a result, the jury never saw pictures showing how far the homes were from the plant.

What happened in these cases? In the first example, defense counsel indicated concern at the time over a potential *Batson* challenge and whether they would appear to be "politically incorrect." Instead of focusing on the jury—who they are, what they are going to think—the defense team focused on legal issues and the appearance of propriety. Even if the *Batson* challenge had been won by the plaintiffs (an unlikely outcome when a juror questionnaire is used, as in this case), the result would have simply been a re-seating of the stricken juror(s).

In the second instance, the corporation's attorneys attempted to comply with what they anticipated to be the court's reaction to a lengthy opening. They thought they knew where the line was, but didn't—because they never crossed it. The defense (again, normally plaintiffs' lawyers) decided to push the envelope and take whatever they could. The difference in these two approaches determined the entire complexion of the trial, and drove the ultimate jury verdict in favor of the team that was willing to take risks.

Too many defense lawyers are overly conservative in their approach to litigation, and less aggressive than their plaintiffs' counterparts.

In the third example, the jury was never able to appreciate the considerable distances between the plaintiffs' homes and the gas plant, ultimately because of the trial team's fear that one of the plaintiffs would contact the media if photographs were taken near their homes. Yet the defendant would have been perfectly justified in obtaining this documentary evidence—after all, it had been sued, and the distance between the homes and the plant was a pivotal issue in the case. Risk-reward or cost-benefit considerations clearly point to the conclusion that there would have been more benefit for the jury to see the photographic evidence than harm arising from the local newspaper reporting that someone in the area was taking pictures.

These three actual case scenarios were purposefully chosen to illustrate the principle that defense attorneys often "carry their conservatism with them" into areas that are unlikely to affect an appellate review of the case. But, every jury trial is like a chess game or a sport, where the best defense is very frequently a good offense. Many other examples could be cited here, but the key point is that a conservative mindset can create a serious handicap when it comes to persuasion of the jury. As Wayne Gretzky stated, "You miss one hundred percent of the shots you don't take." Opportunities for persuasion are routinely left on the table by defense attorneys—opportunities that plaintiffs' attorneys are typically less likely to overlook.

In a jury trial, on the courtroom floor, you must be aggressive; do not be wholly focused on legal niceties. Risks in strategic decisions should be assessed primarily on the basis of their effects on the jurors. When legal ramifications dictate procedural or substantive decisions made by litigators in front of a jury, the result can render a trial team unable to navigate effectively and strike decisively in the courtroom jungle. More effective criteria for strategic decisions would be, "Will this influence the jury in a favorable manner?" and, "Can I get away with it without creating any permanent damage?"

Again, it is acknowledged that preservation of issues for appeal can and should control courtroom behavior in some instances. Nonetheless, from the authors' broad experience over 20 years in dozens of venues, a consistent trend becomes apparent: the counsel team that is willing to bend the rules is more likely to win the jury verdict. The team that is the most cautious, operating from a more legalistic mental framework, is at a tactical disadvantage from the standpoint of jury persuasion.

Many defense litigators approach a jury trial well armed for a legal battle, fully stocked with case law, briefs, motions, documents, and exhibits. However, once the case reaches a jury, the trial attorney is often faced with a situation that has more in common with a knife fight. The trial lawyer who is better prepared for this reality is likely to be the last man or woman standing when the jury renders its decision.

The Punitive Juror

The amount of pre-trial effort, preparation and thought that litigators devote to jury

selection typically pales in comparison to the amount devoted to other trial preparation activities. Yet the importance of avoiding the wrong people in the jury box is difficult to overestimate. One or two intractable jurors who are adversely predisposed can persuade a jury to award catastrophic damage awards.

Research on punitive damages shows that, instead of moderating the amounts awarded, the jury deliberation process produces a striking "severity shift" toward ever-higher awards. See Sunstein, *et al.*, *Punitive Damages: How Juries Decide*. This severity shift is frequently instigated by a small number of extreme jurors in the group. The purpose of this section of the article is to investigate the psychological make-up of this special class of jurors, and to provide some basic methods for identifying them so that they can be eliminated during *voir dire*.

Perhaps the most dangerous juror is the "stealth" juror, that is, the venire member who professes neutrality while concealing bias. See Bodaken & Speckart, "To Down a Stealth Juror, Strike First," *National Law Journal*, September 23, 1996. The stealth juror is most commonly found in high-profile cases, or cases that are well-publicized through considerable grass-roots involvement in a community. These jurors have an explicit agenda, generated prior to the trial itself, that includes punitive motives against the defendant.

Stealth jurors are usually revealed by discrepancies between in-court questioning during oral *voir dire* and prior supplemental juror questionnaire responses. These individuals are usually taken by surprise by the questionnaire, and have not typically planned their "assault" carefully enough to avoid tripping up on some of the details. In short, stealth jurors make mistakes in the consistency of their responses that can be detected by the trained observer, *if* the completed juror questionnaire is in place.

Certain commonalities in psychological characteristics among potentially punitive jurors persist across case types and venues throughout the country. See Speckart, "Identifying the Plaintiff Juror: A Psychological Analysis," September 2000 *For The Defense* 30. Identification of these general traits and commonalities can assist defense counsel in revealing the presence of such risky jurors during selection. Detection of these individuals is greatly enhanced by the use of an appropriately designed juror questionnaire—something that rarely is given priority during trial preparation. Speckart & McLennan, "How to Tap the Potential of the Juror Questionnaire," *The Practical Litigator*, vol. 10, no.1 (1999).

Look for Cynicism and Arousability

The search for the marker characteristics of the potentially punitive juror should focus on basic personality dimensions that differentiate this individual from others. Reviews of databases for mock trials and actual post-trial interviews have implicated the following personality constructs or traits as "markers" of the punitive juror:

- *Cynicism*—A generalized tendency to view the world as sinister, oppressive, or malevolent.
- *Vulnerability*—A characteristic associated with heightened sensitivity, for example, sensitivity to rejection.
- *Arousability*—A predisposition toward nervousness, distractibility, jitters, hysteria, mania, and other excessively aroused states.
- *Depression*—This trait may manifest as ranging from mild dysphoria ("the blues") to clinical depression. In the general population, it is usually observed as a sluggish, withdrawn, or sullen demeanor.

These personality traits are often interrelated in one individual. For example, a correlation between cynicism and depression may appear in many individuals. The following discussion will concentrate chiefly on the traits of *cynicism* and *arousability*, although others are considered where appropriate.

The relationship between cynicism and high damage awards should be obvious, since cynical individuals already believe that corporations are inherently predatory. Cynical individuals often favor substantial damages in cases alleging fraud, unfair competition, tortious interference, misappropriation, unjust enrichment, sexual harassment, or even product liability in which corporate misconduct is alleged. Results from mock trials and real trials confirm this correlation.

Another noteworthy characteristic of punitive jurors is their psychological trait of *arousability*. In the courtroom, a high degree of arousability is often linked to an information-processing style in which large amounts of evidence are stored in each juror's head during the plaintiff's case-in-chief, with less and less information being assimilated later when the defendant has a chance to put on evidence. In essence, this juror becomes "heated up" (aroused) by the plaintiff's case to the point where his or her cognitive (information-storing) facilities "melt down." Post-trial interviews of such jurors reveal that they have retained only traces of evidence from the defense, later in the case, although their recall of information from early in the case is quite vivid, thorough, and accurate. In short, an arousable jury gets angry quickly, undergoes "cognitive meltdown," and stops listening midway through trial—precisely when the defense needs its attention the most.

A good example of an arousable juror can be seen in the antitrust case of *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987); see also, *South Dakota v. Kansas City Southern Industries, Inc.*, 88 F.2d 40 (8th Cir. 1989). The plaintiffs were suing various railroad companies for preventing the construction of a coal slurry pipeline. The defendants sought to demonstrate that there was no causation between their actions and the failure to construct the pipeline, since Energy Transportation Systems, Inc. had not even obtained approval for the project from the Interstate Commerce Commission. The former head of the ICC was the last witness in the trial, and spent the entire day on the stand. Notably, however, a handful of jurors—all energetic and arousable individuals—could not even identify, during the post-trial interviews, what the ICC was. By contrast, these jurors recalled, with great clarity, the videotaped depositions of railroad executives that the plaintiffs had presented during their case-in-chief, weeks earlier.

Research on the arousability characteristic has revealed that:

- There is a significant relationship between

arousability and "emotional empathic tendency"—the predisposition to empathize on an emotional level with another person. More arousable people are more likely to react in kind to an emotional appeal.

- Highly arousable individuals are more likely to *store in memory* and *recall* only the emotional portion of a message or communication. As a result, it is clear that the plaintiff's message will stand out in the memory of an arousable juror not only as a result of "cognitive meltdown," but also because of a generalized bias toward emotional messages.
- Positive correlations exist between arousability and distractibility, which is in turn positively correlated with neurotic tendencies.
- High levels of arousability have also been linked to impulsivity, lack of endurance, anxiety, mood disturbance, and sensitivity.

Traits such as neuroticism, anxiety, mood disturbance, impulsivity, and the tendency to be emotionally empathic are not the types of characteristics that a defense lawyer typically hopes to find in a panel of jurors. Research demonstrating that these traits are intercorrelated helps explain why punitive jurors frequently do not even recall evidence from the defense. This research is strongly consistent with anecdotal observations that suggest that punitive jurors are often more unstable, emotional, sensitive, and selective in their memories than their more level-headed counterparts—the types the defense should endeavor to seat on the jury.

The traits that have been considered—cynicism and arousability—tend to surface in behaviors that are identifiable and detectable during *voir dire* and selection, particularly when a juror questionnaire is utilized. Scientific research indicates a clear association between high levels of arousability and various stress-related illnesses, including cardiovascular disease and myocardial infarction. More broadly, arousability is associated with a variety of physical, psychosomatic, and psychological illnesses and symptoms. This trait has also been associated with an increased prevalence of accidents. Illnesses and accidents are certainly events that are detectable during *voir dire*, and research with mock jurors has demonstrated clearly that reports of poor health and/or frequent accidents are generally predictive of a punitive orientation.

How deeply one can "dig" in *voir dire* is always a sensitive issue, and depends on many factors, including the attitude of the judge, whether the case is in state versus federal court, and the defense attorney's own comfort level and skill in phrasing questions and producing a non-threatening, unobtrusive context. A jury questionnaire can reveal subtleties in jurors' personalities, and thereby yield substantial tactical advantages. The questions can be designed to expose the most risky potential jurors.

Trial Venues

The seasoned defense attorney knows that there are some jurisdictions that are notorious as "bad" (*i.e.*, high damages) venues. It is implausible to suppose that these venues just happen to be areas in which most of the population has inordinately high levels of the personality traits mentioned in the previous section. These areas of the country are instead awarding runaway verdicts for some other reasons that appear to be location-specific. That is, there is some other characteristic, or set of characteristics, prevalent in these venues, that precipitates excessive damages awards.

Litigators with varying experiences may point to different venues as problematic, with some emphasizing specific geographic areas in southern states (Texas, Louisiana, Mississippi, Alabama) and others emphasizing inner-city state courts. However, difficult venues can be found in all parts of the country in scattered pockets. Federal courts centered in urban areas may often be recognized as reasonably "good," whereas some of the state courts centered in the same urban regions may have frequent high-damages verdicts associated with them. For example, anyone who has tried a case in Atlanta-area state and federal courts, or Houston-area state and federal courts, can verify that the different panels within the same urban regions are vastly different in terms of the degree of risk involved for the defendant.

The distinction between the state and federal court *venire* members provides vital insights into the characteristics associated with the observed differences in risk. Jurors from federal *venires* tend to come from outlying areas that are more suburban or rural, more affluent, and have greater proportions of Caucasians and Republicans. Jurors from contiguous state court venues are typically more urban, have comparatively lower socioeconomic status overall, and consist of a greater number of ethnic minorities and Democrats.

There are both legal and non-legal reasons that defense attorneys usually prefer to be in federal courts. The demographic profile differences between the state versus federal venues are clearly part of the non-legal reasons, as most litigators realize that jurors from state court rosters tend to have comparatively more "high-damages" characteristics (*e.g.*, minority, liberal, or Democratic political stance, and lower socioeconomic status).

One distinct impression that emerges from experiences with high-damages verdicts in "bad" venues is that jurors are motivated to simply redistribute wealth (the so-called Robin Hood mentality), and have little interest in the specific factual nuances of the case. One of the most valid predictors of a high-damages award is a juror's agreement with the phrase: "Taxes for large corporations should be increased." The interest in simply redistributing wealth causes jurors to have a lack of motivation for assimilating the fact patterns of the case, resulting in poorer recall of the evidence—especially the evidence presented by the defense.

It is important to note that this lack of retention is not for the same reasons that a highly aroused juror undergoes "cognitive meltdown." Instead, bad venue jurors simply *do not care* about the defendant's case, and may fail to process information because they do not have the motives, or the capabilities, to do so. Their motives are often limited to voyeuristic curiosity that is satiated during the plaintiff's case, with an underlying goal is to simply funnel cash from corporations to the "deserving plaintiff."

These types of juror thought patterns represent some of the most daunting obstacles facing a defense team trying to keep damages awards down to a reasonable amount. Still, comparatively reasonable damages can

be obtained in bad venues. Here are some suggestions that may lead to success in such courts.

- *Make liberal use of creative illustrations, graphics, animations, and demonstrative exhibits.* There is no better weapon against sluggish information processing than to attack the problem visually. Jurors are typically visual learners, and the less sophisticated their problem-solving capabilities are, the more urgent the need for compelling visual aids. Babcock & Bloom, "Getting Your Message Across: Visual Aids and Demonstrative Exhibits in the Courtroom," *Litigation*, vol. 27, no. 3, 2001. Graphics development is another area in which thorough trial preparation becomes of paramount importance. Painstaking formulation of creative and effective visual aids is time-consuming and requires labor-intensive efforts long before the trial date.
- *Meet the jury where they are.* Jurors in difficult venues are apt to focus on different issues than the trial team, and often "invent" unexpected issues that need to be addressed. Many such issues will not be on the trial team's radar screen unless and until field research is conducted *within the venue*. Moreover, issues that are more arcane, complex, or specialized must be articulated in plain language that jurors can easily understand. It is not enough to simply make an effort to simplify concepts as fully as possible. Trial attorneys must "get a feel" for the jurors by recruiting panels for trial simulations in the venue, repeatedly trying new approaches, discarding what does not work and retaining what does, until a maximally effective message is forged. Such efforts may entail mock trials or focus groups until the optimum tactical position has been formulated.
- *"Out-fair" the other side.* Regardless of the socioeconomic backgrounds of jurors, they are still apt to have a basic notion of fairness. The common sense notions of fairness that are instilled in people when they are young can transcend political and demographic differences if they are summoned and resurrected in a compelling manner. Concessions that *some* damages may be appropriate are usually involved in such messages. Jurors need to know that the plaintiffs will be fully compensated, that they will be treated well, and that the defendant cares about their well-being.
- *Provide alternative damages numbers.* Too often, defense litigators do not provide jurors with a complete and realistic map of how to interpret the numbers that are at stake, or simply deny the plaintiff's damages theory without presenting a valid and believable alternative. Clarification of the damages that are being requested by the plaintiffs, and what such numbers actually mean, can help to mitigate damages. Annuities and other economic formulas can be portrayed in a convincing manner to suppress damages awards and reinforce the notion of fairness and taking care of the plaintiff.

Plaintiffs' attorneys are not trying to protect a client relationship. They are simply trying to win. They know that after the case, their client will be gone.

- *Focus on credibility.* In order to prevail in a bad venue, the defense attorney must be the most credible person in the room. He or she must have the most complete command of the facts, and must be communicative in a way that is superior to, and transcends that of the opponent. Defense counsel must deliver everything that he has promised in his opening statement, and must do so convincingly through expert and fact witnesses who are fully trained to connect the dots in a lucid manner throughout the case. Integration of the visual exhibits with witness preparation plays a vital role in enhancing credibility.
- *Use local counsel, private investigators and other research techniques to find out who the jurors are.* In smaller venues, many prospective jurors know each other, and/or know the plaintiffs and their family members. In many cases, these jurors do not reveal such information during *voir dire*, and there may be good reasons for getting them off for cause at this juncture. Photographs of residences, Internet search mechanisms, and other types of investigations can also be used to identify the worst jurors.
- *Accept the burden of proof.* Jurors in bad venues place the burden of proof on the defendant, regardless of the court's instructions to the contrary. They believe that the defendants are in court because a transgression has occurred. It is suggested that trial strategy be formulated with this pitfall in mind, so that jurors are shown why the defense's case is credible.

Conclusions

The two parts of this article have been oriented chiefly toward assisting defense trial teams and corporate counsel with cases that are, for want of a better term, the "worst of the worst"—that is, cases for which damage control is the only realistic goal. It goes without saying that settlement for a reasonable amount is always the preferable endpoint for such lawsuits. In this regard, it is important to note that some cases that could be settled early sometimes end up going to trial because missed opportunities for settlement are lost.

Some cases can, and should be, settled quickly. When a complaint is filed, the defendant may know more about the fact scenario than the plaintiff. With competent risk assessment in place, the identification of the high-damages case can be made on a reasonably prompt basis after filing, once the facts and venue are considered. Faced with the prospect of years—maybe even a decade—before being able to recover any money at all, many plaintiffs may be happy to get a much lesser amount quickly. In short, the time surrounding the filing of a lawsuit may be the best time to get a problematic case out of the way cheaply. Too often, a corporate defendant had a chance early in discovery to dispose of a claim for only a few

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million dollars, when instead the ultimate jury award turned out to be hundreds of millions.

If all that a jury really wants to do is redistribute wealth, or if key witnesses are intent on lying, the defense faces a formidable challenge. Like a case of melanoma, the only treatment may be "excision," which in judicial terms would be comparable to an appeal. Nonetheless, the guidelines suggested in this article represent a fair summary of that which can be accomplished at the level of the jury trial to minimize the probability of a disastrous outcome—if adequate preparation is carried out ahead of time. FD

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