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Please send any comments, questions or ideas to editor@tsongas.com.

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HOW WILL MY JURY ARRIVE AT DAMAGE FIGURES?

The sheer amount of information that jurors are asked to process in a trial is daunting for even some of the most sophisticated minds. Fortunately, humans seem to be pre-programmed for such tasks in their ability to cognitively store information by placing it into manageable categories, known as schemas. The most salient or influential schemas tend to be those that stem from concrete personal experiences. The sum of one's past experiences creates a prototypical schematic experience or norm, which in turn, functions as a frame of reference for understanding and interpreting new information. For example, a juror evaluates the credibility of "the boss" on the witness stand in an employment case by drawing upon past experiences with his or her own managers and supervisors. Drawing upon these past interactions allows one to determine whether the witness fits his or her image of the boss and consequently, construct attitudes towards the witness based on comparisons to his or her own personal experiences. Essentially, it creates a base-point reference. Jurors who have had bosses that they felt abused their power are more likely to be persuaded by the plaintiff's frame that the manager on trial is the type of person who would wrongfully terminate the plaintiff simply because he did not like her.

Most people intuitively understand the role that schemas play in processing information from our day-to-day experiences. However, we may be overlooking an even more influential role that schemas play in our assessment of legal disputes. It is here that schemas may impact the manner in which compensatory damages, particularly non-economic, are awarded in personal injury cases.

Despite popular criticism of damage awards in personal injury cases, most research has shown that jurors arrive at damages quite rationally, basing them primarily upon the severity and permanence of the injuries sustained during an accident. This research reaches its conclusions by comparing damage awards to severity, permanence, and other factors across a wide range of cases using a variety of statistical methods. However, the research falls short as it does not offer insight into how jurors arrive at damages for a particular injury within a particular case. One way to do so could be by analyzing the degree to which the event and injuries in question match jurors' schemas for such an event.

A recent study conducted by members of the psychology department at the University of Iowa showed that people tend to have schemas for common accidents involving personal injuries. In this study, participants were given vague scenarios that led to personal injuries, including automobile accidents and defective products, and were asked to describe what they believed would be the likely causes and resulting injuries. The results indicated that accidents with which a person has experiences tend to produce similar and more consistent descriptions of likely injuries and causes. For example, in the scenario of the automobile accident, participants consistently described the injuries as including whiplash and head injuries. Additionally, participants had common explanations for how the accident occurred despite the lack of any specific details being offered. This establishes the notion that jurors do have expectations for what should occur in a particular kind of accident.



Conversely, results also showed that there was much greater variation in descriptions of likely injuries and causes of accidents for scenarios that tended to be less common to the typical person's experiences. These included injuries sustained from defective products and medical malpractice.

These results have several implications. First, familiar accident scenarios involving injuries that match jurors' schemas will lead to greater consistency in damage awards across similar cases, allowing greater predictability of damages for the parties involved. Second, familiar accident scenarios involving injuries that fall further outside of the jurors' schematic range for that accident will likely lead to greater skepticism of the plaintiff's claims and, consequently, less predictability in terms of damages. Third, one can expect less predictability and greater variability in damage

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(Damage Figures continued)

awards across cases involving unfamiliar accident scenarios. Finally, limited data suggests that unfamiliar accident scenarios tend to produce higher damage awards. A possible explanation for this is that juries hold greater sympathy for victims of unusual accidents as opposed to accidents that are perceived as common to the human experience. An implicit premise of this explanation is that accident scenarios that are more common to the personal experiences of most jurors are viewed as being less severe in nature.

Strategies stemming from this analysis can be highlighted for both the plaintiff and defendant. For the plaintiff, studies show that damage awards tend to be higher when injuries are atypical of a given accident category. This suggests that an advantage exists for plaintiffs when they can successfully differentiate their client's injuries from those that are "typical" of the particular accident category in question. Otherwise, juries will think, "This is just another case of whiplash," or "It'll be a nagging back injury but it'll eventually go away because mine did." This creates a lack of motivation for jurors to work for the plaintiff in the area of damages. Our own qualitative jury research has observed this phenomenon in a variety of cases. Plaintiff's counsel will want to convey the uniqueness of their client's injuries or circumstances so that the jury finds higher damage awards.

It is important to add that a fine balance must be struck. Injuries that depart too significantly from those that are typical of the accident category can create skeptical juries. For example, one recent case involved an individual who became severely ill from consuming food from a restaurant. This illness was so severe that the plaintiff will likely experience medical problems for the rest of her life. During mock trial deliberations, our consultants consistently heard jurors remark: "I've had food poisoning before and it wasn't that big of a deal" or "I just find it hard to believe that food poisoning could have caused this." The implicit contention in these statements is that the injury sustained does not match what is typical for most people; therefore, jurors found it too difficult to establish a causal connection. Jurors' skepticism resulted in these mock juries altering their damage awards to make them more consistent with their expectations of what should have happened, or likely happened, in this particular case.

Success in such cases requires a clear, comprehensible explanation of why the injuries depart from what is typical for such an accident. This might be a difficult task for the plaintiff's attorney. Remember, personal experiences create very intractable schemas for jurors, making it more difficult

for them to accept what they consider to be abnormal. Consequently, plaintiff's attorney must establish the story of the client's injuries as unique, yet reasonably obtainable within the circumstances of an accident of that type. This will necessitate a carefully considered rhetorical strategy by plaintiff's counsel that draws upon the reasonability of a common experience. The focus of such a strategy should highlight the factors that differentiate the circumstances of the incident from those that are typical rather than focusing primarily upon how the resulting injuries are different from the typical incident.

For the defense, damages may be brought under control by shifting the conceptual scope of plaintiff's injuries back under the umbrella of schemas for the accident category in question. The goal here is to get the jury to find that there is nothing especially necessary in terms of relief for the injuries sustained. Issues of severity and permanence are two areas that should be called into question either directly or indirectly considering evidence cited earlier that indicates

Finally, limited data suggests that unfamiliar accident scenarios tend to produce higher damage awards.

juries arrive at damages by examining these same factors. In doing so, there are a few possible outcomes. First, the jury may believe that this is just another instance of a common accident with a corresponding common injury. In this case, when the jury fails to find anything especially unique about the plaintiff's circumstances, they will lack the motivation to aggressively compensate the plaintiff. In instances where the injuries of the plaintiff do not match the schemas of

the jurors, jurors might reject the possibility that the injuries were caused by the defendant.

Another possible outcome is that jurors may identify the incident with one that they have personally experienced either first-hand or through a family member or friend. Often, we find that jurors do not feel compelled to award damages to a plaintiff when they or someone they know did not receive relief for a similar injury. While the likelihood of no damages being awarded is very low, this does keep the overall figures lower than what would otherwise be reasonably expected.

Overall, most readers are unlikely to be surprised by the notion that personal experience plays a significant role in jurors' conceptualization of issues at trial. Most attorneys are well aware of this. However, discussion of this relationship typically occurs within the context of determining liability. Instead, expanding the application of this relationship to cover determinations of damage awards may yield greater strategic options for both the plaintiff and defendant in anchoring damage figures. ■

YOU HAVE MORE IMPORTANT THINGS TO WORRY ABOUT

A particularly common scenario for trial consultants involves an attorney that is about to present a case in front of a jury vexing over presentational details such as which suit to wear. These questions typically merit a simple response: "You have more important things to worry about."

Perhaps it is the overzealousness created in those remaining few days before trial, but there are some details that simply do not warrant the attention that many attorneys want to devote to them. Clothing, state-of-origin, color of PowerPoint slides, and other extra-evidentiary factors are not as important as the evidence. Research shows that evidence accounts for 62% of verdict determination. While some extra-evidentiary factors can have a considerable influence upon the case and the jury's perception of that case, the following list exemplifies a variety of popular concerns that should not interrupt the focus on the evidence.

"Isn't it true that I have to win my case in voir dire?"

No. Jurors are more concerned about the types of questions they will be asked and how to answer if they are put on the spot than trying to figure out who should win or lose the case. We strongly support the goal of uncovering your high-risk jurors in voir dire rather than trying to "sell your case." Jurors have a difficult time placing the themes delivered during voir dire into a context in which the evidence will be presented. Therefore, without the proper context, a framework through which to evaluate those themes will not have been established. Instead, "selling your case" is best accomplished in the opening statement.

"Is the jury going to care that I'm from out of state?"

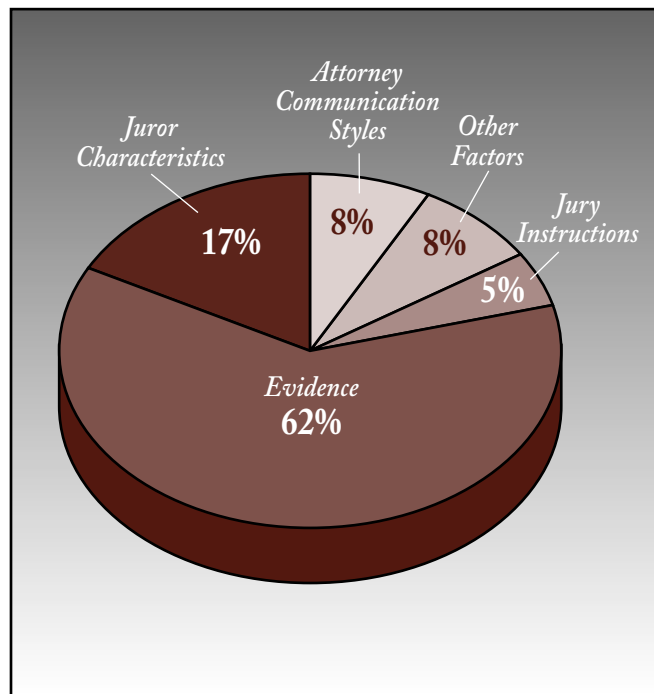
No. If you are a strong advocate for your client, and argue your case clearly and effectively, jurors will give more credence to your advocacy skills than to your state of residence. Jurors do however pay attention to your courtroom demeanor and courteousness toward witnesses and the Court, and will not be tolerant of rude behavior whether you're a local or out-of-state lawyer. It is more important for you to be yourself than to try to "act" out what you perceive to be the demeanor of "local" counsel. Jurors will see through the façade, which is more likely to be a detriment than the fact you are from out of state.

"Won't the jury think that my color graphics are too slick?"

No. Jurors are accustomed to seeing "slick" graphics on a daily basis. They are bombarded with images from USA Today, their local paper, and on their local news stations. Additionally, the digital age has brought colorful, multi-dimensional, animated graphics to jurors' fingertips in the form of iPods, cell phones, digital cameras, personal printers, handheld videogames, and a variety of other personal devices. For some jurors, this level of graphic presentation is commonplace and is expected in the courtroom.

"Do you think it's a mistake to wear my nice suit in front of this jury? Won't they infer that my client has a lot of money?"

No. Barring a return of your favorite leisure suit, the jury is unlikely to be impacted by your choice of suit. Some might even argue that jurors will negatively react to your transparent efforts to create the impression that you are the humble, hometown lawyer focusing on justice, not money.



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(More Important Things continued)

“If plaintiff gives an hour long opening, shouldn’t I give a shorter one?”

No. The length of your opening should not be based upon the length of your opponent’s. You will not gain points by trying to send the message that you are not going to waste the jury’s time like the plaintiff’s lawyer did. Rather, you should offer a clear and concise statement of the case that expresses the underlying narrative themes while emphasizing the relevant and favorable evidence for your client. Length is not the issue. If you are repetitive and rambling, even 15 minutes is too long.

“Won’t the jury wonder why we don’t have a female attorney at counsel’s table during this discrimination case?”

No. The fact that it is a discrimination case will not translate into a juror expectation that counsel should be diverse. Attorneys tend to overestimate the influence that factors such as this can have on the case. Remember, evidence accounts for 62% of the verdict determination. Furthermore, sometimes jurors will perceive the presence of a female or minority as counsel for a discrimination suit as mere tokenism.

“I don’t want to look too prepared so I’m not going to use any graphics in my opening.”

Bad idea. To the contrary, you will be criticized for not preparing enough for your opening statement. Jurors have come to expect a visual component to just about every presentation. Studies have shown that, time and time again, a presenter’s effectiveness along with jurors’ understanding and retention of the evidence is significantly increased when graphics are incorporated into the presentation. ■



JURY SELECTION

Identify and eliminate juror bias on a jury panel.

- Perform high-risk jury profiling.
- Conduct trial venue community attitude survey.
- Design questions for judge and attorney-conducted voir dire.
- Consult on jury selection strategy.
- Develop, design and analyze Special Juror Questionnaires.
- Assist with in-court jury selection.
- Provide jury monitoring.

JURORS AREN’T AS “NEUTRAL” AS WE THINK

We would all like to think that each party in a lawsuit begins on a level playing field. In fact, if you were to ask jurors if they come into the courtroom with an open mind, they’d likely answer, “Yes,” but you’d be falsely comforted if you believed them. “Yes” is, after all, the socially acceptable response. But in our anonymous survey of over 1,000 northwest jury-eligible respondents, we found that jurors aren’t so open-minded. We asked respondents which party they would tend to favor in a lawsuit, knowing only the type of case. If jurors were truly open-minded, then the predominant answer should be “neither.” The chart below shows that this is not the case. ■

