

Evolving Juror Attitudes and Strategies for Uncovering Bias:

Strategies for Minimizing Damages in High Damages Cases

Introduction¹

In any case postured for trial, the defense usually has bad facts or circumstances on its side to make losing on liability a live possibility. Effective jury selection techniques therefore help flush out high damages jurors as well as jurors who are likely to vote plaintiff on liability—and research shows that they are not always the same people. Research also shows that awarding damages is one of the most difficult tasks that jurors face. Good defense lawyers can help their clients minimize damage awards by understanding jurors’ anxieties about damages and providing solid case themes and good anchors to help jurors in their decision-making.

Preparing for trial

Attorneys often come knocking on the door of trial consultants asking for the equivalent of a secret decoder ring or x-ray glasses that will enable them to unfailingly identify high damages jurors. “What should I look for?” they ask. “Men, women, black, white, old, young?” While we have found questions and hot button issues that help identify high damages jurors across many types of civil cases, the best identifying characteristics of your high damages jurors are very often case-specific. In a high stakes case, it’s therefore wise to do pre-trial research that helps you understand the dynamics driving jurors’ damages decisions. Without question, the best identifiers are juror attitudes and experiences—not crude demographic indicators like gender, age and race.

When dealing with damages, jury selection shouldn’t be your only focus. However skilled you may be at voir dire, jury selection is the part of trial over which an attorney probably has the least control—even with a great trial consultant by your side. You also need to consider what you can do to influence where you have the most control, your case presentation. Good pre-trial research can help identify effective themes and damage arguments that you can begin communicating in voir dire so that besides identifying your high priority strikes, you also begin educating jurors about your case. This is an effective way to counter some of the strong plaintiff messages, given in voir dire, that aim to validate giving large damage awards and punish bad corporate behavior.

¹ This paper is distributed in connection with our presentation at the 2003 DRI Conference on Damages. Although it covers the same general topics, it complements, rather than duplicates, our presentation.



Recognize that jurors are nervous about deciding damages

Trial lawyers spend their days talking about settlements and damage awards, a practice which desensitizes attorneys to the fact that most jurors are nervous about deciding damage awards. This nervousness usually gets expressed quite directly in voir dire. For example, in recent jury selections, we have heard jurors say to the lawyers and the Court:

- Do we really have to make the decision about money?
- How can we decide what to award?
- Won't the judge determine the amount?
- Won't you give us guidelines?
- How can I possibly put a value on a human life?

Juror nervousness offers an opportunity for influence

As in any situation where people are nervous, jurors are looking for recognition and guidance. In other words, juror nervousness about damage awards presents an opportunity for attorney influence. Too often, we have seen defense attorneys lose this opportunity for influence and give up the damages issue to the plaintiff.

So what should you do if jurors have been expressing nervousness about making damage award judgments during the plaintiff's voir dire?

First of all, don't necessarily concede that jurors who have expressed doubts about certain categories of damage awards are gone for cause. Even in states like Texas and Florida, where the law states no rehabilitation is allowed for jurors who have said that they are biased or prejudiced, if jurors have not used those magic words, you may be able to rehabilitate jurors who have expressed uneasiness about giving certain types of damage awards. Any jurors you rehabilitate are likely to still be high priority strike targets, but better to make your opponent burn a strike than to get a juror off for cause. This is a subtle judgment call, as you do not want to waste your time in voir dire trying to rehabilitate jurors who clearly will be dismissed for cause.

Acknowledge that damages decisions are tough

In your voir dire, acknowledge to the panel as a whole that making a decision about damages is tough. If deciding about damages makes the panel nervous, that is only right and proper, as it is a big decision. Tell jurors that, contrary to what they may fear, being nervous shows they are qualified jurors. Let jurors know that everyone knows it is harder to make decisions about damages in the "soft" areas, like mental anguish and pain and suffering. That's why the law calls for a decision by jury, so that the best thinking of a group of people can go into making the decision. It won't be up to any one juror to decide.

If there are good defense jurors who have expressed doubts about specific types of awards, talk one on one with them. Let the juror(s) know that attorneys for each side will make recommendations for appropriate awards, and the judge will instruct them on what the law says. Ask if the juror can follow the law and can deliberate with other jurors to reach a fair and reasonable decision in the case. Remind the juror that he or she has not yet heard any evidence in the case yet, and ask if the juror remains open to being persuaded that the plaintiff is reasonably owed non-economic damages.



Then, to flush out high damages jurors as well as show defense jurors that you are willing to take on the plaintiff on the damages issue, ask some direct and pointed defense-oriented questions about damage attitudes. (See page 5 for some examples.)

Know that the battle will be in the middle

It can be disheartening to sit listening to the plaintiff attorney conduct voir dire, hearing all your best jurors betray you by expressing their strong feelings about excessive damage awards. You should steel yourself, even before you enter the courtroom, for the fact that in jury selection, the battle will not be over your best defense jurors. The battle will be over the middle. Assuming that both sides are equally successful at getting cause challenges, whoever best understands the middle, whoever can best read the more subtle clues and indicators given by the jurors who are low disclosers or do not have strong feelings, will win the battle of jury selection.

Strategy considerations in using a jury questionnaire

Using a questionnaire is not always to your advantage as a defense lawyer. If you are going to trial in a highly prejudiced plaintiff venue, using a questionnaire may be more helpful in revealing your keeps to the plaintiff that in helping you target your priority strikes. Effective open court voir dire may be the better method. There are also times when the Court has made clear that it does not favor use of a questionnaire, and you feel the risks of displeasing the judge are greater than the potential benefits of a questionnaire. A great deal depends on the design of the questionnaire agreed upon by both parties or adopted by the Court. However, because the battle in jury selection is over the middle, using a well-crafted jury questionnaire is almost always to your advantage in jury selection. Some of the advantages of a questionnaire include:

- It elicits more candid responses.
- It ensures you get the same information about your entire pool.
- It enables you to get more in-depth information about each juror.
- It helps flush out information from jurors who are reluctant to talk in open court.
- It minimizes the risk of contamination.
- If used properly, it can reduce the time required for voir dire.
- It ensures key questions on your selection model are asked.
- It ensures a fairer jury selection process and jury.

Using a questionnaire also, in our experience, helps you make better decisions about alternates. Our research shows that alternates tend to be more biased against the defense because they are questioned more hastily and selection decisions are made with inadequate information.

Writing the right questions

Questions used on a questionnaire should be phrased differently than questions asked in open court. You can also probe many areas in the more distanced, private form of a written questionnaire than you can in open court.

Use categories that flush out the extreme and reveal emotion

When you have a written questionnaire, take advantage and write questions with at least three categories of response (rather than just “yes, no” or “agree, disagree”) to enable you to flush out jurors who are on the extreme. We typically use four categories of response with attitude statements: strongly agree, somewhat agree, somewhat disagree and strongly disagree. These questions will elicit more useful responses if you force jurors into one of these four categories. However, some courts will be more receptive to attitude questions if you add a fifth response of “neutral” or “no opinion,” which is a reasonable compromise. Also, use the questionnaire to ask more personal kinds of questions about experiences or feelings that you might not want to ask about in open court. For example, in many cases, you will want to ask such questions as whether the juror recently lost a loved one, has ever witnessed a serious accident, or has lost a loved one to cancer. A good follow-up question that works well on a questionnaire but not in open court is, “How affected are you by this today?”

Use questions tested for effectiveness in revealing high damages jurors

Some written questions that are typically effective at flushing out high damages jurors are:

Do you think that civil damage awards today are: too high, about right, too low?
(High damages jurors say too low, about right)

How do you feel about the large awards given recently in tobacco lawsuits? (High damages jurors strongly favor them)

It is more important to compensate an injured party than to figure out who is at fault. (High damages jurors strongly agree)

In voir dire, use direct questions but set the bar low

In voir dire as well, you should not be coy about damages issues. Ask direct and pointed questions to identify those pre-disposed to award money. Since you have the advantage of hearing the plaintiff’s voir dire, identify some likely high damages jurors as your targets in voir dire.

You should phrase your questions differently, however. Jurors are more reluctant to express themselves in a group and in the court setting, so set as low a bar as possible in your questions. For example, don’t start with the phrase, “Does anyone here feel...” That sets a high bar, making it seem like whoever answers is an exception to the social rule. Instead, assume that there will be people who feel that way and ask, “Who here feels...” or, “How many people here feel...”

Similarly, you can effectively use scaled answers in open court voir dire, just like you do in a written questionnaire, if you learn to adapt your scale to your oral presentation. A good question to ask if you are a corporate defendant is, “On a scale of 1 to 7, with 7 being very positive and 1 being very negative, how many of you would say that you have feelings in the 1, 2 or 3 range towards my client?” That enables people with extreme views to initially raise their hands as part of a larger group, something that is more comfortable to do in a public setting. Once you have identified the subgroup of those who have negative opinions about



your client, you can then eliminate those with the more moderate views and figure out your high priority cause targets or strike candidates.

When you ask about damages issues, set the stage by saying that there is nothing wrong with wanting to award money. In fact, that is what our civil system allows for those who are damaged. However, you need to know what people's feelings are about damage awards. For example, who here feels that people who go to court typically don't receive enough compensation?

If you are successful in getting a juror to admit to high damage tendencies, thank the juror and praise the juror for his or her honesty. Then use that person's admission to help "turn" other jurors.

Some effective damages questions to ask in open court voir dire include:

Do you think giving large damage awards is the best way to punish a company you feel has done something wrong?

Knowing that the plaintiff in this case is (dead, disabled, likely to die shortly), do you start off with some number in your head that is a reasonable amount to award for that kind of damage?

Who here believes that most people do not take emotional distress and suffering seriously enough?

Is there any number that in your mind is too low?

Would you be able to go home and look your union buddy in the eye and say that you voted to send a fellow union member home with no money at all?

Do you feel that it might be hard for you to set sympathy aside in making this decision?

Attitudes towards lawsuits and damage awards: stable indicators of high damages jurors

Any good plaintiff lawyer worth his or her salt will include many questions about damages on a questionnaire, and spend a great deal of time in voir dire asking jurors their feelings about specific types of damage awards, such as awards for pain and suffering, or punitive damages. That’s because damage attitudes are the emotional hot button for plaintiff cause challenges.

Naturally, plaintiffs probe on those areas that reveal their strikes and conceal their keeps. To help flush out high damages jurors, you will need to ask questions that address your own defense concerns, such as those recommended above. In many situations, however, you don’t have an opportunity to do an extended voir dire. Our research has shown that there are two simple and effective questions that can flush out high damages jurors. Both are standard questions on the California civil juror questionnaire and are questions we have used or seen others use in state and Federal courts all over the country. They can also easily be adapted for in court voir dire, although you should not expect to get the same results when asking these questions in open court.

The first is, “From what you have read or heard, do you think that in recent years, the number of lawsuits filed has generally been too high, about right or too low?” The second, already given above, is, “Do you feel that money damages awarded in lawsuits today are generally too high, about right or too low?”

Data we have collected over the past fifteen years shows that answers to these questions have been fairly stable, with a large majority of jurors answering *too high* to both questions. Results from recent large-scale community surveys in Dallas, Texas and Alameda County, California are shown below.

Table 1: Juror Attitudes towards Lawsuits

	Texas	California
Too high	79%	75%
About right	17%	21%
Too low	4%	4%

Table 2: Juror Attitudes towards Damage Awards

	Texas	California
Too high	67%	62%
About right	25%	33%
Too low	8%	5%

The art of asking skewed questions: reveal your strikes, hide your keeps

Why are these questions good defense questions? A good question is not just one that shows a statistical relationship to how jurors vote on your case outcome or on damages. A good question also has a typical distribution of answers that reveals your strikes but hides your keeps. Another way of saying this is a good question is *skewed in your favor*. If you plotted the above data on a line graph, you could see that the line defined by the data is in fact skewed—it would cut sharply from top left down to the bottom right, rather than being a straight line or a bell-shaped curve. What this means is that when you ask either of these questions, your best defense jurors remain hidden in that 70%+ majority who agree that there are too many lawsuits these days or that damages are too high. Only a very small number of jurors relative to the total answered “about right” or “too low.” We know from research that jurors who answer “about right” or “too low” are ripe for striking as strong plaintiff, high damages jurors.

How to ask a good skewed question

Even if you don’t have the benefit of pre-trial research or a good trial consultant, you can learn to formulate your own skewed questions. The key is to phrase your question so that only people with extreme views against you are likely to choose one of the answers, leaving the majority of jurors, including your good defense jurors, hidden in the pack. (That’s hiding your keeps.) We show a good example of the difference a good skewed question can make below.

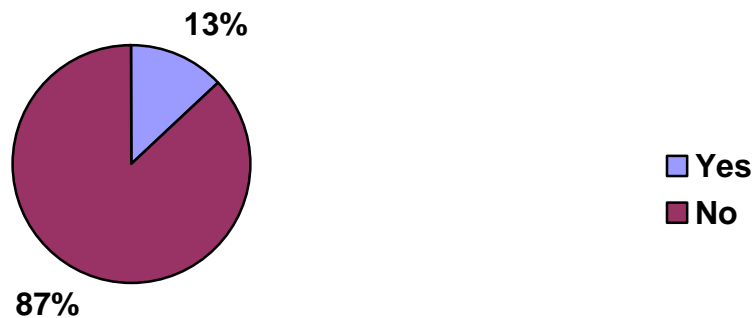
The first graph shows how many jurors said they agreed or disagreed with the statement, “Insurance companies sometimes put their financial interests first.” As you can see, a large majority, 70% found this a reasonable statement and agreed with it. The question is therefore not useful in identifying strong plaintiff jurors in an insurance case because the question is skewed the wrong way and hides the strong plaintiff jurors in the pack. The 30% who answered “No” could be potential defense jurors but they could also be strong plaintiff jurors who feel that insurance companies *always* put their own financial interests first, so the question doesn’t even succeed in identifying likely defense jurors.

Insurance companies sometimes put their financial interests first.



If you slightly change the wording of the question, however, shifting the tone of the statement from moderate to extreme, suddenly the question reveals something much more interesting to the defense:

Insurance companies almost always put their financial interests ahead of policy holders



With the question posed in this way, a large majority reject the extremism of the statement and respond, “No,” while only a small number—13%, which would translate into 7 or 8 jurors in a 55 to 60 juror pool—respond “Yes” and are surely high priority defense strikes.

Focus on anti-corporate attitudes and sympathy

As we discussed earlier, the emotional hot button for plaintiffs is damage attitudes. It is important for the defense to counter some of the strong themes and anchors plaintiffs give in voir dire by probing on damages questions as well. However, the defense is not likely to win many cause challenges by probing on damage attitudes. One emotional hot button for the defense is anti-corporate attitudes. Another is sympathy for the plaintiff. Those are the areas that typically present your best chance at eliciting grounds for cause challenges and identifying high damages jurors.

Developing cause challenges

Some states, like Texas, West Virginia and Florida, have rules that dictate dismissing for cause jurors who clearly express bias or prejudice. However, in most states, achieving successful cause challenges is not so easy. (In Federal court, of course, it is even more difficult since most Federal judges allow only very limited attorney voir dire.) Judges typically do not like to grant cause challenges, often because they are afraid they may have to call up additional jurors or extend the voir dire period beyond what they had planned. However, an experienced trial attorney knows how to achieve cause challenges and is willing to go the extra distance to obtain such a challenge. The motivation and ability of attorneys to achieve cause challenges vary widely, but these are skills that you can develop and improve through study and practice.

Here’s what you need to do to achieve successful cause challenges:

Adopt a proper attitude and demeanor

Jurors who admit to bias usually will only do it if they are speaking with someone who appears to be open to them and is actively listening to what they say.

Don't treat your juror like a hostile witness

Bias is almost never admitted under conditions approximating cross-examination. Jurors, like witnesses, feel trapped and assaulted by a barrage of close-ended questions that offer them no room to explain. You should be conversational, establishing a dialogue with the group. Encourage the jurors to ask questions and to raise doubts. This empathic demeanor is highly effective at getting jurors to confirm their prejudices.

Use silence

Another simple strategy is to talk slowly with the juror and to use pauses to create pressure. Using silence gives time for jurors who feel doubts or are conflicted to feel their own discomfort or uncertainty, increasing the chances that you will get them to acknowledge their predisposition or bias. (Many times, jurors are not fully aware of their own conflicts or biases.) Using silence also creates social pressure, as other jurors, who have already heard everything that has been said, are watching and waiting.

Evoke jurors' emotional commitments

Lawyers are in general a rational, analytical, text oriented bunch. Most jurors are not. Most jurors will not be responsive to questions about what they *think* about case-related issues, what they remember from what they read in the paper or saw on TV, or what their opinions are about contemporary issues. If you are one of those rational, analytical types, you need to take a deep breath and shift personas. You will find yourself getting different answers if you ask jurors how they *feel* about case-related issues, what watching that news story on TV did to their gut, and if it's true that they seem to be uneasy with making a big decision like the one in this case. Eliciting strong juror emotion is one good route to a cause challenge.

In smaller communities, where the dense nexus of social relationships ensures that many people in the pool will have some kind of relationship with the plaintiffs, try to evoke in the juror what it would actually *feel* like to sit in judgment on a case involving their neighbors, fellow church members, or old family friends. A good question to ask is, "So, Mr. Jones, if you were a juror in this case, and having heard all the evidence, you decided that your neighbor really didn't deserve any money at all, how would you feel the next time he came over to borrow your lawnmower and you had to look him in the eye? Would that be difficult for you?"

Interestingly, we have found that it is easier to get challenges granted for feelings of sympathy or compassion rather than for feelings of anger or hostility. Judges appear more understanding and less aggressive about rehabilitating a juror who feels sorry for a victim than for a juror who simply dislikes product manufacturers. In cases where sympathy will be an issue, this is often the more fertile area of voir dire for cause challenges.

Don't hit prospective jurors over their heads with the notion of being fair

The worst question you can ask is, "Can you be fair?" It is the rare juror who will answer, "No," and you have then just rehabilitated your own strike candidate.

If you feel you must use the fairness language, do so in a way that does not pose the issue in such stark black or white terms. One method is to encourage the juror to compare him or herself to other potential jurors: "Now, Mrs. Martinez, are you honestly telling that someone like yourself, who had a parent die of cancer due to toxic exposure, would not have a more difficult time being fair in this case than someone who does not have your experience?" A key is to remind the juror of the specific details of the experience and/or attitudes that make it unlikely she can be fair, rather than just asking the juror an abstract, de-contextualized question.

Establish clear grounds for cause

Establishing clear grounds for cause may be done by referring either to the questionnaire responses or to prospective jurors' responses in oral voir dire. For example:

"You strongly agreed on your questionnaire that you didn't trust product manufacturers. You also said that manufacturers do not care about product safety. Given your strong feelings on these issues, don't you agree that my client starts out a little bit behind here?"

Use metaphors

Since prospective jurors will seldom say that they cannot be fair, the most effective approach an attorney can use is to provide a socially acceptable way to talk about bias. Generally, after the grounds for bias have been established, the strategy is to use some type of metaphor to probe further. Examples include:

- "Given what you said before (or, based on your questionnaire), would the defendant start with a bit of an edge?"
- "Would the plaintiff have a little steeper hill to climb to prove its case?"
- "Would the defendant be starting a little bit behind the plaintiff?"
- "If this trial was a race, would we be starting one step behind?"
- ▶ "If you were in my shoes, representing my client, would you want a person with your views sitting as a juror?"
- ▶ "Do you tend to side with the underdog? Do you see the plaintiff as the underdog in this case?"

After they have agreed with the metaphor, you should then raise the level of commitment and suggest that the juror might have a more difficult time being fair.

Be persistent

Because jurors are reluctant to admit to themselves and others that they cannot be fair, they often resist admitting that they are biased, even when their own answers clearly indicate that



they are. You must therefore be politely, patiently persistent and not take a juror's "I can be fair" as your final answer. I recently saw an excellent example of how persistence can pay off at a trial in Dallas. The defense attorney, a seasoned trial attorney with strong voir dire skills, was questioning a somewhat soft, feminine woman in her mid-50s. This woman had a father-in-law involved in a lawsuit against some of the same defendants as in our case. Yet she had said that she could be fair to the plaintiff attorney.

Some attorneys would be afraid of pushing too hard, afraid of seeming to bully the woman. This attorney pushed ahead, though, and the exchange went something like this:

"I see on your questionnaire that your father-in-law is involved in a lawsuit against some of the same defendants as are involved here, is that right?"

"Yes, but that doesn't have anything to do with this case."

"I understand that, but I'm sure you can understand that on behalf of my clients, I have some concerns."

"Yes, I can see that."

"Are you telling me that even though your father-in-law is sick and suing these same people in court here, it has nothing to do with your feelings about this lawsuit at all?"

"I'm not really involved in that suit. I think I can be fair."

"Now, isn't it true that you would have some financial interest in the outcome of that trial, that you would benefit if your father-in-law won his suit?"

"Well, yes, that's true."

"If you were my clients, would you want a juror like yourself sitting on this jury in judgment of them?"

"No, I guess not."

"So would you agree with me that you may not be the best juror to sit on this particular case?"

"Yes, I guess you're right."

"Would you agree that it might be very difficult for you to be fair?"

"Yes, I guess that's true."

That juror was gone—but only because of the attorney's persistence and patience.

Dealing with damages issues in trial

Once you have completed jury selection, you can still do a number of things during trial to minimize the chances of a high damages award if you understand the dynamics of juror decision-making about damages.

Blocking sympathy

Obviously, in many cases, juror sympathy for the plaintiff is one of the biggest potential fuels for large damage awards. In cases where sympathy is a factor, you should begin dealing with this issue in voir dire. Lay the groundwork then for a consistent campaign to instruct jurors that the law says they must set sympathy aside in their decision-making.

In opening, you should always express your client's sorrow for the plight or condition of the plaintiff and acknowledge that the plaintiff has suffered. Then, acknowledge that it is natural to have sympathy. Next, diminish the impact of that sympathy by explaining that while sympathy is natural, the job of a jury is to examine the facts and to make a reasoned award of damages based on the evidence and the law, not on emotion. In closing, remind jurors about

the need to set aside sympathy. Make sure that the jury instructions contain good language about this as well and refer to that language.

If you consistently educate jurors about the need to set sympathy aside, our experience and research show that sympathetic reactions do not always lead to larger verdicts. Jurors remember and refer back to your education and (if you are lucky) the Court's education on the sympathy issue. In some recent post trial interviews, for example, jurors have told us, "We all felt for the plaintiff — she lost her husband. Sympathy came up in deliberations, but we discussed how that was not the issue" and "The defense attorney mentioned about ruling out sympathy, and the judge kept reminding us of our duty."

Understanding the "severity shift"

An obvious question arises: If most jurors believe that there are too many lawsuits and damage awards are too high—as our data and that of others shows—why are there so many large jury verdicts?²

Recently, research to better understand how jurors arrive at damages decisions was conducted on 509 mock juries, involving over 3000 subjects. The researchers concluded that a phenomenon they called the "severity shift" was at work. They found that when juries deliberate on damages, the damage awards typically *increased* as a result of deliberations. In other words, jurors' pre-deliberation, individual damage awards were less than group jury awards they made later.

Why are jury awards more than individual awards? There is a rhetorical advantage in jury deliberations for those who argue for more money rather than less money. Surveys of the mock jurors show that most people feel it is a hurdle to argue for less money than for more.

Give jurors strong defense damage anchors

Because of the severity shift, it is essential for the defense to give reasonable defense damages anchors to jurors. It is of course often tough to argue both for zero liability and to argue damages, but research is quite clear that without a "low" anchor to balance the plaintiff demand, jurors will use the plaintiff demand as the focal point of their discussion and compromise and ultimately award a higher damage award than if given an alternate, lower defense number. That defense number must be reasonable, however, and based in some reality.

There is some dispute about whether giving a number undercuts an effort to get a defense verdict on liability. Research exists that supports both positions. There is an obvious contradiction between arguing no liability and arguing for a low damages award. This contradiction, particularly if it is not well handled in argument, can leave some jurors believing that by arguing damages, the defense has essentially admitted liability. However, there is also a substantial body of psychological research on the importance of "anchors" when people are involved in an ambiguous situation where there are no external guidelines or benchmarks. My feeling is that there are effective ways to handle the contradictions. Failing

² Of course, there are also plenty of defense victories and low damage awards as well—but we all pay attention to those cases at the high end, which serve as anchors for us all.



offering a low number anchor in a situation where there is a good chance you will lose on liability seems too risky.

Since plaintiff numbers are often not based in reality, the defense can help defense-oriented and low-damages jurors considerably by giving a number or numbers that are clearly backed up by discussing the value of the money. How much would this money really buy of whatever it is the plaintiff needs? Tie the amount to real-world expenditures and possibilities to help take it out of the realm of play and into the common sense worlds of bills and payments that jurors know. For example, in a recent wrongful death case in which a mother died in a terrible accident, leaving behind minor children, we recommended the defense argue for an award of \$1 million each for the minor children, explaining that an excellent college education would cost \$50,000 a year, or \$200,000, leaving the still large sum of \$800,000 for a child to invest, start a business, and buy a house. Explain how compound interest works and show jurors the amount of interest that would grow in a conservatively invested \$100,000 or \$1,000,000. Talk about how much it would take to create a financial security plan—shift the language away from “damage awards” to discussions of how to meet the human needs of the plaintiff(s).

How to minimize punitive awards

Of course, that is impossible to do with punitive damage awards since those awards are not designed to compensate. Recent research suggests that the best way to minimize punitive awards is to be an effective teacher of the law and get jurors to focus on the jury instructions. In a 1998 experiment with 121 juries, all involving real members of the jury pool (most experimental studies are done using students as subjects), Reid Hastie and his colleagues discovered that the key differentiator between juries that gave large punitive awards and those that did not is that jurors who have high awards did not talk at all about the law in deliberations. They also tended to blame the defendant for bad outcomes.

Juries that are less likely to find punitive damages are those that:

- Question the plaintiff’s motives.

- Suggest that the judge’s instructions be followed.

- Discuss the legally relevant issues.

The most common juror error—which should not surprise you—is trouble understanding the law. Jurors usually get the facts straight but figuring out the law in deliberations is a tough task. Many juries do not even open up a discussion of the law because that is the area jurors are least comfortable discussing. It is the area they know the least about, and they usually cannot draw on their common sense experiences to help elucidate its principles.

Making the law an important part of your case

Your best defense against a high damages award, then, is to make the law a significant part of your case.

Ask the Court to pre-instruct

One of the most effective ways of making the law a part of the case is to ask the Court to pre-instruct the jury. Jurors who are pre-instructed on the law understand the evidence better as it comes in, feel more comfortable in their role as juror, and feel better about their jury



experience. Pre-instruction gives them a legal “road map” for the trial just as opening statements give them a road map for understanding the evidence as it will come in.

Explain the verdict form

Jurors often are confused about just what their task is once they enter the deliberation room. Even with clear instructions, a group can quickly find ways to be confused. One of the best ways to keep jurors on track is to present the verdict form in closing and step jurors through it, question by question. Use the real form they will see, if possible, by putting it on an Elmo. Go slowly and carefully, read and explain each question from your point of view.

Ask for the jury instructions to be allowed in the jury room

Ask the Judge at the beginning of trial if he or she will allow a copy of the jury instructions to be given to the jurors so they can refer to it during deliberations. Don’t ask the jurors to rely on their memories about the law—we don’t ask lawyers or judges to do that. Why should we ask jurors, who are least familiar with the law, to do so?

Conclusion

Selecting a good jury is important and with the right preparation, a defense attorney can increase the chances of seating a low damages jury. Jury selection is only part of the picture, however. With a clear trial strategy, and consistent defense themes and low damages messages, a good defense attorney can do a great deal to minimize the chances that his or her client will end up on the pages of the local paper, one more unlucky loser of the high damages lawsuit lottery.

References

David Schkade, Cass R. Sunstein and Daniel Kahneman, “Deliberating About Dollars: The Severity Shift,” 100 (4) Columbia Law Review 101 (2000).

Reid Hastie, David A. Schkade and John Payne, “A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages,” 22 Law and Human Behavior. 287 (1998).