Case Strategy for the Civil Defendant:

The Effects of Injury Severity and Rebuttals on Liability and Damages

by Matt Groebe

The concurrent presentation of liability and damages evidence in a unitary trial poses a challenge for the defense attorney: how much attention should be paid to each component? The defense attorney can either counter the plaintiff's damages recommendation with one of her own (lower in size), or she can refuse to offer a rebuttal by claiming her client is not liable and should not be assessed any damages. The problem with using the former strategy is that jurors may view it as the defendant's assumption she will be found liable and she may be found liable when she otherwise might not have been. However, if the latter strategy is used and the defendant is found liable anyway, no counter-anchor to the plaintiff's *ad damnum* has been offered and the resulting damages award may be higher than it could otherwise have been. This issue can get even more complicated when one considers the severity of the plaintiff's injury. Research finds that more severe injuries generally lead to more liability verdicts (Bornstein, 1998). The phenomenon termed "fusion" - when jurors allow damages-related evidence (i.e. the severity of the plaintiff's injury) to impact their liability decision – explains this research finding. The present research attempted to find the best case strategy for a civil defense attorney to take when the plaintiff was mildly injured and when the plaintiff was severely injured.

The study employed eight possible scenarios by varying two variables: the plaintiff's injury severity (mild or severe) and the defendant's damages rebuttal amount (none, low, moderate, or high). The defendant's damages rebuttal, if any, was always lower than the plaintiff's *ad damnum,* which was kept constant throughout. I hypothesized that due to jurors' inappropriate fusion of the evidence, a severe injury would be detrimental to the defense in terms of liability, so its best recourse would be to focus on keeping damage awards low since it would be fairly likely they would be found liable. Therefore, the best option would likely be to give a moderate rebuttal since a high rebuttal would set the floor too high and jurors might perceive a low rebuttal as callous and cold-hearted. Conversely, with a mildly injured plaintiff, I hypothesized that the best strategy for the defense would be to focus all of their energy on contesting liability. A mild injury is generally less likely to lead to a liability verdict against the defendant than when the plaintiff is severely injured, so if the defense has the opportunity of winning on liability and avoiding damages altogether, then they should take it and avoid giving a specific rebuttal.

The findings were somewhat unexpected, and were in line with Jeri Kagel's (2010) conclusions in *The Jury Expert*. First, there was a remarkable lack of fusion, at least in terms of liability verdicts. While jurors reported that they considered liability-related items to some extent when making damages decisions and vice-versa, they self-reported that they considered the appropriate items (i.e. damages-related items when making their damages decision) to a greater degree. This proper division extended to liability verdicts, in which the jurors were no more likely to find against the defendant when the plaintiff was severely injured than when he was mildly injured.

Second, the only bad strategy to take when the plaintiff was mildly injured appeared to be providing a high rebuttal. The best strategy to take when the plaintiff was severely injured was providing a low or moderate rebuttal. We can draw a few conclusions from these findings. The first is that the defendant's damages rebuttal heavily anchored jurors' awards and the higher she set the rebuttal, the higher the damages awards tended to be. The second is that a providing a specific rebuttal did not hurt the defendant, especially when the plaintiff was severely injured. Perhaps, as Kagel (2010) mentioned, the jurors felt grateful that the defense eased them with their discomfort of awarding high damages by offering them a lower damages amount to consider. Also, when asked how they perceived the defendant, those who had been exposed to a specific rebuttal rated the defendant more positively than jurors who read about the defense attorney contesting liability and refusing to discuss damages. While these findings are surprising and offer good news for defense attorneys, there is perhaps a caveat. In all of the specific rebuttal conditions, the defense attorney said that she did not believe her client was liable and therefore she did not want to discuss damages, but she said that she could not always predict how jurors may decide and therefore she was going to discuss damages to avoid any disservice to her client. She then went on to say that the plaintiff's *ad damnum* was far too high before providing a lower recommendation of her own. It is likely this line of reasoning that the jurors responded to that convinced them that by discussing damages, she was not implicitly admitting liability. And by giving that lower counter-anchor to the plaintiff's *ad damnum*, the jurors had another (and likely more reasonable) figure to guide them in their judgments. As a result, many of the damage awards of those who ended up finding for the plaintiff were anchored by the defendant's rebuttal instead of the plaintiff's *ad damnum*.

Desire to compensate the plaintiff and sympathy for the plaintiff were each measured and were found to influence the effect of injury severity on damage awards. It was those specific feelings that led jurors to return higher damage awards to the more severely injured plaintiff. Thus, with the severely injured plaintiff compared to the mildly injured plaintiff, jurors felt more sympathy for the severely injured plaintiff and a stronger desire to compensate him. These positive feelings are what drove the higher damage awards for the severely injured plaintiff than the mildly injured plaintiff. Bornstein (1998) came to similar conclusions. Also, male jurors were more likely to find for the defendant on liability, whereas female jurors were more likely to find for the plaintiff. Although gender and other demographic characteristics are usually poor predictors of how a juror will decide (Greene & Bornstein, 2003), male jurors in this study appeared to be better for the defendant. This is

puzzling since the transcript involved a slip-and-fall case, which should be much more gender-neutral than a rape case or some other sexual assault case. Nonetheless, desire to compensate the plaintiff and general positive feelings towards the plaintiff mediated the effect of gender on liability verdicts.

From this study, a few recommendations can be offered to civil defense attorneys. First and foremost, jurors will not necessarily perceive a specific rebuttal as an admission of liability. In fact, providing a specific rebuttal tended to help the defendant, both in terms of how the jurors perceived the defendant and in keeping damage awards low, especially with the severely injured plaintiff when jurors were more accepting of the plaintiff's high *ad damnum*. But it is likely essential that the defense attorney offer her rationale for entertaining the idea of damages and providing a specific rebuttal. This would involve a discussion of how her client is not liable, but she would not be doing her job if she did not at least discuss damages. By doing this, it conveys to jurors that the defendant is not liable, but it also gives uncertain jurors a lower damages figure to consider opposite the plaintiff's higher recommendation.

The second conclusion is that the actual recommendation that the defendant provides is crucial in determining final damage awards. Since jurors generally lack confidence in their ability to come up with an appropriate damages award, they will often look to the attorneys for guidance. If (as in this study) the jurors do not feel comfortable adopting the high figure proposed by the plaintiff's attorney, they will be desperate for another figure to guide them in their decision. By providing a lower damages recommendation, the defense attorney can help guide jurors in their decision, ultimately resulting in a better outcome for the defense.

The third main conclusion from these results is that defense attorneys can engage certain mechanisms to affect liability verdicts and/or damage awards. Since desire to compensate the plaintiff and sympathy for the plaintiff tend to be factors driving pro-plaintiff verdicts and high damage awards, defense attorneys can do their best to curb these juror sentiments. Obviously, this must be done tactfully to avoid appearing ruthless, but drawing attention to the plaintiff's carelessness leading up to the accident, depersonalizing the plaintiff, or minimizing the accident's impact on the plaintiff's life all could reduce these pro-plaintiff sentiments.

The take-home message is quite similar to Jeri Kagel's (2010) recent conclusion. Do not be afraid to argue damages. Jurors will probably not view a discussion on damages by the defense as an implicit admission of liability, as long as it is done correctly. Instead of taking a defense rebuttal as an admission of liability, jurors may be grateful that the defense attorney has provided them with an alternative to the plaintiff's higher recommendation. If the jurors trust the defense attorney on her damage recommendation, then perhaps they will also trust her on her liability argument.

Matt Groebe, M.A. is a graduate doctoral student in social psychology at Miami (OH) University in Oxford, Ohio. His research interests are in the areas of juror and jury decision-making, small groups research, and other legal applications of social sciences research. He hopes to enter the field of trial consulting after obtaining his doctorate degree. In his spare time, he likes working out, playing with his dog Wrigley, and watching his beloved Chicago sports teams.

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Our Favorite Thing for September 2010!

This month's Favorite Thing provided by Wendy Saxon who specializes in defense of public entities in Los Angeles.

> "When I get the jury names, I go on the county website and locate public access to civil and criminal cases. Each search costs $1. Since this is public access, it is fair game to present to a judge. For example, I once found a felon, the judge excused him and we saved a peremptory. I was working for Department of Transportation. On the same case, I was able to pinpoint which jurors had multiple moving violations."

So search for the county website specific to your case and see what you can find!

Editor's Note

As you page through this issue, you'll see content on shadow juries, managing and mentoring Millennials, a review of the iJuror application for the iPad, recommendations on family law disputes, some research on damages presentation, thoughts on communication and gender of attorney, supplemental jury questionnaire items for Arab or Muslim parties in cases, and an interview with the trial consultants involved in the civil rights retrials featured in the new movie *Neshoba*. As always, our goal is to educate and inform and cause you to think. We do that through a combination of articles and a sprinkling of original research and technical pieces aimed at helping you keep up with the latest in trial advocacy and thought. We have two departures from trial advocacy in this issue--the interview elicited by the *Neshoba* movie release and the article on *Managing and Mentoring Millennials*.

We are proud of our history with civil rights and proud of our ASTC members who have worked to bring justice (albeit delayed). We're bringing you this interview with Andy Sheldon and Beth Bonora to show that pride and to highlight the contributions of these consultants. (And to encourage you to see the movie!) The Millennial piece is a follow-up to our piece in the July issue on what we really know about the Millennial generation. There has been a tremendous debate in the online community on the work ethic of the Millennial attorney. We are publishing this review of research on the Millennials at work and offering management/mentoring tactics to firms struggling with welcoming and retaining Millennial attorneys.

Read. Comment. Enjoy. Tell your friends and colleagues about The Jury Expert! And (ta-da!) watch for our very cool and way current web redesign coming at some point during the next month!

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