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# The Jury EXPERT

*The Art and Science of Litigation Advocacy*

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**Impact of Graphic Injury Photos on Liability & Non-economic Damage Awards**

*Are grisly photos of injuries more powerful? An experienced trial consultant studies the issue & makes recommendations.*

Page 1

**Civil Case Mediations: Observations & Conclusions**

*Sixty-two mediations are observed to ascertain what works (& what doesn't work) in mediation. Two experienced trial consultants react.*

Page 5

**Identifying Leaders**

*Jury selection is fraught with anxiety. An experienced trial consultant examines how you can identify the best leaders for your specific case.*

Page 12

**Hate Crimes & Racial Slurs**

*Can the 'N' word ever be used in commission of a crime that isn't a hate crime? Provocative findings are presented and two experienced trial consultants respond.*

Page 16

**Anthropomorphism in Technical Presentations**

*How do you humanize high tech information for jurors? An experienced graphics designer and trial consultant shows us how.*

Page 24

**Weapon Use & Gender of Juror**

*Does type of weapon & gender of juror make a difference? Two experienced trial consultants react.*

Page 29

**Alternative Cause Strategies in Product Liability**

*An experienced trial consultant examines the need for an affirmative defense in product liability cases.*

Page 43

## The Impact of Graphic Injury Photographs on Liability Verdicts and Non-Economic Damage Awards

by Bryan Edelman

Over the years, the use of graphic, and at times gruesome, visual imagery in the courtroom has become commonplace. In the criminal setting, particularly trials involving violent crime, prosecutors make every effort to put grisly photographs of the victim and crime scene in front of the jury. These photos are typically selected on the basis of their shock value in an effort to portray the horrific nature of the crime. From the prosecutor's perspective, the more abhorrent the photograph the more effective it becomes. In the civil arena, plaintiff attorneys attempt to enter into evidence photographs of their client's injuries. These photographs are often taken immediately after an accident and may be far removed from their client's current condition. Although the use of such imagery has become the norm, the prejudicial nature of this evidence continues to be a contested issue in courtrooms across America. Criminal defense attorneys routinely submit *motions in limine* to restrict or exclude crime scene photos on the grounds they put undue focus on the victim and generate sympathy. Civil defense attorneys submit similar motions, positing that such evidence, which may be relevant for determining damages, has an improper impact on jurors' assessments of liability. Under both circumstances, judges exercise their discretion and usually allow the jury to see some, if not all, of the images.

With the ever increasing availability of photographic evidence and the trend toward the admissibility of graphic visual images, it has become even more important to understand how these pictures influence jurors' verdicts. Little research has been conducted to address this important issue. What research has been completed suggests that graphic photographic evidence can have an improper effect in the criminal arena by influencing conviction rates (See Douglas, Lynn, & Ogloff, 1997; Bright & Goodman-Delahunty, 2006). The literature on the impact of vivid injury photographs in the civil setting suggests that there is a relationship between this evidence and research participants' damage awards (See Oliver & Griffitt, 1976, Whalen & Blanchard 1982).



In civil litigation, photographic images depicting the severity of an injury are submitted during the trial to purportedly help the jury assess economic (e.g., lost wages) and non-economic damages. Photos of a burned hand taken immediately after an accident may help a jury assess the pain and suffering associated with the injury. The application of this evidence is considered proper when used in this limited capacity. However, before a jury weighs damages, it must first find that the defendant was negligent and that this negligence caused injury to the plaintiff. Arguing jurors' improper use of injury photographs to determine liability may mean these images should be excluded under FRE 403. According to 403, relevant evidence is inadmissible if it is found to be unfairly prejudicial (emphasis added):

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The current study examines the proper and improper use of vivid injury photographs in a civil dispute where the evidence favors a defense verdict. We assessed the impact of injury photographs on research participants' liability, causation, and non-economic damages verdicts (i.e., pain and suffering awards). The study also answers a question of strategic value: Can a defendant mitigate the influence that injury images have on liability verdicts and damage awards by providing counter photographs depicting improvement in the plaintiff's condition?

#### *A Study of Impacts in a Product Liability Lawsuit*

The research combined three conditions including identical written trial stories embedded with neutral photographs. The fact pattern was developed from a lawsuit that was resolved during trial. The original litigation stemmed from an injury to an 11-month-old infant who received severe, instant third-degree burns to his hands after he put them in the path of steam emitted from an operating vaporizer. The plaintiff (the infant) sued the manufacturer of the vaporizer claiming that: 1) the product was defective and 2) the warning labels were insufficient. The defense addressed both of the plaintiff's claims and asserted a comparative negligence argument against the parents. The final version of the trial story was slightly and intentionally skewed in the defendant's favor.

Injury photographs--two submitted by the plaintiff and two by the defense --were chosen from the original nine images provided by counsel. The plaintiff photographs depicted the burns to the infant's hands taken at the hospital within hours of the accident. In contrast, the defense pictures were taken over a year after the incident, following several successful skin grafts. These photographs illustrated marked improvement from the initial injury.



All three versions of the trial story were identical in content and contained the same neutral photographs of the parties, the vaporizer, and other relevant visual aids. The control condition detailed the injuries from both the plaintiff's and defendant's perspective, but did not offer any images of the injury. The second condition incorporated the two photos taken immediately after the accident into the plaintiff's case-in-chief. Finally, the third condition included the plaintiff photos but also incorporated the post-recovery images in the defendant's damages argument. After reading the online trial story, research participants were provided with the relevant jury instructions and then answered the verdict questions.

Research participants were randomly selected by a web-based survey company. The sample was drawn from a list of volunteers who opted in to complete web surveys for compensation in the form of points. The entire exercise was

completed through written materials delivered through internet web access. The final sample comprised jury eligible participants from California, New York, Illinois, Texas, and Florida.

### *The Influence of Photographs On Juror Verdicts*

As predicted, the photographs had a significant effect on final verdicts. The majority (58%) of participants in the first condition, who did not view any of the graphic photographs, found in favor of the defense. However, research participants who saw the plaintiff's injury photographs were significantly more likely to render plaintiff verdicts than participants who did not view the photograph,  $\rho = .03$ . Fifty-one percent (51%) of participants in this condition resulted in plaintiff verdicts. Yet, the defense was able to counter the illegitimate impact of the plaintiff's photographs on liability verdicts. Sixty-percent of participants who saw both the plaintiff and defense photos found for the defense.

The plaintiff's photographs also had an impact on damage awards. The median non-economic damages award for research participants who viewed the plaintiff photographs was significantly higher than that of those in the no photographs condition,  $\rho = .02$ . The defense photographs did not attenuate the impact that the plaintiff photos had on non-economic damage awards.

### *Practical Implications of Injury Photographs in Civil Litigation*

The results from the present study indicate that injury photographs can and do have an improper effect on liability verdicts. Further, these photographs, which are ostensibly provided to assist in the assessment of damages, actually strengthen a somewhat weak plaintiff case. From a practical perspective, these findings have important implications. While injury photographs may be relevant for assessing damages, they also appear to spill over and contaminate questions on liability.

Research participants also improperly used photos proffered by the defense to determine liability. This finding suggests that the defendant may be able to mitigate the effects of graphic injury photos by offering photographs of its own. However, the improper use of counter photos does not justify or downplay the dangers posed by jurors using damages evidence to evaluate liability. Further, the post-surgery images submitted by the defense in this study illustrated a dramatic improvement in the plaintiff's condition. Such strong visual evidence is not always readily available to the defendant. Therefore, the defense may not be able to overcome the prejudicial impact that vivid injury photographs have on liability.

The results also suggest that plaintiff injury photographs have a significant, albeit proper, effect on non-economic damage awards. In contrast, defense photographs do not have an attenuating effect. This finding puts plaintiff counsel at a distinct advantage during the damages phase.

## Legal Remedies

There are several approaches that could be employed by the Court to limit the prejudicial or improper use graphic photographs. Under the most aggressive scenario, the Court could exclude all graphic injury images on the basis of FRE 403. In light of the current trend toward admissibility, this approach is not likely to be employed any time soon.

Under a second scenario, the Court could provide a clear limiting instruction before photographs are submitted to the jury and an additional instruction before deliberations begin. Although this is the more widely accepted remedy, limiting instructions do not appear to be effective. There is a significant body of research within the cognitive and social psychological literature showing that participants have a difficult time suppressing thoughts when told to do so (See Wegner, Schneider, Carter, III & White, 1987).

The third approach calls for the bifurcation of the liability and damages phases, where the jury would only hear damage arguments after making a finding of liability against the defendant. Upon the jury returning a plaintiff verdict, both parties would then submit evidence in support of their competing damages claims. Although defense counsel may continue to have difficulty overcoming the impact that graphic injury photographs have on jurors' damage awards, the improper use of such evidence to determine liability would be eliminated.

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## On civility, racial slurs, graphic pictures & anthropomorphism

Recent days have been filled with news about (very public) rude and/or disrespectful behavior from athletes, celebrities, and politicians. Pundits and pollsters are telling us what it means about our society and about the deepening political divisions in our country. Media outlets are covering the frenzy intently and 'civility' is being talked about as a behavior sorely lacking in our society today. It does make us stop and think about how each of us is responsible for our own behavior and for treating each other with respect.

Our goal with *The Jury Expert* is not only to help you increase your trial skills but also to offer information that helps you pause and ponder from time to time. This issue features diverse and provocative pieces that we hope will make you stop and think about hate crimes, racial slurs, graphic injury photographs, and assault weapons as self-defense tools.

In addition, we have terrific pieces on the contribution of the mediator to the negotiation process; how to identify leaders in the jury pool; the benefits of humanizing complex evidence through anthropomorphism in technical presentations; considering the need for alternative cause strategies in product liability litigation; and a primer of sorts, disguised as our September 2009 Favorite Thing.

Read us cover to cover (or web page to web page)! Tell your friends and colleagues about us. Help *The Jury Expert* travel to offices in venues where we've never been before. And, as always, if you have topics you'd like addressed in upcoming issues, let me know.

--- *Rita R. Handrich, Ph.D.*



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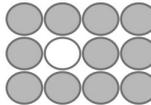
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