

# ADVOCATE

OCTOBER 2003

## **Anger and Sympathy: How Jurors Respond to Plaintiff Themes**

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As the Supreme Court's April 7, 2003 ruling on punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. \_\_ (2003) (*Campbell*) trickles down into the Federal and Municipal courts, savvy plaintiff attorneys are expected to adjust their trial strategies significantly. Based on the Supreme Court's suggestion that punitive damages not exceed a single digit ratio of the compensatory damages award, it will become increasingly important for plaintiffs' attorneys to devote more energy to arguing for increased compensatory damages at trial.

On the surface, this pragmatic shift in trial strategy may appear to be a relatively simple shell game, in which dollar amounts are simply shifted from one category to another. If the facts and issues of the wrongful death or bad faith case remain the same, it seems reasonable to assume that jurors will remain in agreement with the plaintiff's arguments and continue to award large damages in whichever category they are asked, whether that be compensatory next year or punitive last year. But although the facts and issues of cases have not changed, a changing trial strategy toward compensatory damages, and away from punitives would represent a radical shift in the underlying psychology used by jurors to determine damages and verdicts.

In cases in which the defendants' actions were particularly reprehensible, attorneys could historically count on jurors' anger to increase overall damage awards through imposition of punitive damages. As punitive damages may become more limited, however, arguments must appeal more to jurors' sympathy in order to augment compensatory damages.

There is an enormous psychological distinction between anger and sympathy, especially as it applies to human decision-making and, most importantly, the rationale used by jurors to establish liability, assess plaintiffs' damages and defendants' conduct, and determine compensation. This difference will become increasingly crucial as plaintiffs' attorneys strive to augment shrinking punitive damages with higher compensatory damages, because their trial strategy will need to shift away from provoking anger toward greedy or negligent defendants, and focus more on arousing sympathy for physically, emotionally or financially damaged plaintiffs.

Cultivating anger toward the defendant and sympathy for the plaintiff are certainly not mutually exclusive, but research on decision-making and the deliberation process suggests that individual jurors have a tendency to conceptualize the case and base damage awards on primarily one or the other of these overriding themes. Based on differences in attitudes and biases, some jurors are more receptive to attacks on a defendant's wrongdoing while others are more able to empathize with plaintiff suffering.

In addition, the choice of a plaintiff theme strongly influences the issues on which jurors focus and colors the way jurors interpret incoming information in trial. It is therefore crucial for attorneys to understand the psychological distinctions between juror anger and juror sympathy in order to ensure that their case is presented consistently with their chosen theme.

### **Choices in Theme**

When they attempt to determine the presence of and extent of liability in trial, jurors are given two questions to answer. Did the plaintiff suffer damages in some form? Did the defendant act maliciously, negligently, or dangerously? Research on jury decision-making suggests that in many ways, these two decision-making processes are wholly independent.

Any experienced attorney can probably name a case in which a jury awarded damages to a suffering plaintiff even when the defendant's responsibility for the damage was unclear, just as there are cases in which juries award large punitive damages against unlikable defendants even when actual damages to the plaintiff are unclear. Curious jury decisions like these happen because jurors tend to focus on only one of two issues in determining liability: *sympathy* toward the plaintiff or *anger* toward the defendant. Which issue they focus on depends not only on the attitudes and personalities of the jurors themselves but also on the likeability of the litigants and the themes and issues emphasized by the attorneys.

A plaintiff's case designed to attack the negligent, greedy, and/or cruel conduct of the defendant is obviously best suited to provoke anger among jurors and to justify the awarding of punitive damages. Such a trial strategy is in stark contrast to a case designed to illustrate the physical, emotional, and/or financial harm suffered by the plaintiff, the latter strategy being best suited to arouse sympathy among jurors and often to put a number on compensatory damages that may be as indefinite as the value of a life or perhaps a diminished quality of life.

In any trial, the choice of theme emphasized by the plaintiff, especially during opening statements and closing arguments, will have a tremendous impact on how jurors view the case throughout trial, which issues they consider important, which arguments and evidence they find the most relevant, and ultimately how jurors rationalize their verdict and damage award.

On the one hand, a compelling plaintiff's opening that emphasizes a defendant's wrongdoing and thus sets the tone for juror anger will likely obscure issues dealing with the extent of the plaintiff's harm, suffering, and damages to some extent. If effective, a theme tapping into juror anger will focus jurors on the conduct of the defendant. Jurors will want to see and hear evidence confirming defendant's wrongdoing, and will be scrutinizing the defendant's credibility and motivations constantly throughout the trial.

Although jurors will take the extent of the plaintiff's damage claims into account, economic and punitive damages will rise and fall on perceptions of the defendant's conduct and likeability. The success of the plaintiff's case will depend critically on the attorney's ability to demonstrate malice, negligence, indifference, or all of the above.

On the other hand, a compelling plaintiff's opening that emphasizes plaintiff's suffering and thus sets the tone for juror sympathy will likely obscure issues dealing with the extent of the defendant's negligence and intentional harm. If effective, a theme tapping into juror sympathy will focus jurors on the plight of the plaintiff.

In this situation, jurors will gauge the extent to which they empathize with the plaintiff, analyzing not only how physically, emotionally, or financially hurt the plaintiff is but also how closely they identify with the litigants and how likely they can imagine being forced into a similar situation, making similar decisions, and being similarly affected. Jurors will want to see and hear evidence outlining the choices presented to the plaintiff, the decisions made, and the motivations that the plaintiff had in making these decisions and ultimately in suing the defendant.

Whereas a plaintiff theme emphasizing defendant wrongdoing and juror anger would have made the story of the plaintiff less significant to jurors, the sympathy theme would make the jurors very interested in hearing testimony from friends, family, or experts on how the plaintiff's life has been affected. Consequently, the motivations and perceptions of the defendant are obscured and are less relevant to jurors in a sympathy-driven argument.

## **Juror Profiles**

Although the way in which a case is framed in opening statements has a tremendous influence on the way that jurors view the case and the issues they find most relevant in assigning blame, assessing defendants' conduct, and awarding damages, the individual jurors are very different in the ways that they view cases. Due to the *Campbell* ruling and the new challenges in influencing jurors, plaintiffs' attorneys in punitive damages cases will need to devote more attention than ever to jury selection.

Based on differences in attitudes, biases, and life experiences, individual jurors will respond very differently to plaintiff themes; therefore, it is a crucial task for the attorney to understand which jurors are better suited to anger, which to sympathy, and which will be more open to arguments that enhance compensatory damages awards.

While plaintiffs' attorneys can still rely on anger-provoking arguments in order to convince a jury that punitive damages are warranted, sympathetic jurors will be needed more than ever to secure target compensatories and to provide a basis for ratio-determined punitive damages caps. Plaintiffs' attorneys will need to identify not only jurors who can award economic damages, such as lost earnings or medical expenses, but who also are inclined to award reparation for non-economic damages such as pain and suffering, loss of consortium, and emotional distress.

While particular life experiences are central to how jurors interpret case issues and rationalize verdicts and damage awards, there are certain generalizations that can be made on the basis of personality type. These generalizations can be a starting point during jury selection when distinguishing pro-plaintiff and pro-defense jurors and discovering which jurors are likely to react emotionally—with anger or sympathy—or intellectually, with skepticism or a lack of compassion.

In seeking the jurors most likely to respond to plaintiff's sympathy issues and award large compensatory damages, socially oriented individuals, especially those employed in caring and nurturing roles such as school teachers, social workers, pediatricians, therapists, or counselors, are frequently the most sympathetic jurors. They tend to react very strongly when a plaintiff's rights, feelings, and physical wellbeing are at issue.

Social jurors tend to empathize with plaintiffs and award higher compensatory damages; however, they are more forgiving than other personality types and are less likely to want to punish a defendant unless that defendant's conduct was truly outrageous. Artistic and imaginative personality types also tend to be very sympathetic towards plaintiffs, often because these jurors tend to be anti-authoritarian and are more suspicious and less trusting of powerful defendants. They tend to get angry and often desire to send a message through punitive damages.

Juror types characterized by being practical and relatively unimaginative, including those in blue collar occupations in the manual, technical, skilled or athletic fields, are by far the least comfortable understanding, justifying, and awarding non-economic damages. These realistic jurors tend to understand and award clear economic damages such as lost income or costs of repair but have difficulty putting a number on ambiguous damages such as emotional pain or psychological suffering. Depending upon the individual, they may leave the determination of damages largely up to the other jurors or may try to find analogies in their own lives to determine what a realistic figure might be. During voir dire, it is particularly important to discover what types of experiences jurors have had that may influence their decision-making about damages in your case.

Investigative or intellectual personality types are more critical thinkers, and often make the most skeptical jurors. Authoritarians and more conventional personality types, those who tend to be very explicit, ordered, and systematic in their own lives and occupations, tend to be very conservative. They react more positively to authority figures and expert witnesses and often reject appeals to sympathy.

Finally, younger jurors tend to be more cynical, less trusting, and more self-interested than older jurors. They tend to believe strongly in personal responsibility and tend to dismiss victimization rhetoric on the part of plaintiffs. In general, they don't respond as sympathetically to information about victims' family lives and personal struggles as older jurors.

## **Conclusions**

Recent trends in judicial downsizing of large punitive damage awards, combined with the *Campbell* ruling, seem certain to place an invisible cap on consumer lawsuits, especially in cases with little justification for compensatory damages. Whipping the jury into a fury over egregious conduct by the defendant is no longer a viable option in cases where actual damages suffered by the plaintiffs are minimal.

Instead, plaintiff attorneys must be ready to demonstrate actual harm, even when that harm is intangible like pain and suffering. This may be challenging in many cases in which outrageous defendant conduct has caused less-than-outrageous harm to the plaintiff. In addition, the fact that many types of jurors are far less comfortable feeling sympathy and far more comfortable punishing irresponsibility will make jury selection even more crucial.

In adapting to the changing legal environment following *Campbell*, plaintiff attorneys are advised to not only emphasize plaintiff suffering to justify and put a value on ambiguous compensatory damages, but also to better understand the types of jurors who are prone to empathy and who will identify with their client and their client's unique situation.

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