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### **September 2014 Jury Tip: "Shaping verdicts using your jurors' imaginations"**

Imagine a world in which jurors decided lawsuits and criminal trials using only the concrete facts and evidence before them, without speculation, suspicion, skepticism, reasonable (and unreasonable) assumptions... in short, without somehow using their imaginations to shape how they view the case. Does that idea appeal to you? If so, it's with my deepest sympathy that I inform you that, for better or worse, this world is wholly imaginary. In the real world, jurors use the facts in trial as a jumping off point... and fill in the rest with their imaginations: by speculating, by guessing, and by imagining what must have happened, what the litigants could have or should have done, and what it must have been like for the litigants to deal with what happened.

The jury instructions won't fix this "problem." Nothing a judge can order your jurors to do will stop them from filtering the facts through their imaginations. Lecturing to your jurors during voir dire about their duty to decide cases based only on the facts and evidence won't stifle their imaginations in the slightest. Even when your jurors try their best to somehow "set aside" their prior knowledge and attitudes, to avoid guesswork or speculation, they will inevitably use their imaginations to help decide cases, sometimes consciously but always subconsciously. The mountain of psychological research over the past 50 years is impossible to ignore. And if you've ever seen a mock jury deliberate, or talked to jurors about their verdict after a trial, you will undoubtedly have found that jurors use personal anecdotes, make up wild assumptions, turn those assumptions into theories they become convinced are facts, and use their imaginations in deciding cases and civil damages.

So don't try to stop them or waste time trying to stifle your jurors' imaginations. Instead, recognize the persuasive power of your jurors' imaginations, because a juror's imagination is more powerful than what any lawyer or witness can say. And take your jurors' imaginations into account when you select a jury and persuade your jurors during trial. Your jurors' imaginations aren't unpredictable, so you don't need a crystal ball to identify in jury selection which jurors will probably imagine the worst (and which jurors will likely imagine the best) for you when given an opportunity to speculate. So let's talk about one important way to leverage your jurors' imaginations: in jury selection.

Jurors use their imaginations during trial in a number of ways, but perhaps the most interesting and influential is the impact of imagination on a plaintiff's perceived harms and the juror's assessment of the resulting damages. Simply put, whenever a juror hears about a plaintiff's harms, the juror cannot help but imagine what that harm "must have felt like." How painful is a broken leg? How traumatic to lose your spouse in a car crash? How devastating to be the victim of workplace harassment or discrimination? A juror can never know how horrific or uncomfortable or tolerable a plaintiff's injuries, pain, trauma, or emotional distress felt to the plaintiff, so the juror can't help but imagine for themselves. And this is one powerful reason why different jurors have different ideas about how horrible or not-so-horrible a plaintiff's harms must have been: because each

juror's imagination is so different. Even lawsuits outside of personal injury engage your jurors' imaginations; how successful would a stolen or sabotaged business or invention or product or piece of intellectual property have been?

So let me make an important, perhaps surprising point about predicting how a juror's imagination might influence their assessment of damages: in my years of jury consulting and jury research, I have consistently found that jurors are highly persuaded by how "common" a plaintiff's harms or defendant's conduct are. Jurors never judge a plaintiff's harms in a vacuum, by assessing only the individual plaintiff. Instead, jurors are heavily influenced by how many others have experienced similar harms. So when jurors get the sense (through their assumptions and imagination) that a particular plaintiff has experienced an uncommonly bad harm, their imaginations run wild and they tend to magnify their horror and size of the damages. And yet when jurors see a plaintiff who has been harmed in an objectively horrific but seemingly "common" way-- in the sense that the juror has the impression that many people suffer the same harms-- their horror is minimized, and they tend to award far less damages (especially non-economic) than they would have for a novel, surprising harm. This phenomenon has a lot to do with desensitization toward harms and injuries they've seen and heard about before, even terrible things like debilitating bad backs or fetal miscarriages or careers ruined by a wrongful layoff. Anything the jurors get the sense "happens to a lot of people" is for better or worse (depending on whether you're on the plaintiff or defense) minimized because your jurors' imaginations don't run wild.

There are two applications to this phenomenon. First, a skilled plaintiff's lawyer has a terrific opportunity to leverage the jury's imagination and maximize horror and damages by presenting the plaintiff's harms as unusual and uncommonly bad. For the same reason, a skilled defense lawyer can minimize shock and damages by showing your jurors that the plaintiff's harms or injuries are fairly common, or more common than they might appear to be. One example that comes to mind is a birth injury case involving exposure to toxic chemicals that sounded mysterious and scary to most jurors. In that case, the plaintiff's attorney had a great opportunity to present the toxicity injuries as unusual and scary, while the defense attorney had a great opportunity to show the jurors that the plaintiff's injuries were identical to those suffered by any baby born prematurely... which is a common occurrence that most jurors find less terrifying and more an acceptable, inevitable risk of pregnancy. And no matter how objectively toxic the chemicals in that case were, it makes a huge difference to jurors how "commonplace" the chemicals were; when jurors hear that those industrial chemicals were found in nail polish or paint, their shock and damages tend to shrink... even though those facts have nothing to do with the danger of the chemicals or scope of plaintiff's injuries.

Second, be aware that jurors who have personally experienced what the plaintiff has gone through will not need to imagine, but those who haven't had first-hand experience will use nothing but their imaginations to step into the plaintiff's shoes and imagine what it must have been like. For most lawyers, an especially counter-intuitive reality is that most jurors who have experienced what the plaintiff experienced are not good for the plaintiff, especially when it comes to damages. A disabled juror is not likely to "identify and

sympathize" with a disabled plaintiff in an injury case. A juror who has lost a loved one tragically does not award more in damages to a similarly-situated plaintiff in a wrongful death case; in fact, they usually award less, and imagination is the reason why. The reason usually has nothing to do with the juror thinking "I didn't get any money for what happened to me, so they shouldn't get money either." I rarely hear or observe that kind of thinking, although I sometimes do. Much more common is the phenomenon that a juror who has experienced similar harms can imagine what it was like to suffer the same harms, and they tend to have learned that "life goes on" and that it's not unimaginably bad. Jurors with similar experiences may sympathize, but they minimize emotional distress, pain and suffering, and even the economic damages when a plaintiff is claiming to be financially or physically or emotionally devastated.

Just the opposite happens with jurors who have never experienced the trauma the plaintiff went through. When I'm working on the plaintiff's side, I want a jury full of happy, healthy jurors who cannot imagine what it would be like to suffer... because when they are assessing damages, they WILL imagine, their imaginations will run wild, and they will maximize damages. When I'm working on the defense side, I don't mind keeping a juror who has suffered something similar, because only that juror can tell the other jurors that "it's not that bad."

So the next time you're selecting a jury and trying your case, imagine a world in which your jurors will use their personal experiences, and the examples of situations they've seen or heard, to judge how shocking or pedestrian a plaintiff's harms may be, even more than what they hear from the witness stand... because once your jurors start making decisions and deliberating, that will become a reality.

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