5055 Oakwood Avenue
La Canada, CA 91011
Los Angeles and Nationwide

HARRY PLOTKIN
JURY CONSULTANT

(626) 975-4457
YourNextJury.com
harry@yournextjury.com

**May 2017 Jury Tip: "Make it clear why your case is different"**

Cognitive psychologists have been demonstrating for years that our brains are lazy… whenever we can take a mental short-cut, we do. We make first impressions, we make assumptions, we stereotype… all without even trying. We naturally try to figure things out as early as possible, and then we get especially lazy when we think we've figured something out. And no matter how hard your judge tries to keep the reading of the preliminary jury instructions interesting, the reality is that jurors struggle to avoid making snap decisions when they're deciding cases. When a friend of mine interviewed his jurors recently after a terrific verdict of ours, they told him that they decided the case after the first four witnesses. And the trial lasted 6 weeks.

To me, one of the most troubling short-cuts jurors take is something I'm going to call "preconception bias." I'll explain it like this: even when your jurors don't make an early decision about who should win the trial, the jurors often make assumptions that your case fits neatly into a predictable box. Jurors expect that they won't be surprised. "Oh, this is just another one of those car crash lawsuits where the crash wasn't huge but the victim is saying he was seriously hurt. Oh, this is just another one of those employment lawsuits where a person who doesn't want to work says they have a disability. Oh, this is just another one of those lawsuits where a big corporation ripped off the little guy." Once your jurors create a lazy, first impression of your case, it gets sticky… and they don't search hard to figure out if your case defies their expectations.

That's why it's so crucial to emphasize, emphasize, and over-emphasize how your case is different from the usual lawsuit in its category. Build credibility by acknowledging what your jurors' may expect to see… then tell them how your case is different. Savvy plaintiff lawyers are smart to tell jurors something like "I know there are a lot of frivolous cases out there, but this is different"… or for savvy defense lawyers to say "I know there are a lot of irresponsible companies these days, but my client is different." But agreeing with your jurors' biases only gives you a little credibility; to convince them to throw out their first impression of your case and stop stereotyping it, you need to frame your case around a critical difference.

Let's illustrate with a few examples. Just another car crash lawsuit? When jurors hear about a car crash that wasn't catastrophic-looking or don't see a plaintiff in a wheelchair, many take the short-cut and assume that the permanent injuries must either be minor or exaggerated. Even though the physics and forces and biology of every crash and victim are different, jurors don't look hard for differences. Instead, they've seen or heard about people walking away from big crashes without serious injuries, seen or heard (or experienced themselves) people healing up quickly from medium-sized crashes, so they are quick to assume that someone claiming a surprisingly bad injury that defies their expectations of the crash details must be exaggerating. So on the plaintiff side, you have to frame your whole case around a unique DIFFERENCE. In one trial like the one I've

described, I advised my client to build around the fact that "unlike most crashes, where the victims are at least protected by a seatbelt and airbags, the plaintiff in this crash didn't have the protection of a seatbelt" (and I should note: not by his own fault, he was legally parked). In another, I had my client stress that "unlike most crashes, this plaintiff was driving a motorcycle, so he didn't have the protection of a seatbelt or airbags or crumple zones or auto body around him; his body slammed directly into the asphalt."

Let's discuss the "oh, just another person who doesn't want to work saying they have a disability." When jurors hear "disability," many expect to see either someone who is paralyzed or a liar. As soon as most jurors hear "disability" and "medical restrictions," their instinct is to assume "oh, I've seen this before, they're lazy, they just don't want to work." So many jurors have seen co-workers milking the system, or using a medical restriction to get special treatment, or know someone who claimed to be disabled but could have worked. On the plaintiff's side, you need to quickly re-frame the case and point out a huge difference. In one recent disability discrimination trial of mine, we started framing in voir dire by asking:

How many of you feel that anyone with a medical condition or injury who is capable of working, but instead gets paid disability pay and doesn't work, is being careless and irresponsible? How many of you know someone like that? Upsetting, right? That brings up an interesting point: when we use the word "disability," does everyone here understand the difference between an employee with a disability that can still keep working with a little help called an "accommodation" and an employee who says they're "disabled" and can't work? Does everyone here understand that the plaintiff in this lawsuit is not saying she's disabled, just that she has a disability that requires a little help to keep working?

We used our jurors' bigger bias—people who claim to be disabled from working at all—to distinguish our case and show jurors that "this is someone who has medical problems but WANTS to keep working… but their company wouldn't let them!

I did the same thing in another case; we talked to jurors about how much they disliked employees taking excessive medical leaves to distinguish the fact that our plaintiff was incredibly responsible: she wanted to continue working (without a medical leave) through chemotherapy… and her company FIRED her because it didn't want to accommodate her minor restrictions.

And of course, defendants are no less immune to preconception bias. There are plenty of kinds of lawsuits that tempt jurors to automatically think "oh, just another lawsuit where a big, unethical corporation ripped off the little guy," so defense counsel needs to be proactive about pointing out a key difference in your case to open your jurors' minds.

Next time you're preparing to go to trial, do yourself a favor: be brutally honest with yourself about your jurors' preconceptions about your case. Assume that they're going to try to stereotype your client and your case. Jurors don't start trials open-minded; you have to earn it. So work hard to identify a key difference that will surprise them and compel them to pay closer attention to your case… and give it the unique attention it deserved in the first place.