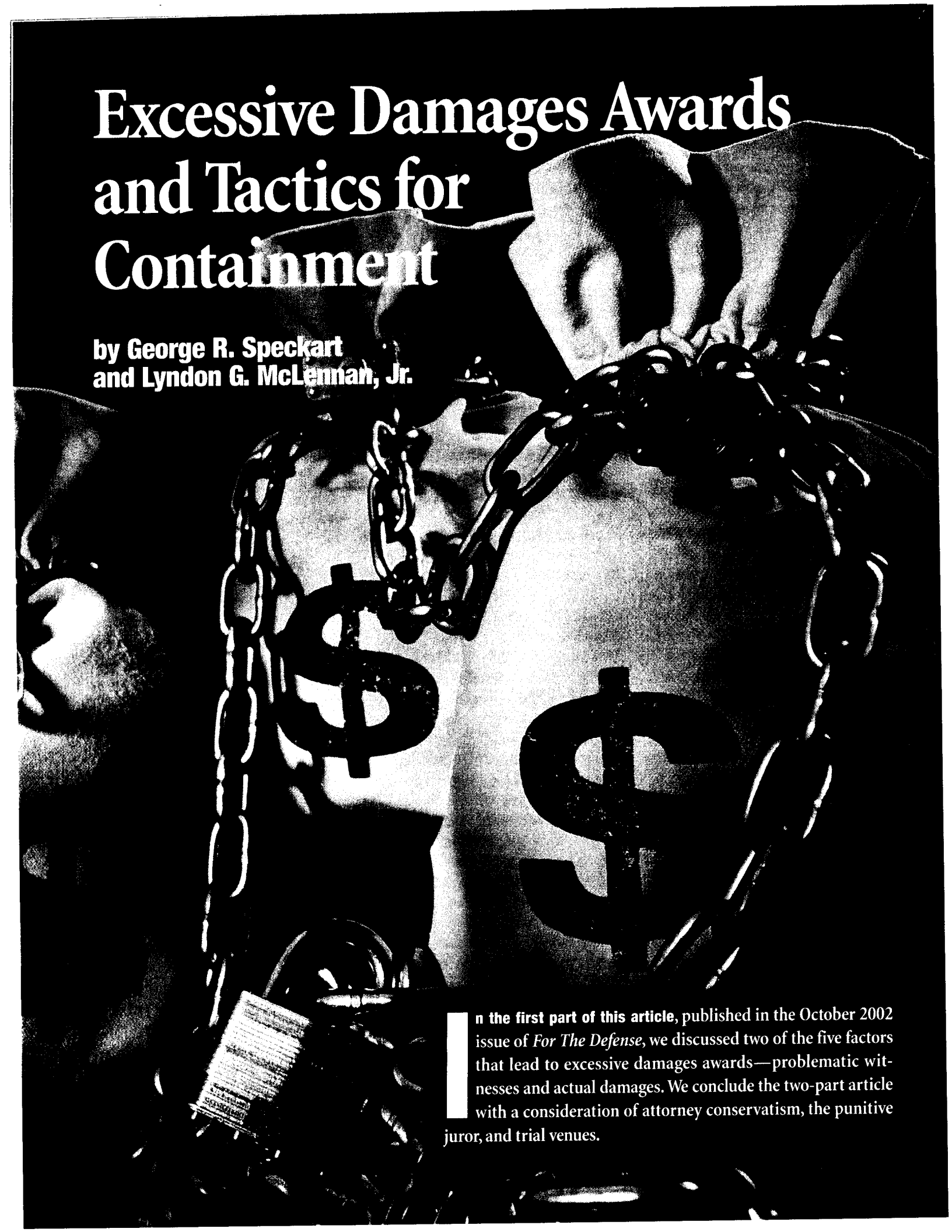


Excessive Damages Awards and Tactics for Containment

by George R. Speckart
and Lyndon G. McLennan, Jr.



In the first part of this article, published in the October 2002 issue of *For The Defense*, we discussed two of the five factors that lead to excessive damages awards—problematic witnesses and actual damages. We conclude the two-part article with a consideration of attorney conservatism, the punitive juror, and trial venues.

Defense Attorney Conservatism

The topic of attorney performance is a broad one that encompasses many areas, including preparation issues. In addition to the deposition problems mentioned in the first part of this article, failure to prepare adequately can jeopardize the outcome of a trial. Preparation issues relate to discovery, production of creative graphics and visual exhibits, development of juror profiles and a supplemental juror questionnaire, and many other matters.

In this section, the authors will deal with the fact that too many defense lawyers are overly conservative in their approach to litigation, and less aggressive than their plaintiffs' counterparts, an attitude and performance that sometimes works to the detriment of the defense attorney.

Plaintiffs' attorneys have become more and more creative at stretching courtroom boundaries and artfully "crossing the line" on the courtroom floor to win the hearts and minds of the jury. They have also become more adept at exploiting jurors' inability to comprehend numbers like "a billion," and have innocuous ways to characterize such numbers as suitable punitive damages awards by portraying them as "just a week's pay for this corporation." In addition, plaintiffs' attorneys appear to understand the implications of research demonstrating that the more they ask for, the more they will get—and they readily capitalize on this phenomenon. See Sunstein, Hastie, Payne, Schkade & Viscusi, *Punitive Damages: How Juries Decide* (U. of Chicago Press 2002).

The scope of this article is limited to actual

jury trial outcomes, and the inflated damages that have recently been associated with them. Appellate issues are not considered here. From the vantage point of the courtroom floor, a distinct impression emerges that plaintiffs' attorneys are more likely than defense attorneys to bend the rules in their zeal to sway the jury. The result has been a number of memorable jury verdicts in which plaintiffs' attorneys have forcefully worked their way toward enormous jury damage awards.

Observation of plaintiff and defense litigators reveals distinct differences in how they are motivated. Plaintiffs' attorneys are not trying to protect a client relationship. They are simply trying to win. They know that after the case, their client will be gone. In addition, plaintiffs' attorneys may be more interested in achieving fame (or, perhaps more appropriately, notoriety) and may not be as concerned as to whether an award will "stick." As a result, on the courtroom floor, they seem to continuously push the envelope by inserting arguments into opening statements, in speaking objections, and during cross-examination of witnesses. By the time actual closing arguments are presented, the plaintiff's lawyer needs merely to expand and reinforce the arguments that the jury has already heard for weeks throughout the trial.

Defense attorneys seem to be more conservative in their courtroom performance. More than plaintiffs' lawyers, they have a focus on protecting the record for appeal, and a comparatively lesser emphasis on winning the approval of the jury at trial. Defense attorneys may be encumbered by a myriad of political situations and extraneous considerations, including competition among the firm members or other law firms, relationships with corporate counsel, and maintaining the corporate client's loyalty to the

firm. While it is not suggested that these considerations are trivial, it is suggested that they can compromise the ability to fight effectively against more nimble and aggressive opposing counsel in the courtroom jungle.

Many defense litigators save their argumentative material for the end of trial, during "actual" closing arguments. However, at this point in the trial, jurors may have already made up their minds. In many cases, defense counsel may overestimate the size of their "window of opportunity" for persuasion, thinking that, if closing arguments are sufficiently compelling, they can wrest the case from the jaws of disaster at the end of trial. Research clearly demonstrates, however, that jurors have already made up their minds at this point, and almost never change their minds during closing argument.

Defense attorneys are frequently more interested on winning over the long haul. Thus, while plaintiffs' attorneys may try to win "here and now," defense attorneys may be more concerned with the "win for all purposes." They may place extra effort on winning motions, such as for directed verdict and the like. Moreover, some cases cannot be won except at the appellate level. However, there is also a level of conservatism among many defense teams that extends beyond long-term strategic considerations and that severely compromises efforts to persuade a jury in the heat of battle.

A few noteworthy examples of overly conservative courtroom performance by defense lawyers that can jeopardize success at trial are presented here.

- In a fraud and breach of contract case, pre-trial research had indicated a strong antipathy in the venue between many African-American women and key defense witnesses. As a result, the defense team was advised during jury selection to use peremptory challenges on two particularly vociferous African-American women. Defense counsel declined, citing concern over a *Batson* challenge (*Batson v. Kentucky*, 476 U.S. 79 (1986)) and political "correctness" (the judge was also Hispanic). No African-Americans were stricken by the defense in this case. During deliberations, these two women led the charge against the defendant, in which



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hundreds of millions of dollars were awarded by the jury.

- In a trade secrets and misappropriation case, a corporate plaintiff was suing two individuals. In this trial, the roles of the attorneys were reversed: The plaintiff corporation was represented by attorneys who normally handled defense litigation, while the individual defendants were represented by lawyers who otherwise handled only plaintiffs' lawsuits.

The corporation's lawyers were advised to provide a lengthy opening statement (well in excess of two hours) at the outset of trial. Lead trial counsel responded to this suggestion by declaring, "I can't do that—the judge won't let me." His subsequent opening lasted about one hundred minutes. Opposing counsel (normally plaintiffs' attorneys) subsequently gave an opening statement that lasted for two days. The judge simply watched while the corporation's case was buried in the avalanche. During the remainder of the seven-week trial, the corporation's attorneys (again, normally defense litigators) were never able to gain control of the trial, and ultimately lost the case.

- In a toxic substances case involving a gas processing plant, the defense team was advised to acquire photographic evidence in the locale of the plaintiffs' homes in order to show the jury the considerable distance between the homes and the plant. The defense team said: "We can't do that. Mrs. Wilkinson (one of the plaintiffs) is a maniac. She will see us because she is out there every day checking on who comes around." The defense team expressed concern that she would report to the media and others that "people from the gas company" were out there "snooping around." As a result, the jury never saw pictures showing how far the homes were from the plant.

What happened in these cases? In the first example, defense counsel indicated concern at the time over a potential *Batson* challenge and whether they would appear to be "politically incorrect." Instead of focusing on the jury—who they are, what they are going to think—the defense team focused on legal issues and the appearance of propri-

ety. Even if the *Batson* challenge had been won by the plaintiffs (an unlikely outcome when a juror questionnaire is used, as in this case), the result would have simply been a re-seating of the stricken juror(s).

In the second instance, the corporation's attorneys attempted to comply with what they anticipated to be the court's reaction to a lengthy opening. They thought they knew where the line was, but didn't—because they never crossed it. The defense (again, nor-

■ **Too many defense lawyers are overly conservative in their approach to litigation, and less aggressive than their plaintiffs' counterparts.**

mally plaintiffs' lawyers) decided to push the envelope and take whatever they could. The difference in these two approaches determined the entire complexion of the trial, and drove the ultimate jury verdict in favor of the team that was willing to take risks.

In the third example, the jury was never able to appreciate the considerable distances between the plaintiffs' homes and the gas plant, ultimately because of the trial team's fear that one of the plaintiffs would contact the media if photographs were taken near their homes. Yet the defendant would have been perfectly justified in obtaining this documentary evidence—after all, it had been sued, and the distance between the homes and the plant was a pivotal issue in the case. Risk-reward or cost-benefit considerations clearly point to the conclusion that there would have been more benefit for the jury to see the photographic evidence than harm arising from the local newspaper reporting that someone in the area was taking pictures.

These three actual case scenarios were purposefully chosen to illustrate the principle that defense attorneys often "carry their conservatism with them" into areas that are

unlikely to affect an appellate review of the case. But, every jury trial is like a chess game or a sport, where the best defense is very frequently a good offense. Many other examples could be cited here, but the key point is that a conservative mindset can create a serious handicap when it comes to persuasion of the jury. As Wayne Gretzky stated, "You miss one hundred percent of the shots you don't take." Opportunities for persuasion are routinely left on the table by defense attorneys—opportunities that plaintiffs' attorneys are typically less likely to overlook.

In a jury trial, on the courtroom floor, you must be aggressive; do not be wholly focused on legal niceties. Risks in strategic decisions should be assessed primarily on the basis of their effects on the jurors. When legal ramifications dictate procedural or substantive decisions made by litigators in front of a jury, the result can render a trial team unable to navigate effectively and strike decisively in the courtroom jungle. More effective criteria for strategic decisions would be, "Will this influence the jury in a favorable manner?" and, "Can I get away with it without creating any permanent damage?"

Again, it is acknowledged that preservation of issues for appeal can and should control courtroom behavior in some instances. Nonetheless, from the authors' broad experience over 20 years in dozens of venues, a consistent trend becomes apparent: the counsel team that is willing to bend the rules is more likely to win the jury verdict. The team that is the most cautious, operating from a more legalistic mental framework, is at a tactical disadvantage from the standpoint of jury persuasion.

Many defense litigators approach a jury trial well armed for a legal battle, fully stocked with case law, briefs, motions, documents, and exhibits. However, once the case reaches a jury, the trial attorney is often faced with a situation that has more in common with a knife fight. The trial lawyer who is better prepared for this reality is likely to be the last man or woman standing when the jury renders its decision.

The Punitive Juror

The amount of pre-trial effort, preparation and thought that litigators devote to jury

selection typically pales in comparison to the amount devoted to other trial preparation activities. Yet the importance of avoiding the wrong people in the jury box is difficult to overestimate. One or two intractable jurors who are adversely predisposed can persuade a jury to award catastrophic damage awards.

Research on punitive damages shows that, instead of moderating the amounts awarded, the jury deliberation process produces a striking "severity shift" toward ever-higher awards. See Sunstein, *et al.*, *Punitive Damages: How Juries Decide*. This severity shift is frequently instigated by a small number of extreme jurors in the group. The purpose of this section of the article is to investigate the psychological make-up of this special class of jurors, and to provide some basic methods for identifying them so that they can be eliminated during *voir dire*.

Perhaps the most dangerous juror is the "stealth" juror, that is, the venire member who professes neutrality while concealing bias. See Bodaken & Speckart, "To Down a Stealth Juror, Strike First," *National Law Journal*, September 23, 1996. The stealth juror is most commonly found in high-profile cases, or cases that are well-publicized through considerable grass-roots involvement in a community. These jurors have an explicit agenda, generated prior to the trial itself, that includes punitive motives against the defendant.

Stealth jurors are usually revealed by discrepancies between in-court questioning during oral *voir dire* and prior supplemental juror questionnaire responses. These individuals are usually taken by surprise by the questionnaire, and have not typically planned their "assault" carefully enough to avoid tripping up on some of the details. In short, stealth jurors make mistakes in the consistency of their responses that can be detected by the trained observer, if the completed juror questionnaire is in place.

Certain commonalities in psychological characteristics among potentially punitive jurors persist across case types and venues throughout the country. See Speckart, "Identifying the Plaintiff Juror: A Psychological Analysis," September 2000 *For The Defense* 30. Identification of these general traits and

commonalities can assist defense counsel in revealing the presence of such risky jurors during selection. Detection of these individuals is greatly enhanced by the use of an appropriately designed juror questionnaire—something that rarely is given priority during trial preparation. Speckart & McLennan, "How to Tap the Potential of the Juror Questionnaire," *The Practical Litigator*, vol. 10, no.1 (1999).

Look for Cynicism and Arousability

The search for the marker characteristics of the potentially punitive juror should focus on basic personality dimensions that differentiate this individual from others. Reviews of databases for mock trials and actual post-trial interviews have implicated the following personality constructs or traits as "markers" of the punitive juror:

- *Cynicism*—A generalized tendency to view the world as sinister, oppressive, or malevolent.
- *Vulnerability*—A characteristic associated with heightened sensitivity, for example, sensitivity to rejection.
- *Arousability*—A predisposition toward nervousness, distractibility, jitters, hysteria, mania, and other excessively aroused states.
- *Depression*—This trait may manifest as ranging from mild dysphoria ("the blues") to clinical depression. In the general population, it is usually observed as a sluggish, withdrawn, or sullen demeanor.

These personality traits are often interrelated in one individual. For example, a correlation between cynicism and depression may appear in many individuals. The following discussion will concentrate chiefly on the traits of *cynicism* and *arousability*, although others are considered where appropriate.

The relationship between cynicism and high damage awards should be obvious, since cynical individuals already believe that corporations are inherently predatory. Cynical individuals often favor substantial damages in cases alleging fraud, unfair competition, tortious interference, misappropriation, unjust enrichment, sexual harassment, or even product liability in which corporate mis-

conduct is alleged. Results from mock trials and real trials confirm this correlation.

Another noteworthy characteristic of punitive jurors is their psychological trait of *arousability*. In the courtroom, a high degree of arousability is often linked to an information-processing style in which large amounts of evidence are stored in each juror's head during the plaintiff's case-in-chief, with less and less information being assimilated later when the defendant has a chance to put on evidence. In essence, this juror becomes "heated up" (aroused) by the plaintiff's case to the point where his or her cognitive (information-storing) facilities "melt down." Post-trial interviews of such jurors reveal that they have retained only traces of evidence from the defense, later in the case, although their recall of information from early in the case is quite vivid, thorough, and accurate. In short, an arousable jury gets angry quickly, undergoes "cognitive meltdown," and stops listening midway through trial—precisely when the defense needs its attention the most.

A good example of an arousable juror can be seen in the antitrust case of *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987); see also, *South Dakota v. Kansas City Southern Industries, Inc.*, 88 F.2d 40 (8th Cir. 1989). The plaintiffs were suing various railroad companies for preventing the construction of a coal slurry pipeline. The defendants sought to demonstrate that there was no causation between their actions and the failure to construct the pipeline, since Energy Transportation Systems, Inc. had not even obtained approval for the project from the Interstate Commerce Commission. The former head of the ICC was the last witness in the trial, and spent the entire day on the stand. Notably, however, a handful of jurors—all energetic and arousable individuals—could not even identify, during the post-trial interviews, what the ICC was. By contrast, these jurors recalled, with great clarity, the videotaped depositions of railroad executives that the plaintiffs had presented during their case-in-chief, weeks earlier.

Research on the arousability characteristic has revealed that:

- There is a significant relationship between

arousability and “emotional empathic tendency”—the predisposition to empathize on an emotional level with another person. More arousable people are more likely to react in kind to an emotional appeal.

- Highly arousable individuals are more likely to *store in memory* and *recall* only the emotional portion of a message or communication. As a result, it is clear that the plaintiff’s message will stand out in the memory of an arousable juror not only as a result of “cognitive meltdown,” but also because of a generalized bias toward emotional messages.
- Positive correlations exist between arousability and distractibility, which is in turn positively correlated with neurotic tendencies.
- High levels of arousability have also been linked to impulsivity, lack of endurance, anxiety, mood disturbance, and sensitivity.

Traits such as neuroticism, anxiety, mood disturbance, impulsivity, and the tendency to be emotionally empathic are not the types of characteristics that a defense lawyer typically hopes to find in a panel of jurors. Research demonstrating that these traits are intercorrelated helps explain why punitive jurors frequently do not even recall evidence from the defense. This research is strongly consistent with anecdotal observations that suggest that punitive jurors are often more unstable, emotional, sensitive, and selective in their memories than their more level-headed counterparts—the types the defense should endeavor to seat on the jury.

The traits that have been considered—cynicism and arousability—tend to surface in behaviors that are identifiable and detectable during *voir dire* and selection, particularly when a juror questionnaire is utilized. Scientific research indicates a clear association between high levels of arousability and various stress-related illnesses, including cardiovascular disease and myocardial infarction. More broadly, arousability is associated with a variety of physical, psychosomatic, and psychological illnesses and symptoms. This trait has also been associated with an increased prevalence of accidents. Illnesses and accidents are certainly events that are detectable during *voir dire*, and research with mock jurors has demonstrated clearly that

reports of poor health and/or frequent accidents are generally predictive of a punitive orientation.

How deeply one can “dig” in *voir dire* is always a sensitive issue, and depends on many factors, including the attitude of the judge, whether the case is in state versus federal court, and the defense attorney’s own comfort level and skill in phrasing questions and producing a non-threatening, unobtrusive context. A jury questionnaire can reveal subtleties in jurors’ personalities, and thereby yield substantial tactical advantages. The questions can be designed to expose the most risky potential jurors.

Trial Venues

The seasoned defense attorney knows that there are some jurisdictions that are notorious as “bad” (*i.e.*, high damages) venues. It is implausible to suppose that these venues just happen to be areas in which most of the population has inordinately high levels of the personality traits mentioned in the previous section. These areas of the country are instead awarding runaway verdicts for some other reasons that appear to be location-specific. That is, there is some other characteristic, or set of characteristics, prevalent in these venues, that precipitates excessive damages awards.

Litigators with varying experiences may point to different venues as problematic, with some emphasizing specific geographic areas in southern states (Texas, Louisiana, Mississippi, Alabama) and others emphasizing inner-city state courts. However, difficult venues can be found in all parts of the country in scattered pockets. Federal courts centered in urban areas may often be recognized as reasonably “good,” whereas some of the state courts centered in the same urban regions may have frequent high-damages verdicts associated with them. For example, anyone who has tried a case in Atlanta-area state and federal courts, or Houston-area state and federal courts, can verify that the different panels within the same urban regions are vastly different in terms of the degree of risk involved for the defendant.

The distinction between the state and federal court *venire* members provides vital insights into the characteristics associated

with the observed differences in risk. Jurors from federal *venires* tend to come from outlying areas that are more suburban or rural, more affluent, and have greater proportions of Caucasians and Republicans. Jurors from contiguous state court venues are typically more urban, have comparatively lower socioeconomic status overall, and consist of a greater number of ethnic minorities and Democrats.

There are both legal and non-legal reasons that defense attorneys usually prefer to be in federal courts. The demographic profile differences between the state versus federal venues are clearly part of the non-legal reasons, as most litigators realize that jurors from state court rosters tend to have comparatively more “high-damages” characteristics (*e.g.*, minority, liberal, or Democratic political stance, and lower socioeconomic status).

One distinct impression that emerges from experiences with high-damages verdicts in “bad” venues is that jurors are motivated to simply redistribute wealth (the so-called Robin Hood mentality), and have little interest in the specific factual nuances of the case. One of the most valid predictors of a high-damages award is a juror’s agreement with the phrase: “Taxes for large corporations should be increased.” The interest in simply redistributing wealth causes jurors to have a lack of motivation for assimilating the fact patterns of the case, resulting in poorer recall of the evidence—especially the evidence presented by the defense.

It is important to note that this lack of retention is not for the same reasons that a highly aroused juror undergoes “cognitive meltdown.” Instead, bad venue jurors simply *do not care* about the defendant’s case, and may fail to process information because they do not have the motives, or the capabilities, to do so. Their motives are often limited to voyeuristic curiosity that is satiated during the plaintiff’s case, with an underlying goal is to simply funnel cash from corporations to the “deserving plaintiff.”

These types of juror thought patterns represent some of the most daunting obstacles facing a defense team trying to keep damages awards down to a reasonable amount. Still, comparatively reasonable damages can

be obtained in bad venues. Here are some suggestions that may lead to success in such courts.

- *Make liberal use of creative illustrations, graphics, animations, and demonstrative exhibits.* There is no better weapon against sluggish information processing than to attack the problem visually. Jurors are typically visual learners, and the less sophisticated their problem-solving capabilities are, the more urgent the need for compelling visual aids. Babcock & Bloom, "Getting Your Message Across: Visual Aids and Demonstrative Exhibits in the Courtroom," *Litigation*, vol. 27, no. 3, 2001. Graphics development is another area in which thorough trial preparation becomes of paramount importance. Painstaking formulation of creative and effective visual aids is time-consuming and requires labor-intensive efforts long before the trial date.
- *Meet the jury where they are.* Jurors in difficult venues are apt to focus on different issues than the trial team, and often "invent" unexpected issues that need to be addressed. Many such issues will not be on the trial team's radar screen unless and until field research is conducted *within the venue*. Moreover, issues that are more arcane, complex, or specialized must be articulated in plain language that jurors can easily understand. It is not enough to simply make an effort to simplify concepts as fully as possible. Trial attorneys must "get a feel" for the jurors by recruiting panels for trial simulations in the venue, repeatedly trying new approaches, discarding what does not work and retaining what does, until a maximally effective message is forged. Such efforts may entail mock trials or focus groups until the optimum tactical position has been formulated.
- *"Out-fair" the other side.* Regardless of the socioeconomic backgrounds of jurors, they are still apt to have a basic notion of fairness. The common sense notions of fairness that are instilled in people when they are young can transcend political and demographic differences if they are summoned and resurrected in a compelling manner. Concessions that some

damages may be appropriate are usually involved in such messages. Jurors need to know that the plaintiffs will be fully compensated, that they will be treated well, and that the defendant cares about their well-being.

- *Provide alternative damages numbers.* Too often, defense litigators do not provide jurors with a complete and realistic map of how to interpret the numbers that are at stake, or simply deny the plaintiff's

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damages theory without presenting a valid and believable alternative. Clarification of the damages that are being requested by the plaintiffs, and what such numbers actually mean, can help to mitigate damages. Annuities and other economic formulas can be portrayed in a convincing manner to suppress damages awards and reinforce the notion of fairness and taking care of the plaintiff.

- *Focus on credibility.* In order to prevail in a bad venue, the defense attorney must be the most credible person in the room. He or she must have the most complete command of the facts, and must be communicative in a way that is superior to, and transcends that of the opponent. Defense counsel must deliver everything that he has promised in his opening statement, and must do so convincingly through expert and fact witnesses who are fully trained to connect the dots in a lucid manner throughout the case. Integration of the visual exhibits with witness preparation plays a vital role in enhancing credibility.
- *Use local counsel, private investigators and other research techniques to find out who*

the jurors are. In smaller venues, many prospective jurors know each other, and/or know the plaintiffs and their family members. In many cases, these jurors do not reveal such information during *voir dire*, and there may be good reasons for getting them off for cause at this juncture. Photographs of residences, Internet search mechanisms, and other types of investigations can also be used to identify the worst jurors.

- *Accept the burden of proof.* Jurors in bad venues place the burden of proof on the defendant, regardless of the court's instructions to the contrary. They believe that the defendants are in court because a transgression has occurred. It is suggested that trial strategy be formulated with this pitfall in mind, so that jurors are shown why the defense's case is credible.

Conclusions

The two parts of this article have been oriented chiefly toward assisting defense trial teams and corporate counsel with cases that are, for want of a better term, the "worst of the worst"—that is, cases for which damage control is the only realistic goal. It goes without saying that settlement for a reasonable amount is always the preferable endpoint for such lawsuits. In this regard, it is important to note that some cases that could be settled early sometimes end up going to trial because missed opportunities for settlement are lost.

Some cases can, and should be, settled quickly. When a complaint is filed, the defendant may know more about the fact scenario than the plaintiff. With competent risk assessment in place, the identification of the high-damages case can be made on a reasonably prompt basis after filing, once the facts and venue are considered. Faced with the prospect of years—maybe even a decade—before being able to recover any money at all, many plaintiffs may be happy to get a much lesser amount quickly. In short, the time surrounding the filing of a lawsuit may be the best time to get a problematic case out of the way cheaply. Too often, a corporate defendant had a chance early in discovery to dispose of a claim for only a few

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omy, neurochemistry, neuropharmacology, neurophysiology, neuropathophysiology, neuropathology, neuroradiology, and electroencephalography to properly diagnose illnesses and medications affecting the brain.

In individual cases, physicians practicing outside these three medical specialties may also have the requisite knowledge to construct a proper differential diagnosis, but there is no scientific basis to expect a *non-medical* doctor to do so. The proof of the pudding is to ask yourself whether a reasonable person would bring his or her spouse to anyone *but* a neurologist if the spouse suddenly developed trouble thinking and remembering.

When neuropsychologists use differential diagnostic methodology to diagnose traumatic brain damage, *Daubert* standards require that such methodology be generally accepted by the medical community. There are two uses for a differential diagnosis. The first is to incorporate all possible causes for the patient's signs and symptoms. This is a legitimate and generally accepted use of the differential diagnosis as it forces a doctor to consider all possible reasons for the patient's presentation.

However, the second use of a differential diagnosis, namely, to actually *make* a diagnosis, is not generally accepted by the scientific community, as discussed in my article, "The Differential Diagnosis—Its Use and Misuse," in the August 2002 issue of *For The Defense*. Confirming one specific illness in a differential diagnosis by ruling out every other illness and assuming that the last remaining diagnosis must be the correct one is too risky for general medical use. No reasonable doctor would use such passive logic to make a diagnosis when objective tests are available to confirm the diagnosis.

Admittedly, when the illness in question cannot be definitively confirmed with objective tests, but every *other* illness in the differential diagnosis can be ruled out with objective tests, the differential diagnostic method may have scientific validity. But when neither the illness in question nor the alternative illnesses can be confirmed or ruled out with objective scientific tests, differential diagnostic methodology lacks scientific validity as a means of making a diagnosis. Under such circumstances, there is simply no reliable scientific way to diagnose one specific illness in the differential diagnosis. In the case of microscopic traumatic brain damage, illnesses and conditions like somatization disorder, malingering, depression, apathy, preoccupation, anxiety, excessive daytime

sleepiness, fatigue, side effect of medications, iatrogenic belief of brain damage, conflict of interest, hypochondriasis, conversion disorder, stress, frustration and anger, migraine headaches, and chronic pain will always remain in the differential diagnosis.

Conclusion

Neuropsychological testing and the conclusions drawn from it have heretofore escaped the brunt of scientific scrutiny under *Daubert v. Merrell Dow Pharmaceuticals*. There is considerable doubt about the scientific underpinnings of neuropsychological testing and the conclusions drawn from the results of such testing. Nine years after *Daubert*, it is time to address the scientific validity of the testing and the conclusions derived from its results. **FD**

Fire Scene Spoliation, from page 15

every state that considers the tort will adopt it. But a tort action can be an important resource for the attorney whose ability to defend a product liability suit is hampered by a third party who destroys relevant evidence, and it should be available to every defendant.

Just as intent should be irrelevant to whether a judge decides whether to grant a defendant's motions for sanctions, so too intent should be irrelevant to the availability of a tort remedy. As the law stands now, spoliation torts fall into the categories of "negligent" or "intentional." Some states have adopted torts for both negligent and intentional spoliation of evidence, and some recognize only one or the other. But the intent of a third party who destroys a fire scene should be irrelevant, because, as with a spoliation defense, the prejudice to the defendant is the same.

Conclusion

It is time to take the issue of spoliation of physical fire scene evidence as seriously as destruction of documentary or other evidence is taken in any other civil or criminal case. An "adverse inference" instruction simply is not enough. From the manufacturer defendant's point of view, to paraphrase Winston Churchill, by the time a jury is given such an instruction, a lie has made it halfway around the world, before the truth has even had a chance to put its pants on. There should be consistent standards and remedies for fire scene spoliation that focus on control of the scene, the materiality of the evidence, and the prejudice to the defendant. **FD**

Excessive Damages Awards, from page 21 million dollars, when instead the ultimate jury award turned out to be hundreds of millions.

If all that a jury really wants to do is redistribute wealth, or if key witnesses are intent on lying, the defense faces a formidable challenge. Like a case of melanoma, the only treatment may be "excision," which in judicial terms would be comparable to an appeal. Nonetheless, the guidelines suggested in this article represent a fair summary of that which can be accomplished at the level of the jury trial to minimize the probability of a disastrous outcome—if adequate preparation is carried out ahead of time. **FD**

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