LITIGATION CONSULTANTS AND PRETRIAL RESEARCH IN CRIME VICTIM CASES

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Attorneys who have recently completed a trial often think: "I should have done that differently;" "That issue should have been covered more thoroughly;" or "I should have spent more time with our witness on that point." Litigation consultants can help attorneys obtain some of the benefits of hindsight before a trial starts by conducting case-specific pretrial research, including focus groups, trial simulations, and attitude surveys. In addition, litigation consultants can assist in the preparation of witnesses, in the evaluation of trial exhibits, in the development of trial themes and stories, and in seating a fair and unbiased jury. (*See* box "Services Provided by Litigation Consultants.")

A litigation consultant's services can be particularly beneficial in civil cases involving crime victims because these cases can elicit from jurors deeply held beliefs and powerful emotions. Prior research and consulting work in crime victim civil suits have produced a variety of valuable insights.

Blaming the Victim

Many issues and litigation strategies can be explored with pretrial research. One concern that arises in nearly all civil cases involving crime victims is jurors blaming victims for the harms the victims have suffered. The tendency to blame victims for their plight, even when there is evidence that supports an alternative cause, has been the subject of extensive investigation by social scientists.[i] One series of studies found that the greater the extent of the injustice inflicted upon the victim, the greater the tendency to disparage the victim.[ii] Early explanations for this phenomena suggested that people have a need to believe that the

world is just, and that people get what they deserve. Good people experience good outcomes and bad people experience bad ones.[iii] Thus, when people see injustice toward what appears to be an innocent victim, they are motivated to restore their perspective of a just world—either by convincing themselves that the victim deserves the suffering because of previous bad acts or a bad character, or by actively taking steps to remedy the injustice.[iv] Remedying injustice is often the more difficult option.

Cusimano and Wenner have proposed a technique for overcoming jurors' tendency to blame victims.[v] They performed case studies showing that when attorneys began their opening statement by talking about the plaintiff, jurors blamed the victim for what happened. In contrast, if attorneys began their opening statement by focusing on the defendant's conduct, jurors focused on what the defendant had done wrong and attributed less blame to the plaintiff. Cusimano and Wenner attribute this finding to "availability bias,"[vi] which, in the context of trial presentations, suggests that jurors will make causation decisions based on whichever party an attorney initially focuses on, because that is the information that is most readily available to the jurors.[vii]

Juror Story Construction

Research has also explored the process by which jurors make sense of the facts at the center of a lawsuit. Pennington and Hastie have shown that jurors attempt to make sense of a situation through a process of story construction.[viii] Although the "story model" was developed in the context of criminal litigation, it provides a comprehensive means to analyze juror decision-making in civil cases. The "story model" has several important implications for civil cases:

· Jurors are active in their interpretation and evaluation of a case.

Some experts used to believe that jurors were passive—accepting and combining information as it was presented. In fact, it has been found that individual jurors actively begin to put together a story of what happened as information is presented and interpret subsequent information in light of the story they are formulating.

- Individual jurors characterize the participants in the story and the reasons the participants did what they did. A crucial aspect of the story that each juror develops is who are the "good guys" and who are the "bad guys." To do this, jurors take into account their interpretation of the motives of the different story participants.
- The juror's concept of the case story suggests an ending. The verdict the jurors reach will likely be one the jurors see as an appropriate ending to the story they have developed.

Attorneys preparing an opening statement should make it easy for jurors to develop a meaningful trial story by presenting a clear and comprehensive account of what happened in the case. Attention should be paid to the following four components that jurors use to develop their own trial stories: 1) knowledge about similar events; 2) knowledge about story structures; 3) trial evidence; and 4) statements and arguments by attorneys. Each of these items is discussed in greater detail below.

Knowledge About Similar Events. A juror's knowledge of events similar to those in the case influences the construction of the juror's trial story. For example, in a case in which inadequate security is an issue, a juror who lives in an apartment and has been less than satisfied with the maintenance of the surrounding fences will bring a

different perspective and form a different story than a juror who has never experienced apartment life. The "baggage" that each juror brings to a trial can be assessed with supplemental juror questionnaires, during the *voir dire* process, and with the help of pretrial venue studies.

Knowledge About Story Structures. Most people have been told stories since childhood, and have developed ideas about what makes a complete story. For example, many people believe that stories have good guys and bad guys, and that a character's actions are often motivated by self-interested goals. In the initial presentation of the case, such expectations need to be sufficiently addressed, or jurors will fill in story gaps, often with unpredictable results.

For example, in presenting a rape victim's civil suit, rather than just telling jurors that a parking garage owner failed to provide closed circuit cameras for the facility, the plaintiff's attorney should let the jury know *why*—there was evidence the owner failed to provide monitoring because he used the parking garage for activities he did not want monitored. Rather than telling jurors that an apartment manager failed to change several light bulbs outside the back door weeks after women in the building had complained, tell the jury the reasons for the manager's actions—he had consciously decided not to change the bulbs because to do so required a special kind of screwdriver the owner did not want to buy.

Trial Evidence. Information presented during the trial (such as witness testimony, memos, and other documents) influences the stories jurors construct. The appropriate presentation of trial evidence is particularly important in crime victim civil cases when that evidence relates to third party liability. It is often difficult for jurors to

see beyond the heinous acts of the perpetrator to the responsibility of a third party for the harm done to the victim. The reasons the third party is responsible must be incorporated into the trial story from the beginning of the trial. One way to emphasize the third party's responsibility is to make sure the jurors understand the trial evidence that shows that the third party's behavior deviated from the behavior of most people or businesses in the third party's situation, and how that behavior is related to the crime. The concept is to encourage the jurors to ask themselves why the third party defendant did not behave as others do—to help the jurors distinguish the third party's actions from those of others similarly situated. Jurors should understand that the attorney is not saying all businesses or property owners are liable for all crimes that occur on their property, but that *this* defendant is liable because it acted in an unusual, abnormal, and unreasonable way.

For example, in a trial simulation for a case involving the negligent hiring of an employee who murdered another employee at their workplace, mock jurors who saw the employer's hiring practices as unusual (*e.g.,* he failed to conduct a background check), tended to attribute responsibility to the employer, whereas mock jurors who saw the employer's actions as typical of most employers were unwilling to attribute responsibility to the employer.

Statements and Arguments ("Stories") by Attorneys. Trial stories presented by the attorneys are a major influence on the final story jurors will select. Therefore, attorneys should attempt to develop an effective story; one that has a strong theme running throughout. The theme should be disclosed at the outset of an opening statement, repeated as often as comfortable during the opening statement, reinforced

by evidence during the trial, and revisited during the closing argument. The theme should be expressed in a few words that have been carefully chosen to explain the greatest number of facts. The theme should communicate a basic feeling that the attorney wants jurors to have about the case. The theme should be bigger than the case, and show how the case impacts upon society.

An attorney's trial story should be internally consistent, plausible (correspond to the decision maker's knowledge about what typically happens in the world), complete (a story is complete when the expected structure of the story has all of its parts), and adequate to cover the evidence presented at trial. The trial story should suggest a conclusion that is fair and just. One of the primary factors influencing jurors' decision-making is the consequences of their decision. For example, in inadequate security cases, the implications of the jury's verdict should be clear: If we do not hold property owners responsible, they have less incentive to protect against such situations. If we can simply blame it on the criminals, there will be no reason for property owners to try to live up to accepted community standards.

Selecting Jurors in Crime Victim Cases

Litigation consultants can use pretrial research to develop effective *voir dire* and supplemental juror questionnaires, and to identify those jurors who, because of past experiences or ingrained attitudes, are unable to assess a case in an unbiased manner. With crime victim clients, it is essential to identify members of the jury pool who might re-victimize the plaintiff by allowing predispositions or experiences to interfere with their ability to fairly judge the issues relevant to the case. In order to identify such

individuals, potential jury members should be examined regarding the following topics:

- their attitudes toward crime and crime prevention (*e.g.*, their perception of whether crime is widespread, whether it's possible to take steps to prevent crime, whether they believe crime is random or predictable);
- personal experiences with crime;
- factors that may cause them to identify with the defendants (*e.g.*, do they own a business or property that is visited by the public, and whether they have they been sued for negligence);
- the standards they have for the care of their own property (*e.g.*, whether they have a security system, and whether they lock the doors in their home or car);
- their perceptions of crime victims (*e.g*., do the jurors have a perspective of the "kind of woman" who is targeted by rapists or the type of person that is mugged, and whom do they blame for the occurrence of a crime?);
- their perceptions of the safety of businesses and public places; and
- their beliefs about a property owner's responsibility for the safety of visitors or patrons.

Conclusion

This article has reviewed some of the insights that litigation consultants can offer into juror perceptions and biases in crime victim civil suits. In a legal arena that often places obstacles in a victim's path to justice, pretrial research in the form of focus groups, trial simulations, and venue studies can provide the kind of insight that attorneys need to present the most effective case possible.

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1. **Melvin J. Lerner and Leo Montada, eds.**, **Responses to Victimizations and Belief in a Just World** (Plenum Pub. Corp.) (1998).

ii. *Id.*

iii. Zick Rubin and Letitia Anne Peplau, *Who Believes in a Just World?,* 21 **Journal of Social Issues** 65 (1975).

iv. Jurgen Maes, *Immanent Justice and Ultimate Justice, in* **Responses to Victimizations and Belief in a Just World** (Plenum Pub. Corp.) (1998).

v. Elaine McArdle, *Plaintiffs Should Always Start by Attacking the Defendant*, **Lawyers Weekly USA**, Oct. 18, 1999, at 99.

vi. Amos Tversky and Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability, in* **Judgment Under Uncertainty: Heuristics and Biases** (Cambridge Univ. Press) (1982).

vii. McArdle, *supra* note 6.

viii. Nancy Pennington and Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model,* 13 **Cardozo Law Review** 519 (1991).