

Insiders' Views On Jury Decision Making

By: Lyndall Lambert, *Holland + Knight LLP* and Melissa Pigott, Ph.D.

Overview

In the article that follows, Lyndall Lambert shares her unique insights derived from her recent experience as a juror on a personal injury case held in Miami-Dade County Circuit Court. Dr. Melissa Pigott provides commentary on Ms. Lambert's observations based on her experiences as a jury expert.

Ms. Lambert

Imagine my surprise when I was selected as a juror in a personal injury case, after discussing in detail during *voir dire* my 25 years of experience as a personal injury defense attorney. I even acknowledged that I was familiar with all of the trial attorneys and two of the experts. I was convinced that I would be the first on the panel to be excused. However, after all of the strikes were made, I was one of seven jurors remaining in the courtroom. Of course, there seemed to be more than the usual number of "loose canons" on the venire, but could they be less appealing to a plaintiff's attorney than me?

After hearing the opening statements, it became clear why I was left on – proving liability was not much of a concern for the plaintiff. She was a restrained passenger in a T-bone intersection collision, and she sued both of the drivers. There was no claim that she was negligent, and it was obvious that at least one of the defendants was at fault. Also, the plaintiff had permanent, substantial injuries, so Florida's no-fault threshold was not an issue. The plaintiff's attorney probably figured that I would at least know how to reasonably evaluate the damages. Little did he know that, of

the jurors selected, I would eventually be the most liberal.

Dr. Pigott

In my many years as a social psychologist assisting attorneys in jury selection, I have come to recognize that there are many cases for which an attorney will be a suitable juror. Although selecting an attorney for jury service is sometimes risky, in that it is highly likely that he/she will be the jury foreperson and/or opinion leader, depending on the composition of the venire an attorney may often be a better choice than other potential jurors. Overall, there are no rules of thumb that dictate a particular attorney's suitability for jury duty.

Ms. Lambert

During *voir dire*, the plaintiff's attorney extracted my promise to be fair to his client. I felt this technique was very effective, despite Dr. Pigott's contrary research. I would like to think that my contribution to the verdict was influenced more by the evidence than by my promise to the plaintiff's attorney, but that promise was in my thoughts during deliberations.

Dr. Pigott

There is a vast body of social psychological research on people's tendency to give socially desirable responses in group settings. When asked by an attorney or the judge whether he or she can be a fair and impartial juror, almost everyone will respond "yes." A better questioning technique is to let questionable jurors "opt out" of jury service on a particular case by asking a series of questions designed to assess their feelings about whether they would be better suited for

another kind of case. Helping the juror feel comfortable in not giving a socially desirable answer is crucial for establishing an open dialog during *voir dire*.

Ms. Lambert

My experience as a juror reinforced my long-held belief that judges and attorneys should make sure the jurors are comfortable and expedite the trial as much as possible. The presiding judge took very good care of us, but we were perturbed by the numerous breaks. From a juror's perspective, attorneys should keep side bar conferences to a minimum, and strive to make most of the legal arguments in the beginning or the end of the day. Jurors would prefer breaking early for the day rather than taking long breaks in the middle of the day. Also, attorneys should make evidentiary stipulations before trial. I was happy to see that the parties stipulated to the amount of the medical bills, thereby relieving the jury of a burdensome chore.

The ability of jurors to take notes was invaluable. I took copious notes, as did most of the other jurors. Our notes were very useful during deliberations, especially when our respective memories of the evidence differed. In Florida, some judges allow jurors to pose questions to the witnesses. This did not happen in my case, but I would have found it helpful to clarify some points made by the medical expert and the witnesses.

Dr. Pigott

There is a growing body of social science research on the impact of jurors' notetaking on their decisions. In general, notetaking

improves the jury's decision making by: (1) actively involving the jury in the trial; (2) enhancing individual juror's memory for details of the trial, especially the content of witnesses' testimony; and (3) forming a collective memory from which the jury as a group can make the most informed decision. Although research on the impact of jurors asking questions of witnesses is in the initial stages, it is evident that anything which aids the jurors in understanding the case is a benefit to the attorneys and their clients.

Ms. Lambert

In my opinion, the accident reconstruction experts retained by the two defendants were unnecessary. This was a simple collision, where the driver of Car A turned left, allegedly on a green arrow, into the path of Car B (in which plaintiff was a passenger) traveling in the opposite direction. The plaintiff had no liability expert, and did not need one because the defendants blamed each other. The experts played with toy cars, and they had no measurements or photographs of the accident scene from which they could draw conclusions. We ignored the opinion testimony of both of these experts (but we had fun talking about their seemingly excessive fees). So, attorneys should consider carefully whether experts are needed to talk about uncomplicated accidents within the common knowledge of jurors. The testimony and credibility of the parties were so much more important to our decision.

On the other hand, the medical expert was necessary to our understanding of the complex injuries. Unfortunately for the defense, they had to present their orthopedic surgeon expert out of turn as the very first witness after opening

statements. During the cross examination of the defense doctor, the plaintiff's attorney proved the entire damages case – the multiple fractures in her feet, her shattered arm, her surgeries and future care. He used poster-sized enlargements of x-rays, showing the fractures in color. Thanks to the out-of-turn defense expert, plaintiff did not need to call on any treating doctors to testify, and the jury was duly impressed throughout the trial with the nature of plaintiff's injuries.

Dr. Pigott

As a litigation psychologist/jury expert, I have had the opportunity to observe thousands of mock jurors deliberate on a wide variety of cases. A common thread in jurors' deliberations is their tendency to discount expert testimony in favor of their commonsense notions. Jurors' reluctance to rely on expert testimony stems from their belief that each side's experts will say things that favor the side for which they have been retained. Jurors have become increasingly skeptical about expert witnesses, especially in cases such as the one in which Ms. Lambert participated, where the facts are straightforward enough for anyone to reach the same conclusions as the expert has been paid to reach. Due to jurors' usual bias that favors physicians over non physicians, however, testimony of medical experts is often well received by the jury.

Ms. Lambert

As a juror, you see witnesses from a different perspective than the attorneys who know them and have been working with them. Jurors see just a snapshot of the witness on the stand, and do not know any of the behind-the-scenes aspects of the case so familiar to the litigators. For instance, due to credibility problems

that we perceived, not a single juror believed the testimony of the driver of Car A that he had a green left arrow light when he turned. The driver of Car B, on the other hand, admitted he was driving faster than the speed limit, so we believed him when he said that he had a green light. There might have been background information about these defendants filtered out by evidentiary rules that would have changed our impressions about their credibility. However, we had to base our decision on the limited information available to us.

Dr. Pigott

Credibility is comprised of expertise and trustworthiness. Expertise is determined by a person's background characteristics that qualify him or her to express a certain opinion. Trustworthiness is based on honesty and believability. In the context of a trial, trustworthiness is largely a function of whether a witness has something to gain from the outcome of the case. In general, as Ms. Lambert's experience confirms, a witness' credibility (or the absence of credibility) in one part of the case has a strong impact on other, even unrelated, aspects of the case.

Ms. Lambert

The deliberations shook up some of the preconceptions I held based on my experience in participating in real and mock trials. I always assumed that jurors reviewed most of the trial exhibits – or at least those emphasized at trial. But, we did not even glance at the big stack of medical record exhibits (after the testimony of the defense expert, there was no point). The only exhibit that we used was the enlarged aerial photograph of the intersection, which we found to be immensely helpful during our

liability discussions. After consulting our notes and conducting our own accident reconstruction with the use of the photograph, we quickly determined that each defendant was 50% at fault.

I also found it interesting that two legally irrelevant but often discussed issues were never mentioned – whether there was insurance coverage and whether we should consider plaintiff's attorney's fees in arriving at our verdict.

Dr. Pigott

I share Ms. Lambert's surprise about the absence of jurors' discussion of attorneys' fees and insurance as they decided damages. In most, but certainly not all, mock trials I have conducted, one or more jurors bring up these legally irrelevant factors. Typically, however, another mock juror admonishes the person then reminds the jury as a whole that they are to discuss only the evidence that was presented to them. As far as jurors' tendency to disregard the mountains of exhibits they receive, it has been my experience that juries' consideration of the exhibits varies greatly and depends on the composition of the group. For the most part, however, jurors rely on their notes and review the exhibits as a way to clarify a specific point.

Ms. Lambert

Defense attorneys always struggle with deciding whether or not to suggest to a jury a specific dollar amount to compensate the plaintiff if liability is found. In my case, neither defendant mentioned a number for pain and suffering damages. Several of my fellow jurors initially wanted to award the amount suggested by the plaintiff's attorney, because they assumed – from the defense counsels' silence – that the

defendants acquiesced to that amount. After I explained to them the dilemma faced by defense attorneys, we disregarded the plaintiff's number and proceeded with a discussion about how much to award.

Dr. Pigott

Ms. Lambert's experiences as an attorney had a marked effect on her jury's determination of damages. It is usually the case that jurors will use the plaintiff's attorney's damages figures as an anchor to determine damages in the event the defense attorney has not provided an alternative figure. As in Ms. Lambert's jury, our research has revealed that jurors usually equate the defense attorney's silence about damages with agreement, although reluctant, with the plaintiff's damages request. Although it is impossible to know what would have happened if Ms. Lambert had not educated her fellow jurors about the defense attorney's damages dilemma, her participation on the jury obviously had a strong impact on the outcome of the case.

Ms. Lambert

My experience during deliberations disabused me of any notions about selecting a juror based on stereotypes. The defense attorneys were probably happy with the selection of three of the jurors – the traffic control engineer with a Master's degree, the white collar retiree whose wife was the office manager for a defense law firm, and me, the career defense attorney. Yet, compared to the other jurors, the three of us came up with the highest pain and suffering damages. The other three jurors – who were demographically similar to the plaintiff and who fit the standard profile as "liberal" – suggested surprisingly low awards. Our deliberations revealed that the jurors' life experiences were

much more determinative of the outcome than stereotyping. For instance, the engineer whose soccer injuries came back to haunt him later in life wanted to award the most for future medical expenses.

Dr. Pigott

I wholeheartedly echo Ms. Lambert's comments about jurors' life experiences being more determinative of the outcome of the case than stereotyping. Reliance on stereotypes is a dangerous practice and is likely to lead an attorney to make the wrong decisions when selecting a jury. Considerable social science research has revealed that verdicts are more related to jurors' case specific attitudes than all other factors. Attorneys' over reliance on easily-discernable demographic information is, in my opinion, the most common mistake they make while selecting juries. To really get to know anyone, including a prospective juror, one must go beyond quick judgments based on demographics.

Ms. Lambert

Being a member of a jury was very rewarding and educational. We ultimately reached a unanimous verdict that we all felt was fair and reasonable to all of the parties. I learned later that there was no appeal, which made the experience even more satisfying for me; because, we helped the parties resolve their dispute. I highly recommend this experience for any attorney who is lucky enough to have a chance to serve as a juror. ⚖️

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