

Contrast

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In this issue

Advanced Strategies for
Defending Complex Brain
and Spinal Cord Cases 2

Innovations in Jury Trial
Practices are Abundant,
But Do They Make Case
Evaluation and Choice of
Venue More Complicated? 14

About Us

The Endurance Healthcare Liability practice focuses on excess medical professional liability for multiple hospital systems, integrated delivery networks, university teaching hospitals and large specialty hospitals. Our clients are typically sophisticated purchasers who practice strong clinical risk and claims management.

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Letter from the Editor

Dear Friends:

We are pleased to offer our latest installment of Contrast. This publication is prepared in-house by our healthcare team and is dedicated to sharing news, trends and developments with respect to medical negligence litigation and risk management.

In this issue are two articles. First, you will find Part II of an informative article, reprinted with permission, by Barry Montgomery and Bradley Nahrstadt entitled "Advanced Strategies for Defending Complex Brain and Spinal Cord Cases." Due to its length, we are reprinting this article in three parts. Part I, reprinted in the previous issue of Contrast and available on our website, described the diagnostic tests that are used to assess and "prove" brain damage and the use of technology, trial themes and cross-examination at trial.



Part II, reprinted here, includes the remaining discussion about cross examining the neuropsychologist. In addition, it includes discussions about jury trials vs. judge trials, how to prepare for a mock trial, and the first portion of a really good analysis of the techniques and strategies the defense can use to reduce the jury assessment of damages. Part III, which will appear in our next edition of Contrast, focuses on issues surrounding evidence of present value of future life care, in particular, the cost of annuities, and how to make effective closing arguments.

Also in this issue, you will find an article by Phil Ashley, an attorney at Wagstaff & Cartmell, discussing the many jury trial innovations being implemented by various states and how they may affect jury verdicts. The article describes two jury procedures in particular that are probably beneficial to medical malpractice defendants and should be utilized wherever appropriate.

Thank you for allowing us to share these discussions with you. As always your thoughts, suggestions and requests are welcome.

Yours truly,

A handwritten signature in blue ink that reads "Judy Hart". The signature is fluid and cursive.

Judy Hart

Advanced Strategies for Defending Complex Brain and Spinal Cord Cases[†]

By C. Barry Montgomery & Bradley C. Nahrstadt

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This article is being reprinted in three parts due to its length. Part I Appeared in the Fall 2007 issue of "Contrast" and is available on our website. Presented here is part II. Look for part III in the next issue of "Contrast."

VII. CROSS-EXAMINING THE NEUROPSYCHOLOGIST AT TRIAL (cont'd)

D. The Case for Malingering

Perhaps one of the best ways to overcome the "respected aura" of neuropsychological testing is to prove to the trier of fact that brain damage of the type determined through neuropsychological evidence can easily be simulated or faked. For example, in one study, a team of psychologists gave sixteen brain injured patients a series of neuropsychological tests. They then gave the same tests to sixteen normal subjects who had agreed to falsify their answers in an effort to appear brain damaged. Next, the experimenters took the sixteen results from the imposters and the sixteen results from the real patients and gave them to experts on neuropsychological testing. These experts were told that half of those tested had misrepresented their condition while half were real brain injured patients. The experts were asked to identify the real patients. In point of fact, they could not do so, *even when forewarned!*⁷⁹ Two other well-known investigators have demonstrated that neuropsychological testing evidence of brain damage can be falsified quite easily by children as young as nine years old.⁸⁰

In the last few years, several tests have emerged to detect malingering, including the Test for Malingering Memory ("TOMM"). In addition, internal validity scales have been validated and cross-validated for the Luria-Nebraska Neuropsychological Battery ("LNNB") and the Raven Progressive Matrices. It is now possible to administer a comprehensive neuropsychological battery consisting of four tests (the TOMM, LNNB, Memory Assessment Scale, and Raven) that contain three separate checks for malingering.⁸¹ The plaintiff's expert should be cross-examined about the results of these tests or questioned about why they were not performed. The plaintiff's neuropsychologist also should be cross-examined concerning the validity of the tests and their ability to detect malingering.

One further point should be mentioned in regard to malingering. Defense counsel should be attentive to signs of attorney referral for neuropsychological treatment or attorney payment of the neuropsychologist's bill. Attorney referral or the provision of monies for such treatment is the first item raising a suspicion of malingering indexed in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition. Evidence of attorney involvement may suggest a claimant with a litigation agenda in mind, rather than a wellness agenda.⁸²

E. Problems with the Neuropsychological Tests

The defense can strike a damaging blow to the plaintiff's case by cross-examining the plaintiff's expert about the neuropsychological tests themselves. One of the key issues surrounding a neuropsychological evaluation concerns how much of the interviewing, observation, and testing of the plaintiff was conducted by a technician and how much was carried out by the neuropsychologist who signed the evaluation. More often than not, a majority (if not all) of the testing is done by a technician. The plaintiff's neuropsychologist then makes an evaluation based on a list of test scores rather than firsthand knowledge from the plaintiff. Under the circumstances, the competency of the technician clearly can influence the plaintiff's test results.

Another weakness in the entire neuropsychological scheme is that the neuropsychologist must take the plaintiff at his or her word. A typical cross-examination on this point might proceed as follows:

Q: Doctor, you reported that the plaintiff has been experiencing nightmares since the accident?

A: Yes.

Q: The plaintiff spoke to you about this?

A: Yes.

Q: Is that how you made this finding?

A: Yes.

Q: Doctor, wouldn't it be more accurate to say that you were told of nightmares, and that you accepted the plaintiff's statement?

A: I suppose, but it seemed consistent with the rest of the information I had.

Q: Would you agree that it is at least possible that a plaintiff, in at least some cases, might embellish, exaggerate, or perhaps even lie?

A: Of course it's possible.

Q: Wouldn't it be important for you to know if such a thing were happening?

A: Yes.

Q: You don't want to merely validate claims which could be heard directly in testimony by the plaintiff?

A: That's correct.

Q: So part of your expert opinion, the reason the court should pay attention to your opinions, would be that you can evaluate such claims in a way that is special and expert?



A: Of course.

Q: All right, Doctor, would you please explain what you as a neuropsychologist would do to tell if you are being manipulated by a subject?

A: I have seen thousands of patients in my career, so I rely on my clinical expertise.

Q: Isn't it true, Doctor, that your profession has no special methods to detect what is true and what is not true?

A: It's true that we have no test, but we're good at evaluating people, and the plaintiff seemed to be honest.

Q: Isn't it true that in your normal practice the patient would have less reason to fudge a bit than a person suing for money?

A: I suppose that's true.

Q: And your training was aimed at those normal clinical situations, rather than lawsuits, correct?

A: Yes.⁸³

After similar questioning, the attorney has conveyed a critical message to the trier of fact, regardless of the neuropsychologist's responses: the expert has no scientific method to test the validity of the subject's information.

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The cross-examination also should develop the fact that there are essentially two approaches to neuropsychological testing. One approach involves the use of fixed testing batteries such as the Halstead-Reitan or the Luria-Nebraska Battery. The second approach involves the use of flexible batteries which adapt the testing to the particular individual. Use of the second approach results in no standardization; each set of tests may be idiosyncratic, or nearly so, based on the clinical judgment employed by the neuropsychologist. A line of questioning designed to elicit the pervasive confusion that surrounds neuropsychological testing might evolve as follows:

Q: Doctor, do you use a standard fixed battery of tests or a flexible approach?

Q: (Whatever the response to the above question): Aren't there a number of authorities who disagree with that approach?

Q: (If either the Halstead-Reitan or the Luria-Nebraska was administered): Doctor, what is the rate of agreement between the Halstead-Reitan and the Luria-Nebraska?

Q: Your answer would indicate then that there are a number of cases in which these two leading test batteries would disagree with one another, correct?

Q: In that case, whether or not the plaintiff is found to have brain damage might depend on which of these leading test batteries was given to him,

isn't that true? (This question may not be necessary since the point also can be made in argument.)

Q: (If a "flexible" battery has been used): Doctor, do the tests you use constitute a standard battery of tests?

Q: Do I understand correctly that you select the test according to your judgment about what would be most appropriate for the individual?

Q: Doctor, aren't there a number of authorities in your field who feel that a standard battery is better?

Q: There are no norms for overall performance on the set of tests you have selected to use with the plaintiff, are there? (It should be made clear that this refers to overall performance, not necessarily to the performance on any individual tests since norms may exist for that.)

Q: On the Halstead-Reitan Battery, poor performance on one or two of the sub-tests would not be sufficient to classify the individual as brain damaged, isn't that correct?

Q: And isn't it true that an individual's poor performance on one or more of the tests you administered also would not, at least according to Reitan standards, constitute brain damage?

Q: According to published surveys, isn't it correct that the Halstead-Reitan Battery is not used by a majority of neuropsychologists?

Q: (If appropriate): According to published surveys, isn't it correct that the Luria-Nebraska Battery is not used by a majority of neuropsychologists?⁸⁴

Q: Isn't there scientific literature indicating that poor performance on some of these neuropsychological test batteries falls far short of an adequate description of specific, intellectual, or cognitive difficulties and their impact on everyday functioning?⁸⁵

Since the research is clear, it should be obvious to the trier of fact at this point that no format of neuropsychological testing is adequate for assessing brain damage.

One other point merits attention. Owing to the nature of the neuropsychological test batteries, neuropsychologists sometimes make claims of brain damage based on one extremely low test score. Variability in testing is normal, however, and it is not unusual for healthy individuals to perform poorly on some tests in a particular battery. For this reason, the neuropsychological test batteries such as the Halstead-Reitan and Luria-Nebraska have built allowances into their scoring systems for poor performances. If an individual performs poorly on a particular test within the battery, the defense attorney can determine a pro-rated score, using the directions found in the testing materials, to determine a more functional measure of the plaintiff's ability. This process always should be invoked when brain damage claims are based on one extremely low test score.⁸⁶

F. Examiner and Situation Effects

The research is clear that examiner and situation effects operate in neuropsychological assessments, just as they do in psychiatric or clinical psychological assessments of other disorders. For example, some psychological tests contain validity scales or internal measures for evaluating the candor with which the plaintiff responds. Many times, however, the examining neuropsychologist ignores these scales or does not bother to include them.⁸⁷ Oftentimes, neuropsychologists make a number of mistakes in testing and analysis, and these errors undermine the validity of their opinions and conclusions. For example, neuropsychologists often make clinical errors in scoring the tests. Errors occur frequently enough that defense counsel must be ready with their own consultant to check the scores.⁸⁸ On occasion, neuropsychologists also fail to report key test or interview results. These types of mistakes can and should be identified through a careful review of the expert's complete file (including handwritten notes), billing forms, and raw test data.

It should also be noted that "prompting" is a largely unrecognized but surprisingly common problem in neuropsychological cases. When the neuropsychologist discusses or even mentions potential symptoms to the patient prior to testing, it is an open invitation to replace scientific evaluation with suggestion, hysteria, or voluntary manipulation of the symptom pattern.⁸⁹ It is also imperative that the defense attorney investigate whether the

plaintiff was taking medication at the time of testing. It is not uncommon for brain injury patients to be taking medications that will affect test scores. These can include antihypertensive drugs, tranquilizers, or anti-seizure medications, and they must be considered whenever the drug has a known effect on neuropsychological performance.⁹⁰ All of these examiner and situation effects can influence the outcome of the neuropsychological testing; they should be investigated in the presence of the trier of fact through the skillful cross-examination of the plaintiff's neuropsychologist.

G. Determining Pre-Accident Levels of Functioning

Probably the most vulnerable area in the entire field of neuropsychology, and the area that a defense attorney must exploit, is the neuropsychologist's virtual inability to determine the plaintiff's functioning prior to the exposure that prompted the lawsuit. Neuropsychologists frequently "guess" or estimate the plaintiff's pre-accident functioning by using the so-called "best performance" method in connection with the Wechsler Adult Intelligence Scale. The neuropsychologist examines the scores on the sub-tests of the WAIS and concludes that the best score represents the innate capacity of the individual at which he or she would have performed prior to the exposure. To the extent that other scores are appreciably lower, they indicate impairment.⁹¹

A defense attorney simply cannot be satisfied with the neuropsychologist's assessment of the plaintiff's pre-accident

functioning level. Instead, defense counsel must gather independent data, such as the records mentioned earlier, to provide more accurate evidence about the plaintiff's pre-accident level of functioning. Absent an identical set of tests administered to the plaintiff prior to the accident, the best evidence comes from school, employment, and military records. These are useful in showing a plaintiff's typical level of performance prior to the accident. In particular, they may be useful in showing that the plaintiff previously exhibited the same variability in his or her performance in different areas, as demonstrated on the neuropsychological tests. In addition, school records often contain IQ test results and descriptive comments from teachers which may reveal that the individual displayed many of the same debilitating characteristics early in life that are now alleged to have resulted from the accident. Sometimes a neuropsychologist will have interviewed family members to obtain statements regarding the plaintiff's forgetfulness or irritability after the accident. Obviously, in the case of family members, the statements are made by people who have an interest in the plaintiff and the outcome of the lawsuit. To that extent, the information may be unreliable. Defense counsel therefore should make every effort to obtain extensive information with regard to the plaintiff's pre-accident and post-accident functioning from disinterested witnesses, informing the trier of fact that although the plaintiff's family members are not untruthful about the plaintiff's condition, they have become more aware of the plaintiff's functional problems than they were previously.

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Finally, the neuropsychologist may try to establish the plaintiff's pre-accident functioning level by pointing to the plaintiff's occupation and education level. Cross-examination should disclose that obtaining a college degree requires no more than an average intellectual level, and that many people who test no more than average have obtained college degrees. The defendant also should elicit testimony that even those occupations that involve some kind of technical training can be performed by people of ordinary intelligence who have acquired the necessary skills. The defendant cannot afford to let the neuropsychologist enhance the plaintiff's pre-accident functioning level simply because the plaintiff had a college degree or a good job.

In addition to the testimony of a neuropsychologist, nearly every case involving brain injury (or spinal cord injury) will involve the testimony of an economist. The economist employed by the plaintiff will attempt to convince the jury that a very large sum of money is necessary to compensate the plaintiff for the injury suffered. More often than not, the plaintiff's economist will use the plans created by the plaintiff's life care planner to make projections about the future costs of plaintiff's care and needs. In addition, the economist most likely will testify regarding the plaintiff's lost earnings and the amount of money necessary to compensate the plaintiff at the time of trial for those lost earnings (present cash value).

Once plaintiff's counsel has identified his testifying economist, every effort should be made to obtain any previous

testimony given by the expert or reports authored by that expert. Review of these materials may reveal inconsistencies in the expert's approach to such crucial matters as the wage base and the net discount rate, or a range of other variables and issues.⁹² To demonstrate that a plaintiff's economist is using a one percent net discount rate in the current case, but used a two and one-half percent net discount rate in a previous — and factually similar — case can prove a devastating attack on his credibility.⁹³

In dealing with the issue of expected loss of earnings versus lost earning capacity, the defense should be prepared to emphasize *probabilities*, an area which may be ignored by the plaintiff. Many "capacity" predictions can have a very low probability of actually occurring. For example: What is the probability that the minor plaintiff would have been a college graduate? What is the probability that the plaintiff housewife would have returned to work as the children went to school or reached majority age and left home? The defense almost always benefits by emphasizing probabilities.⁹⁴

Defense counsel also must closely examine the estimates of lost earnings made by plaintiff's economist and cross-examine him vigorously about this item of damages. A plaintiff's economist may commit the huge error of double-counting the value of leave time, which already is in the wage and salary loss estimate. A more common error occurs by using a national statistic for employer contributions to fringe benefits, when data on the value of fringe benefits actually received

by the plaintiff in his last few jobs is available. It is a rule of common sense that a specific person's own experience in fringe benefit valuations is the best predictor of fringe benefit losses in the future.⁹⁵

Another issue, which holds greater impact if the injured plaintiff is young, concerns the "net discount rate" applied by the plaintiff's economist. The "net discount rate" is the difference between the compound discount rate driving the (lost) earnings base lower and the wage growth rate driving the (lost) earnings base upward. For the last twenty years, the net down rate has been between two and two and one-half percent per year. Experienced economists who examine the differences between wage growth (up) and discount rates (down) should be estimating a net (down) discount rate in the two to three percent range. And, as noted above, the size of the discount rate can be substantially important when the injury occurs at a young age, so that the rate differences compound over many years.⁹⁶

When addressing medical cost calculations, vigilance in this area may account for millions of dollars in difference. The communication of cost data between the plaintiff's life care planner and the plaintiff's economist may be poor or inaccurate. The economist may apply medical cost inflation trends to all elements of the life care plan, resulting in a liberal net discount rate of close to zero. Typically, however, the largest elements of life care plans involve care by non-medical personnel. Thus, medical cost inflation should not be involved, lowering the net

discount rate by two percent or higher. Life care planners also may include total costs of vans or specially constructed homes, but the economist should have converted these costs to incremental losses, i.e., the injured plaintiff would have needed a home and a car in any event.⁹⁷

In some jurisdictions, household service losses are recoverable. In those jurisdictions that follow the replacement cost theory, the loss should be calculated by multiplying the (discounted) lost hours in each year times the costs of replacing these services in the specific locale. Plaintiff's economist may make liberal assumptions about both variables, however: she may double count simultaneous activities, she may ignore what the plaintiff actually did or did not do before the accident, and she may count hobby hours. All of these items need to be explored during the cross-examination of the plaintiff's economic expert.⁹⁸

While exploring these items, however, defense counsel should not overlook the fact that favorable damage evidence can be introduced through the plaintiff's economist. An effective cross-examination of the plaintiff's economist can produce data admissions that are advantageous to the defendant or at least lay a foundation for the admission of economic data favoring the defendant.

The Statistical Abstract of the United States, published annually by the U.S. Department of Commerce, Bureau of the Census, can be employed prominently during cross-examination of the plaintiff's



economist to introduce favorable recent inflation rates, immediate family income, and other data that refute the analysis made by the plaintiff's economist. Having the Statistical Abstract in hand impresses the jury and usually results in a quick acknowledgement by the plaintiff's economist of any figures read by defense counsel.

The Economic Report of the President, available from the U.S. Government Printing Office, also can be used to cross-examine the plaintiff's economist on current bond yields and interest rates, which probably will be higher than the interest rate suggested by the plaintiff's economist. The use of such figures can rebut the opposing economist's traditional reliance on lower-yielding government bonds.

VIII. JUDGE ALONE – OR JURY?

In most instances, the American system of jurisprudence contains the right to a trial by jury. Defendants should take advantage of the system and exercise that right whenever possible,⁹⁹ despite the residual concerns noted below.

For more than two hundred years now, individuals and corporations have railed against the ability of twelve average citizens to decide complex legal issues. Even before 1800, New York canal builders, perceiving a threat of excess jury awards, sought and secured legislation to avoid jury determinations of land values.¹⁰⁰ Again in the nineteenth century, several states that were consciously pro-

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moting railroad growth restricted the right of trial by jury.¹⁰¹ Today, law reformers who are suspicious of juries repeatedly urge policymakers to modify the right to trial by jury.¹⁰²

Despite the constant refrain that juries have a pro-plaintiff bias, cannot understand complex issues, and award higher damages than judges, the empirical evidence seems to suggest just the opposite. According to two noted researchers, plaintiffs enjoy greater success before judges than before juries in three major tort categories: products liability, medical malpractice, and motor vehicle accidents.¹⁰³ Furthermore, in several categories of personal injury liability, the mean recovery in trials before judges is higher than the mean recovery in jury trials.¹⁰⁴ These statistics clearly suggest that a defendant is often better situated before a jury than a judge.¹⁰⁵

Research also has revealed that when evaluated over a series of cases, juries are good fact finders.¹⁰⁶ More to the point, research does not support the view that juries are overly generous with awards, frequently ignore the law, or are institutionally unable to handle complex cases.¹⁰⁷ In fact, related research seems to suggest that a jury could even outperform a judge, since the judge is also human, and groups typically outperform individuals by virtue of their collective superiority in tasks such as recalling facts and correcting errors.¹⁰⁸

IX. HOW TO PREPARE THE CASE USING A MOCK TRIAL

The use of mock trials has evolved considerably over the course of the last twenty years. Two decades ago, defense counsel and their corporate or insurance counterparts were reluctant to use mock trials to help prepare cases for trial. Today, it is not uncommon for corporate clients themselves to request that mock trials be used to test the trial themes discussed above.

Jurors are sometimes apt to focus on different issues than those considered by the trial lawyer. They may even invent some unexpected issues that need to be addressed. Many such issues will not appear on defense counsel's radar unless and until field research is conducted within the venue. Trial attorneys should "get a feel" for local jurors by recruiting panels for trial simulation within the venue, trying new approaches, discarding what does not work and retaining what does, until a maximally effective message is forged regarding damages.¹⁰⁸

As two commentators have noted, "the purpose of a mock trial is not to predict whether a case will be won or lost. . . . More important is. . . 'to see what flies and what dies.'"¹¹⁰ Some of the more common reasons for conducting a mock trial include: (1) evaluating jury reactions to the case theory; (2) evaluating alternative case strategies; (3) assessing the performance or credibility of key witnesses; (4) determining the type of juror who will least accept the particular trial strate-

gy; (5) determining strategies for handling damages arguments without conceding liability; and (6) determining how best to instruct the jurors or, as is sometimes the case, determining whether they can understand the scientific evidence.¹¹¹ The mock trial allows defense counsel an opportunity to obtain some insights into these issues while there is still time to use them.¹¹²

Using a mock trial also provides defense counsel with an opportunity to identify those types of jurors who will favor the plaintiff and those types of jurors who will favor the defendant. In addition, the mock trial gives defense counsel an opportunity to identify unchangeable juror attitudes that are unfavorable to the defense, to isolate those attitudes if jurors who favor the plaintiff are selected for duty, and to stop unfavorable jurors from spreading poison in the jury room.¹¹³ The mock trial also can help identify juror attitudes that are slightly unfavorable, providing insight on how to change them. Finally, it will help identify those juror attitudes that are slightly favorable, providing insight on how to solidify them.¹¹⁴ In short, conducting a mock trial can uncover the unchangeable attitudes of those jurors who are favorable to the defense, show how to trigger those attitudes, and show counsel how to give jurors the arguments they need to convert the attitudes of those jurors who may be in the middle.¹¹⁵

Once a decision has been made that a mock trial should be conducted, it is important to consider how long the mock trial should take. The length of the mock

trial obviously depends on the size and complexity of the case as well as the resources that can be committed to its preparation and presentation.¹¹⁶

If defense counsel is considering two different approaches to the case, two half-day mock trials using different juries may provide more valuable feedback than one full-day session. The use of a second jury avoids unduly skewed feedback caused by a particularly aberrant or strong juror or those jurors who simply cannot see past the evidence presented in the first trial. The second jury also can be used to experiment with different techniques or themes.¹¹⁷

It is important for the lead trial counsel to have an opportunity to articulate his or her position before the mock jury in order to ascertain the feel of selected themes before using them at trial. For that reason, lead counsel should present the defendant's case while the second chair (or another lawyer in the firm if there is no second chair) presents the plaintiff's case.¹¹⁸ The simplest way to present the case to a mock jury is to ask each attorney to offer a combined opening statement/closing argument discussing the evidence, arguments, and themes.¹¹⁹ Special attention should be paid to providing realistic presentations that reflect the strengths and weaknesses of each side's expected case as closely as possible.¹²⁰

Some lawyers opt to have key evidence presented to the mock jury by way of witnesses, thus allowing the attorney a means to obtain the mock jury's reactions

either to the testimony itself or to the credibility of the witnesses. This approach works particularly well where depositions of the parties and other witnesses have been videotaped. If defense counsel is particularly concerned about having the defendant obtain some practice testifying before a jury or is concerned about obtaining feedback about the defendant's appearance and credibility, the defendant can be asked to testify live before the mock jury.¹²¹

Careful thought should be given to the location of the mock trial. Every effort should be made to conduct the mock trial at a location that has viewing rooms located behind two-way mirrors, allowing counsel to observe the jurors while they deliberate.¹²² If possible, the deliberations should be recorded so that they can be reviewed and studied by the trial consultant and the defense team as the trial approaches.¹²³

Observing the deliberations allows the trial team to learn which issues and questions either worked or failed during the mock trial. Counsel also will learn which arguments or themes worked with the jury or failed to capture their attention. In addition, the mock jurors themselves sometimes arrive at images, metaphors, and themes that can be worked into the trial approach and delivery.¹²⁴

Once defense counsel has selected the theme and refined it using one or more mock juries, counsel must remember to structure the case so that everything is done to further that theme. Defense counsel cannot simply deliver the evi-

dence and hope that the themes emerge on their own. Voir dire, the opening statement, the choice of witnesses and exhibits, the examinations, and the closing argument all must be conducted with an eye toward the winning theme.¹²⁵

X. DEFENSE STRATEGIES TO REDUCE JURY ASSESSMENT OF DAMAGES

The struggle to contain the plaintiff's damage award begins the moment defense counsel sets foot in the courtroom. Like all human beings, jurors eventually reach a decision about whether or not they like and trust a particular individual. The defense counsel who believes that jurors can and will divorce their personal opinions from their fact-finding role is simply unrealistic. Whether consciously or unconsciously, jurors will consider their personal feelings towards the attorneys when deciding the issues of the case. While it may be rare that a juror's negative opinion of defense counsel results in converting a verdict of no liability to one of liability, a negative opinion of defense counsel is likely to be reflected in the amount of damages awarded. This is especially true with respect to large corporate defendants against whom juries typically award the largest verdicts. Jurors are more likely to assume that the corporate defendant can absorb the additional damages and more likely to treat defense counsel as an extension of the corporate defendant. In fact, they sometimes associate their negative opinions of defense counsel with the corporate defendant itself.

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Cultivating a favorable image in the eyes of the jury is not complex, nor does it require a great deal of effort. However, it does require that defense counsel remain attentive to his or her conduct before the jury at all times. From voir dire to closing argument, defense counsel should remember that every word or deed will affect his image in the jurors' minds. Thus, defense counsel should be careful to avoid any act which constitutes a serious affront, even though common to the practice of litigating attorneys. Examples include cutting a witness off (especially a non-party witness), demeaning or humiliating a witness on the stand, making repeated technical objections (especially when the judge is clearly going to overrule them), resorting to exaggeration, sarcasm, or hysterics during arguments with the court, ordering (as opposed to asking) the court reporter or bailiff to perform certain tasks (e.g., to mark an exhibit), and being late or unprepared. If the jurors like defense counsel, they likely will offer greater respect to his or her damage arguments as well.

A. *Voir Dire*

The first step in successfully refuting excessive damages and laying the foundation for a fair and reasonable award to the plaintiff should be taken during the voir dire examination. Voir dire is defense counsel's first opportunity to interact with the jury. As such, it is an excellent opportunity to begin developing a rapport with the jury so that jurors will repose their trust and confidence in counsel.

Voir dire also offers an excellent opportunity to begin persuading the jury and preparing jurors for the defense theory of damages. Defense counsel should inform potential jurors that they will hear evidence regarding damages. Each juror should be asked whether the presentation of such evidence by the defense will be considered an admission that the defendant is responsible for paying damages. Such questioning permits defense counsel to explain that a lawyer is obligated to defend all aspects of the case, addressing liability as well as damages.

The jury also should be told what the law will require of them if they are chosen to serve. It is extremely important for defense counsel to inform prospective jurors during voir dire (and again during the opening statement) that they can expect to hear highly charged and emotional testimony about the plaintiff's medical condition and future prognosis. Defense counsel must ask each member of the venire whether he or she can displace their sympathies, as the law requires, and decide the case fairly and reasonably. Each juror should personally commit him or herself to follow the law in the case, including that affecting damages, even though he or she might not agree with it. Following such a procedure accomplishes two objectives. First, the emphasis on requiring that jurors be honest and fair reflects back on defense counsel — demanding that others be honest and fair assures that defense counsel is a fair and honest person himself. Secondly, members of the jury will understand that they were selected because defense counsel believes that they will follow the law and put their sympathies aside.

When eliciting an assurance from prospective jurors that a verdict will be fair and reasonable to all sides, including the defense, defense counsel must advise the jury of the nature and extent of the plaintiff's injuries, particularly when dealing with a catastrophic injury. By advising the jury up front, defense counsel softens the impact of the trial testimony and conditions the jury to guard against an award based on sympathy or compassion.

Potential jurors should always be asked if they would be willing to refuse a damage award to the plaintiff if the evidence demonstrates that the plaintiff was not injured as a result of the defendant's conduct. This question allows defense counsel to introduce the idea during voir dire that the plaintiff may not have suffered any injury as a result of the actions or inactions of the defendant.

Finally, in catastrophic injury cases, defense counsel must be creative during the jury selection process. In brain and spinal cord injury cases, plaintiff's case will depend in large part on the jury's empathy with the catastrophically injured plaintiff. To take best advantage of that sympathy, plaintiff's counsel often introduces and shows to the jury a day-in-the-life film of the plaintiff. If that be the case, defense counsel should consider requesting that the entire panel view the film in advance of voir dire to excuse those individuals for cause who cannot put sympathy and prejudice aside and base their verdict solely on the evidence and the law.

B. Opening Statement

The defense opening statement should educate the jury on the damage issues and the defendant's theory of damages. The jury forms important first impressions during the opening statement. Therefore, defense counsel should project competence and concern for every aspect of the case, including damages. Counsel should take advantage of the jurors' uncluttered and receptive minds at the outset of trial. Thus, the opening statement is the best time to influence jurors regarding the defense perspective on damages.

The competent and well-prepared defense attorney will develop the damages theory well in advance of trial and use it as a blueprint for addressing the damage issues throughout trial. That theory, which must be articulated in the opening statement, should be logical, consistent, and appropriate to the case. It should be capable of clear enunciation to the jury and should include references to supporting evidence later admitted at trial. Jurors should be reminded during the opening statement that by discussing damages, defense counsel in no way admits or acknowledges that the defendant is liable for negligence or responsible for the plaintiff's injuries.

At the beginning of the opening statement, the defense attorney faces jurors who know very little about the case they will hear. The jury must be educated with respect to the damage issues they will be asked to decide. In addition, the jury must be provided with information concerning the facts and circumstances



surrounding those damages. This would include information regarding the nature and extent of the plaintiff's injuries, her diagnosis and prognosis, the plaintiff's education, and her occupation and employment history. Moreover, the jury must be taught the meaning of the unfamiliar terminology it will hear during the course of trial. Finally, the jurors must be provided with a detailed description of unfamiliar concepts that will permeate their damage determinations. The most likely unfamiliar concepts will include malingering, present cash value, life expectancy, work-life expectancy, discount rate, rates of disease, remission and relapse, long-term care costs, and vocational rehabilitation. Educating the jurors in these areas will motivate them to identify with the defendant and the defendant's case regarding damages.

Every case involves different fact and damage scenarios. However, several techniques are available to help prepare the jury to regard the defendant's side favorably during the opening statement.

Defenses counsel should identify himself with the client by saying "we" and "us" when referring to the client. Defense counsel should use demonstrative evidence and visual aids appropriately and selectively. Every effort should be made to speak in "plain English" rather than using legal and medical jargon. It is important that counsel define crucial terminology, especially in terms of damages, before the jury hears those terms from the witnesses. And legitimate injuries should always be described accurately, since this builds the lawyer's credibility with the jury.

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Defense counsel should present a positive or constructive approach to the damage issues rather than an approach that simply razes the plaintiff's case. Defense counsel should reveal and diffuse the weaknesses in his damages case in the most constructive way possible before the plaintiff's witnesses take the opportunity to exploit those weaknesses later in the trial. Defense counsel also should attempt to warn jurors about potential red herrings in the plaintiff's case, cautioning them that they might be misled if they are not vigilant in reviewing the evidence.

Additional techniques for persuading the jury during opening statement include stimulating their interest in the testimony that they will hear during the trial without exaggerating the "appeal" of such dry matters as economic testimony. Defense counsel must make the jury anticipate any testimony concerning damages that

would be generally interesting and important. Defense counsel should be careful never to overstate or exaggerate a point, however, as the opposition is sure to turn that tactic to its own advantage later in the trial. This maxim is especially true with regard to damages.

Finally, defense counsel should not suggest ultimate verdict figures during the opening statement. Instead, any statements concerning an actual dollar figure should be reserved for the closing argument. Nonetheless, defense counsel must remember that effective control on damages requires defense counsel's reiteration of the "fair and reasonable" standard of compensatory damages. The jurors must be reminded constantly, including during opening statement, that any damages awarded to the plaintiff must be fair and reasonable to all parties, including the defendant. ◀

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- † Submitted by the authors on behalf of the FDCC Trial Tactics, Practice & Procedures Section.
- 79 See Robert Heaton et al., *Prospects for Faking Believable Deficits on Neuropsychological Testing*, 46 J. COUNSELING & CLINICAL PSYCHOL. 892 (1978).
- 80 See David Faust et al., *Pediatric Malingering: The Capacity of Children to Fake Believable Deficits on Neuropsychological Testing*, 56 J. COUNSELING & CLINICAL PSYCHOL. 578 (1988).
- 81 R. K. McKinzey, *A Research Update: Neuropsychological Assessment*, 42 FOR THE DEFENSE 22, 23 (July 2000).
- 82 Price, *supra* note 67, at M8.
- 83 Coleman, *Psychiatry and Personal Injury: Exposing the Experts*, 27 FOR THE DEFENSE 8, 9-10 (Feb. 1985).
- 84 Guilmette et al., paper presented at National Academy of Neuropsychology, 1987.
- 85 ZISKIN & FAUST, *supra* note 75, at 213-14.
- 86 Price, *supra* note 67, at M11-M12; see also David Faust et al., *Challenging Neuropsychological Evidence in Brain Damage Litigation*, 36 FOR THE DEFENSE 22, 28 (June 1994).
- 87 ZISKIN & FAUST, *supra* note 75, at 213-14.
- 88 Paul Lees-Haley, *Neuropsychological Testing in Cases with Normal Neurological Findings*, 61 DEF. COUNS. J. 131, 135 (Jan. 1994).
- 89 Lees-Haley, *supra* note 71, at 29.
- 90 There are many other factors that can affect test results adversely, including drug and alcohol abuse, negative emotional stresses (including domestic problems, divorce, death of a loved one, problems with children, financial difficulties, etc.), pain, distraction, hearing problems and visual difficulties. These areas of potential influence frequently are ignored by neuropsychologists, but should be vigorously explored by defense counsel on cross-examination. Paul Lees-Haley, *Neuropsychological Testing in Toxic Exposures: Brain Damage and Disability Issues*, 38 TOXIC L. REP. 118 (Feb. 28, 1990).

- 91 ZISKIN & FAUST, *supra* note 75, at 215-16.
- 92 Michael L. Brookshire, *The Forensic Economist for the Defense*, 41 FOR THE DEFENSE 23 (Feb. 1999).
- 93 *Id.*
- 94 *Id.* at 25.
- 95 *Id.*
- 96 *Id.*
- 97 *Id.* at 26.
- 98 *Id.*
- 99 In some cases, the right to trial by jury does not exist. For example, when the United States is a defendant, usually no right to jury trial exists. See 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2314 (1971). Generally, in a tort action brought under the Federal Tort Claims Act, the statute dictates trial by judge. 28 U.S.C. § 2402.
- 100 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 67 (1977).
- 101 *Id.* at 84.
- 102 Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1125 (1991-92).
- 103 *Id.* at 1134.
- 104 *Id.* at 1126.
- 105 It should be noted that some researchers have suggested that juries are significantly more likely to award punitive damages than are judges and that juries are apt to award higher levels of punitive damages than judges. See Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (Jan. 2004).
- 106 See VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 113-48, 245-47 (1986); REID HASTIE ET AL., INSIDE THE JURY, at 230 (1983); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 201-16 (1988); RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 49-71 (1980).
- 107 Clermont & Eisenberg, *supra* note 102, at 1152 nn.70-72.
- 108 *Id.* at 1152-53 n.73.
- 109 George R. Speckart & Lyndon L. McLennan, Jr., *Excessive Damages Awards and Tactics for Containment*, 44 FOR THE DEFENSE 11, 16 (Nov. 2002).
- 110 Carlson & Graeven, *supra* note 8, at 23.
- 111 *Id.* at 24.
- 112 *Id.*
- 113 Gass, *supra* note 6, at 23.
- 114 *Id.*
- 115 *Id.*
- 116 Carlson & Graeven, *supra* note 8, at 23.
- 117 *Id.*
- 118 *Id.* at 24.
- 119 *Id.*
- 120 Dorothy K. Kagehiro, *Factors Affecting Jury Damages Awards Decisions*, 45 FOR THE DEFENSE 18, 20 (Aug. 2003).
- 121 *Id.*
- 122 *Id.*
- 123 *Id.*
- 124 *Id.*
- 125 *Id.*

Innovations in Jury Trial Practices are Abundant, But Do They Make Case Evaluation and Choice of Venue More Complicated?

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I. INTRODUCTION

With the increased use of mediation, arbitration, and other alternative dispute resolution mechanisms in recent years, the incidence of jury trials in medical malpractice cases seems to be further declining. Even so, a jury trial, or the threat thereof, is still an important and often climactic event in most medical malpractice cases. In 2006, 14 of the highest jury verdicts in the US came from medical malpractice or nursing home suits, ranging from about \$217 million to \$19 million. In 2005, 11 of the top 100 jury verdicts were from medical malpractice suits and ranged from \$606 million to \$20 million.¹

Though on the decline generally, jury trials are still numerous throughout the US. The National Center for State Courts ("NCSC") estimates there are 154,498 jury trials each year in the US. Of those, about 5,940 are held in federal courts and 31% of them are civil jury trials (46,053).² California has the most each year, about 16,000. Vermont and Wyoming have the fewest, about 126. Jury trial rates per population unit also vary widely among states. Alabama has the lowest rate, at 15 trials per 100,000 people. Alaska has the highest rate, at 177 per 100,000 people.³



When a medical malpractice suit is brought, one of the first issues that is typically considered is the location of the trial—more precisely, in which court or venue will the trial take place. It is also one of the most important factors in evaluating a case. It has become common practice to link, at least to some extent, the potential severity of the damages award to the venue where the case will be tried. Typically, this association is made because many people believe that the socio-economic background of the jurors themselves in that venue has a direct impact on the amount of damages they will be willing to award. This adage

is "proven" in a particular venue when there is a history of what appears to be above average awards. Some venues are even called "judicial hellholes" by industry groups in part due to a pattern of comparatively large jury verdicts and perceived judicial inequities that contributed to those verdicts.⁴

While there may be some validity to looking at venues in this way, there may be differences in the jury trial procedures employed in the various venues that may have an effect on the outcomes of jury trials. Jury trials are held in a wide variety of venues throughout the United States.

1. *VerdictSearch Top 100 Verdicts of 2005*, The National Law Journal, February 20, 2006; www.verdictsearch.com; www.nlj.com;
2. Judge Gregory E. Mize, et al., *The State-of-the-States Survey of Jury Improvement Efforts Executive Summary*, at 2 (National Center for State Courts, Center for Jury Studies 2007)
3. *Id.*
4. American Tort Reform Foundation, *Judicial Hellholes 2007*, at 1 (American Tort Reform Foundation 2007) <http://www.atra.org/reports/hellholes/report.pdf>

Venues available to litigants include all the states and territories, all the counties within each, and sometimes even certain city courts. In addition, there are the various federal district courts and the different regions within each. Jury practices and procedures among these various jurisdictions and venues are not uniform. Adding to this non-uniformity is the fact that many jury trial techniques are permitted “in the sound discretion of the trial court.” Procedures can even vary among the judges within the same local court.⁵

Plagued by juror complaints about their negative jury trial experiences, a persistent high rate of “no shows” at jury calls and a high rate of jurors who want to get discharged due to hardship and other reasons, courts have initiated a variety of improvements to the jury trial system.

The NCSC reports that over the past 10 years, 38 states have appointed some entity to focus on jury improvement, such as a task force or commission. And just over half of local courts surveyed reported some jury improvement activity in the past 5 years.⁶ The areas of improvement that seem to be most often targeted are: technology upgrades; decreasing the non-response rate of called jurors; improving the jury yield, improving facilities and improving juror utilization.⁷ These issues are dealt with in a variety of ways including better ways of instructing jurors and providing jury instructions, allowing jurors to take notes or ask questions of

witnesses, better facilities, higher pay, shorter terms of service, and others.

This article will describe and discuss some of the varying jury practices among the different US courts, many brought about by jury system improvement efforts, and explore whether those practices have the potential for affecting the outcome of trials, thus complicating case evaluation and choice of venue.

II. PRE-TRIAL CONSIDERATIONS

A. Length of Jury Service and Juror Compensation

Courts are plagued by poor response rates to jury calls, and high strike rates for cause or hardship. The basic causes for this aversion to jury service may be loss of income and the length of jury service. Over half the states allow the local courts the discretion to determine length of jury service. More than 1/3 of those local courts require a 1 day/1 trial term. About half the states mandate that term as well. However, the maximum term of service in some states is set a lot higher, even as high as a month or more. In twelve states the maximum jury service term is

a month (or more).⁸ Courts with one day/one trial terms have lower excusal rates than courts with longer terms.⁹

Juror fees, rates of pay, the payment structure, mileage and other expense reimbursement differ considerably among the various states and venues in the US.¹⁰ Another cause for poor response rates and high strike rates appears to be poor compensation paid to jurors. The NCSC reports that states are now seeing a relationship between the amount of juror fees, the proportion of citizens excused for financial hardship, and minority representation in jury pools.¹¹ So, some states have increased the fees paid to jurors or altered the payment structure. One such example is Arizona, which has implemented a “Lengthy Trial Fund” that compensates jurors for lost income up to \$300 a day.¹² Courts that pay juror fees larger than the national average see lower excusal rates than those courts that do not pay as high.¹³

It is logical to think that those with increasingly more to lose by spending their time in jury service will be increasingly more likely to try to avoid service. Thus, jury panels in states with longer

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5. Mize, *supra* note 2, at 1, 6.

6. Mize, *supra* note 2, at 3.

7. Mize, *supra* note 2, at 3.

8. Judge Gregory E. Mize, et al., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report*, at 11 (National Center for State Courts, Center for Jury Studies 2007) http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendiumFinal.pdf

9. Mize, *supra* note 2, at 4, 5.

10. Mize, *supra* note 8, at 12, 13

11. Mize, *supra* note 2, at 4.

12. Mize, *supra* note 8.

13. Mize, *supra* note 2, at 5.

terms of service, and/or lower pay, may be weighted more heavily with persons whose income level, or personal or job responsibilities do not prohibit them from participating in jury service for even extended periods of time. It is important for the medical malpractice defendant to know whether important segments of the jury pool may be absent or more likely to be absent from their case and to assess the impact. It is important to know what terms of service and pay jurors can expect relative to other venues and the history of juror response to jury calls.

B. Juror Source Lists

Source lists are the lists of potential jurors that courts use to call a panel for service. There are many different lists that courts can use for this purpose. Which lists are used is the initial filter that establishes the inclusiveness and demographics of the jury panel. 30 states mandate which source lists are to be used. 15 states allow local courts to supplement required source lists with other lists. Voter registration lists (38 states) and driver's license lists (35 states) are the two most commonly mandated. The other supplemental source lists most commonly used are income or property tax rolls, unemployment compensation recipient lists, public welfare recipient lists and state ID card holders.¹⁴

One could argue that all source lists are not completely impartial in terms of the demographics of those listed. Some of these lists appear to be more impartial than others. For example, the source list

of licensed drivers does not depend on any other factor, such as race, education level, income level, community stability, etc. Such a list is probably most representative of all segments of the population, except for those that do not drive. However, other lists are not so clearly proportionally representative of the community. Property tax rolls list those that own property. Non-property owners, such as those that rent, would not appear on that list. Conversely, welfare recipient lists are more likely not going to include those with steady jobs, or high income levels. So, if your case may be brought in a state or venue that relies upon certain of these alternative lists, then it may be important to assess this factor in choosing a venue or evaluating your case or potential trial outcome. Alternative venue choices may be perceived as more favorable based on the socio-economic demographics of those on the particular source lists used by those venues.

C. Prevalence of Local Jury Trials and Local Verdicts

Where a person lives has an effect on the likelihood they will have experience in their local jury trial system. In New Mexico, for example, in just the past few months there have been 3 well publicized jury verdicts in medical malpractice and nursing home cases in excess of \$20M. Having a relatively small jury pool exposed to this kind of activity in such a short period of time, along with the attendant publicity, likely has some effect on potential jurors. Knowing what the jury

pool has been exposed to, local verdict history and publicity, and jurors past experiences are important considerations. Knowing these facts will be of assistance in conducting better mock trials or focus groups, jury selection and all other parts of the trial.

III. TRIAL CONSIDERATIONS

A. Jury Selection—Who Asks the Questions During Jury Selection? And Preemptory Challenges

Not surprisingly, the process for selecting jurors in a trial also varies considerably among the various jurisdictions and venues. Preemptory challenges are not allowed by all courts. Attorneys are more likely to ask the panel questions in state courts, while judges are more likely to do the questioning in federal courts. In addition, the time allowed for jury selection varies considerably among the states. In South Carolina, it is common to pick a jury in about 30 minutes. But in Connecticut, jury selection in civil trials averaged 16 hours.¹⁵

Preemptory challenges are certainly beneficial to a party where a juror might be perceived to be prejudiced against that party, but not admittedly so. Not having preemptory challenges means it is more likely a party will be stuck with jurors they could have otherwise stricken. However, having preemptory challenges doesn't mean much if you don't use the strikes well. Having adequate time for voir dire is therefore essential. The combination of

14. Mize, *supra* note 2, at 5.

15. Mize, *supra* note 2, at 6.

having no strikes and little or no control over voir dire is truly a major comparative disadvantage. Having the judge formulate and ask the jury panel questions may be less than optimal.

Research has shown that jurors are more likely to answer attorney-asked questions more candidly. This is because attorneys are less intimidating than judges and they usually know their cases better and can ask better questions.¹⁶ Medical malpractice defendants should maximize their use of jury selection, not only to start telling the jury their story, but most importantly, to select the best jury possible that will be able to understand their defense, be receptive to it and able to render a verdict commensurate thereto. Limited or no voir dire, or lack of preemptory strikes makes it less likely the jury will do either. Knowing the processes to be used at the outset of the case should be a priority.

B. Allowing Jurors to Ask Questions During Trial

Some venues allow jurors, at some point during a trial, to ask questions to the witnesses. They are usually put in writing and read by the judge. This is a growing trend. It is estimated to have taken place recently in about 15% of trials.¹⁷ It does seem like a good idea: if a juror has a question during a trial and the attorneys and witnesses aren't providing the information that will help the juror answer that question, then simply providing a process for jurors to ask those questions would be a positive step. While it sounds good in theory, there are some real

concerns about putting it to actual use, especially in a trial that may yield a significant award. The practice is prohibited altogether in 11 states.¹⁸

A common error that sometimes requires a mistrial is where an attorney asks a question of a witness where either in the question itself, or in the witnesses answer, mention is made of a particular fact or issue that had been previously ruled inadmissible at trial by the court in a motion in limine hearing. The "classic" example of this is mention of the dreaded "I" word—Insurance. It can go either way. The argument goes: if the jury is told that a physician or hospital has insurance, then they might be more likely to find for the plaintiff, or may be more likely to award higher damages. Conversely, if the jury is told that the plaintiff has insurance that covers some or all of her economic damages, i.e. medical insurance, disability insurance, worker's compensation, Social Security disability, etc. then the jury will be less likely to find in favor of the plaintiff, or more likely to award lower damages.

The error has already occurred when the forbidden word or subject matter is mentioned (or when the jury knows what is coming in answer to a question even before it is spoken) but such error is further compounded when the attorneys for the other side are required to stand up and object thus giving the jury the

impression that they are trying to hide something. So, one major concern about allowing jurors to ask questions is that they will inquire about a fact or issue that has been ruled inadmissible. The simple fact that they want to ask a particular question, even if the judge does not allow it to be read in open court, may have the same effect described above, at least as far as that one juror is concerned. If that juror then discusses this with the others, they are all tainted. If you are in a venue that allows juror questions, it would be good practice to anticipate juror questions in advance and have at least sample answers or other plans prepared to deal with improper questions. If defense counsel is prepared, he can move that jurors' questions be sequestered to avoid contaminating the whole panel and to avoid mistrials.

In a field study of actual trials, juror questioning enhanced juror satisfaction with their experience and made them feel they had more information upon which to decide the case. However, there was no clear evidence that this procedure helped to uncover important evidence or lead to overall juror satisfaction.¹⁹ It appears that most of those surveyed are in favor of allowing juror questioning.²⁰

Some of the other criticisms of juror questioning are: that juror questioning will be unduly disruptive, prolong the trial, unfairly surprise one side, burden the court,

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16. Mize, *supra* note 8, at 28.

17. Mize, *supra* note 2, at 7.

18. Mize, *supra* note 8, at 35.

19. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, Court Review, Spring 2004, at 14.

20. *Id.* at 14-15.

or be inappropriate. In criminal cases, this issue of juror questioning has garnered a lot of attention. In a criminal case, the Minnesota Supreme Court reasoned that in order for jurors to ask questions, they must first form some opinions, or a hypothesis, that their questions then test or investigate. Thus, there is an increased risk the jurors will draw conclusions or settle on a theory before all the evidence and instructions are given to them.²¹ The Second Circuit US Court of Appeals has said regarding juror questioning in criminal cases: “The most troubling concern is that the practice risks turning jurors into advocates, compromising their neutrality.”²² Besides turning jurors into advocates, the main concern in criminal cases is that juror questioning will unfairly assist the prosecution in meeting its burden of proof.

While not discussed in the articles reviewed and cited herein, that same concern should apply with equal force to civil cases as well. After all, aren’t hospitals and physicians often “accused” of “committing” malpractice? The similar concern in civil cases is whether a juror’s question will have the effect of unfairly shifting the burden of proof from the plaintiff to one or more of the defendants. “Why didn’t the nurse call for the doctor sooner?” or “Why wasn’t the TEE (test) ever ordered?” are just a couple examples of questions shifting the burden of proof from the plaintiff to the defendant. Rather than looking to the Plaintiff’s experts and treating physicians for proof that something was required and wasn’t done, that

burden is then shifted to the defendants who now must affirmatively prove the contrary assertion, or risk losing the case. Once the question is uttered, there is no taking it back. Once the defense takes on the question and fails in the eyes of the jury to answer it to their satisfaction, then that defendant may very well get a verdict against him, even though the plaintiff’s side has technically failed to meet their burden of proof—failed to make a submissible case. Knowing whether a venue allows juror questioning, and how it is done, is important. Alternative venues, like federal court, that don’t allow the practice at all may be viewed as more favorable. At a minimum, knowing what process will be used in advance will allow for better preparation.

C. Allowing Jurors to Take Notes During the Trial for Use During Deliberations

Most states now allow jurors to take notes during trials. More than 2/3 of the judges surveyed by the NCSC in both state and federal courts allow juror note taking. It seems that most of the opinions of jurors, mock jurors, attorneys and judges surveyed favor juror note taking.²³ The focus of juror note taking is not necessarily on outcome, or effects on outcome, but instead on juror satisfaction and ability to remember evidence. Those favoring juror note taking seem to think both things are improved by it. Criticisms of juror note taking include: taking notes during a trial is a distract-

tion both to the note taker, and others; notes taken may be inaccurately made, notes are filtered and thus may favor one side; and notes may give note takers an advantage over non-note takers during deliberations. Interestingly, one project, a field experiment to test juror note taking, did not find strong effects either for or against it. The jurors who did take notes were somewhat more satisfied with their experience. However, there was no clear evidence that those jurors remembered the evidence better.²⁴

There are real concerns as regards juror note taking. One is that a particular note may further embolden a juror and make it impossible for them to change their mind. Once written down, sometimes people put more emphasis or reliance upon it giving it more weight than it would otherwise get or deserve. Non-important issues may take on undue importance. Jurors with more or better notes may take on a more important role or be given more deference from the others. All jurors might have an equal opportunity to take notes, but unless they all pursue it equally and with equal skill, then inequality may result. The effect would be to make the better or stronger note taker(s) the decision maker(s). If you are in a jurisdiction or venue that allows juror note taking, knowing who will take notes and who is educated or skilled in taking notes are important considerations. You may be able to discover or make an educated guess as to who will be the jury foreman.

21. *State v. Costello*, 646 N.W.2d 204 (Minn. 2002); see generally, Robert Augustus Harper & Michael Robert Ufferman, *Jury Questions in Criminal Cases: Neutral Arbiters or Active Interrogators?*, 78:2 Fla. Bar J. 8(Feb. 2004)(This article contains a thorough discussion of this issue as applied to criminal cases.)

22. *U.S. v. Bush*, 47 F.3d 511, 515-16 (2d Cir. 1995); see also, note 21.

23. Dann and Hans, *supra* note 19, at 13-14

24. Dann and Hans, *supra* note 19, at 13-14.

D. Preliminary Jury Instructions

It is increasingly more common for courts to provide the jury with some or all of the jury instructions prior to the start of the evidence. Some states require it by court rule. There are varying degrees of the amount of instructions jurors are given. The idea is to provide the jury with a roadmap that will guide them through the trial and form the “bulletin-board” onto which the evidence will thumb-tacked as trial progresses. In one study on the effectiveness of this program the authors said that the jurors made better decisions when they had a coherent framework to organize the initial processing and subsequent recall of the evidence. Jurors reported really liked having the preliminary instructions.²⁵

Intuitively, this sounds like a great process. It would be of particular assistance to the medical malpractice defendant to have the jury prepared in advance about complicated medical issues or a hard to understand causation defense. If it is true that jurors prepared in this manner really do understand the issues and evidence better, and have better recall, then it is favorable for medical provider defendants. The converse must also be true—that jurors who do not receive preliminary jury instructions won’t be as attentive or attuned to such facts, issues or defenses. Therefore, one could argue that medical malpractice defendants would generally fare better in venues that pre-instruct jurors, and that this would be especially true if there were complicated medical



issues or causation defenses. Knowing what process a venue follows may be important to know as alternative venues may be more favorable. But even more importantly, it will help you plan to deal with a venue that does not so pre-instruct. Voir dire and opening statements, and even witness examinations may need to take on a totally different feel to be effective. In venues where it is not done routinely, counsel should ask the court to pre-instruct, if there is no legal prohibition to the contrary.

E. Juror Notebooks

This is an extension of juror note taking discussed above. Providing jurors with individual multipurpose notebooks for use during trial and deliberations is gaining

popularity, especially in complex and long cases.²⁶ Such notebooks might contain copies of important documents, seating charts of trial participants, glossaries of terms used, witness lists and their backgrounds, blank sheets for notes and other items. It has been reported that a high percentage of jurors that got such notebooks really liked them.²⁷ Empirically, such jurors did score higher on comprehension tests. Analyzing the use of juror notebooks mimics that for preliminary jury instructions and juror note taking generally. Medical malpractice defendants may fare better in those venues that allow such notebooks when there are complicated medical issues, causation defenses, or the trial will be long. So,

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25. Dann and Hans, *supra* note 19, at 16.

26. Dann and Hans, *supra* note 19, at 16.

27. Dann and Hans, *supra* note 19, at 17.

even if your trial venue has not previously allowed, or had much experience with trial notebooks for jurors, it is something that should be thought about and possibly tried out. The Dann and Hans article cited herein could be used as a basis for authority supporting their use.

III. CONCLUSION

While fairness and an even playing field is thought to be guaranteed by the practices and procedures in each jurisdiction and venue, when comparing and contrasting the vast and material differences between them, the question naturally arises whether all the playing fields are on the same level. This question then takes on additional importance to litigants when they have a choice of different forums or venues in which to bring their cases or have them tried to a jury. Even though the number of jury trials held each year has been steadily declining²⁸ they are still an important vehicle for resolving disputes in medical malpractice cases.

In trials with catastrophic injuries, huge damages claims, the possibility of punitive damages, etc., the rules regarding juror processes and participation take on increased significance. The various issues and procedures discussed above can and probably should be taken into account and given appropriate weight depending upon their relative significance to the particular case. Such consideration may lead a party to choose one venue over another, ask for a change of venue or removal to federal court from state court. At a minimum, defendants should adjust their trial strategies to gain every perceived advantage possible.

It is not likely that any one of these variables alone will change trial outcomes. But, in a close case, knowing which of these procedures will be used or may be allowed could impact how well the jury understands your side of the case—clearly a critical component to a successful outcome.

Based upon the discussion above, there are certain jury procedures that are probably more beneficial to the medical malpractice defendant compared to not having them. The two standouts are preliminary jury instructions and juror notebooks. These two have the highest potential for positive impact with a jury in terms of their understanding and retention of complicated medical issues and causation defenses. It's not a coincidence that these two also have embedded in them some degree of control by defense counsel—another advantage to their use. Defense counsel will put together and argue the appropriateness of their proposed preliminary jury instructions and juror notebooks, and against any improper ones submitted by plaintiff's counsel. These two procedures are already allowed in some jurisdictions and venues. However, they should be considered, and the courts petitioned for their use, in areas where they aren't already affirmatively allowed. ◀

28. Mize, *supra* note 2, at 1.