

Punitive Damages:

Not to Worry, Jurors Still Rely on Common Sense

By Idgi D'Andrea



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A record-setting punitive damage award of \$28 billion against Phillip Morris in favor of a plaintiff dying of lung cancer caused many to fear it is now "open season" on corporations. "Jury Orders Philip Morris to pay \$28 Billion in Punitive Damages," Fox News, October 4, 2002.

Jurors exposed to the media blitz that followed the announcement have been speaking out from the jury box about this award. The "MacDonald's coffee spill" has been replaced with the "tobacco verdict" as the symbol of a jury system run amok. Shaking their heads, commentators and everyday citizens call for tort reform or doing away with juries altogether and using professional decision-makers instead. As one *LA Times* reader put it, "Twenty-eight billion dollars for a single smoker? When exactly is enough enough?...I look at [the plaintiff's attorney] as simply

another reason for tort reform in this country." Will Ray, "Smoker's \$28-Billion Award Raises Ire," *L.A. Times*, October 13, 2002.

Questions abound in the aftermath of such publicity and both the public and legal experts raise important issues. How bad is the situation? Can juries be fair? And what, if anything, can attorneys do to select fair and unbiased jurors who will restrain sympathy and passion in favor of reason and discretion?

While a few punitive damage awards have been accurately described as "jaw dropping," the common perception that exorbitant

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punitive damage awards are a frequent occurrence is simply incorrect. In a comprehensive review of the literature, Edie Greene, Ph.D., a researcher and author of a recent book on the psychology of damages, cites a Bureau of Statistics study that found punitive damages were awarded in only 4% of jury trials in which the plaintiff won on liability. Greene, *“Determining Damages: The Psychology of Jury Awards”* (2002), citing DeFrances & Litras (1999). Contrast this with the finding that potential jurors estimated that almost 50% of jury verdicts include punitive damages. J. K. Robbenolt, “Punitive Damages Decision Making: The Decisions of Citizens and Trial Court Judges”, 26 *Law & Hum. Behav.* (2002).

Potential jurors’ estimates of the size of jury awards are similarly overinflated. Even those who regularly participate in litigation and trials — judges and defense attorneys — are not immune from believing the worst and they also overestimate how much money jurors might award in punitive damages. Perhaps ironically, it is plaintiffs’ lawyers themselves who are the most on target. R.L. Wissler et al., “Decisionmaking about General Damages,” 98 *Mich. L. Rev.* 751, 783 (1999).

What accounts for the disparity between jurors’ verdicts and the public’s perceptions of them? The most compelling explanation hinges on a phenomenon known as the “availability heuristic.” Simply put, an individual evaluates the likelihood that an event will occur by his or her ability to recall similar events in the past. Accordingly, potential jurors’ concerns about large-verdict awards are shaped by media exposure that routinely reports only the most dramatic verdicts. Due to selective media coverage emphasizing large jury awards, potential jurors assume the frequency of such awards to be far greater than it is. The mundane and less glamorous day-after-day work of juries and courts, where reasonable verdicts are routinely handed down, simply does not grab the pub-

lic’s attention, much less sell newspapers.

On the surface, this situation might appear to be cause for worry, if not alarm. Fortunately in recent years, outstanding researchers in jury decision-making, such as Edie Greene and Valerie Hans, have provided us with reassuring data suggesting that the system is hardly going haywire. Their findings are consistent with our own impressions, which are based on trial simulation research, communi-

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ty attitude surveys and post-trial interviews with jurors. By and large, jurors are doing a commendable job of reasoning through complex legal issues and arriving at rational and fair verdicts.

Studies have shown that jurors do take a rational approach to deciding punitive damage awards. Guidelines for determining reasonable punitive damages set by the Supreme Court’s decision in *BMW v. Gore*, 517 U.S.

559 (1996) are indeed reflected by the deliberations of most juries. Juries closely examine the severity of the harm inflicted by the defendant, the conduct of the defendant, and the wealth of the defendant in determining how to set an award that will punish and, in some instances, deter a defendant from inflicting further harm. J.K. Robbennolt, “*Determining Punitive Damages*,” *Buffalo Buffalo Law Review v. 50*, No. 1 (Winter 2002).

Our post-trial interviews with jurors confirm the research results. Obviously, the court instructs jurors on how they should consider damage awards, but it appears that jurors are inclined either naturally or by virtue of the instructions themselves to follow the law. Thus, we can be reassured that the best legal minds and the humblest jurors strive to apply the same principles to the moral issues at stake in punitive damages cases.

Still, every attorney seeks to go into jury selection with some view of who is likely to be favorable to his or her side, and what types of prospective jurors must be weeded out at all costs. It is not difficult to imagine a respondent in a jury panel airing her disapproval of a decision in an infamous punitive damages case, and a sea of heads nodding in agreement. Clearly, potential jurors who *strongly* agree that most damage awards are too high are the least likely to award punitive damages. Robbennolt, *supra*, at 129. However, plaintiffs typically have too few peremptory challenges to excuse all those who sound equally disinclined towards such awards. Attorneys must dig deeper to understand who among this large group is likely to harbor bias against the plaintiff or in favor of the defense.

Jury selection is puzzling for defense attorneys as well. Even though a sizable majority of potential jurors may express reservations about excessive awards, chances are that not all of those in this group will automatically

reject claims for large amounts of money. In fact, if selected to serve and if convinced that the defendant should be punished, many of these same jurors are likely to assess an even higher punitive damage award than those who believe awards are about right. This startling notion is based on studies conducted by Greene and her associates demonstrating that those who “perceived a high frequency of large damage awards awarded higher amounts in damages” than others in mock trials. Robbennolt, *supra*, citing E. Greene *et al.*, *Jurors’ Attitudes About Civil Litigation and the Size of Damage Awards*, 40 *AM. U. L. Rev.* 805, 813 (1991).

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With little direction from the court about how to arrive at a monetary award, jurors use their knowledge of the rare, exorbitant damage award as a “benchmark” for determining what a “punitive” award should be. When asked directly, either in questionnaires or in



voir dire, many potential jurors will scornfully dismiss those who would even consider awarding the kinds of damages seen in highly publicized cases. Yet when actually called upon to make decisions themselves, they use what they have learned in the media to guide them through a difficult process.

Faced with a significant group of anti-damages jurors, some of whom pose problems for one side or the other, how might an attorney make informed choices about whom to excuse? A thoughtful *voir dire*, aimed at eliciting relevant personal information about jurors' attitudes and life experiences, is essential for developing a jury selection strategy defining who will be excused. A focus on life experiences and employment are among the most important issues to explore.

Demographics are an essential but insufficient basis for determining whom to excuse. Simply knowing whether a juror is a man or a woman, highly educated or not, will rarely help an attorney determine whether the juror will award large or small amounts of money to injured parties. But jurors' experiences at work (including homemakers) shape their attitudes and assumptions about people's motivations and intentions.

Employment is a fruitful area for *voir dire* and offers a compelling opportunity to understand how an individual might approach cases in which punitive damages are sought. Defining jurors by job title or industry is only the first step. In order to exercise peremptory challenges intelligently, it is important that attorneys explore jurors' specific job duties, the experiences each juror has had with the issues at stake in the case and their feelings about bosses, employees, procedures and practices. Furthermore, the attorney can learn jurors' approach to key issues such as personal responsibility, views of people in authority and how they manage and resolve conflict, all attributes that will inform a juror's view of the case. Digesting all this information can help an attorney assess the extent to

which a juror will identify with either the defense or the plaintiff.

By inquiring about jurors' work lives, an attorney can establish good rapport and

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develop a comfortable conversation with a juror. A good beginning is to ask what the juror likes and dislikes about his or her job. Then an attorney can move on to more personal questions about jurors' views of typical workday situations and dilemmas. This way, a juror is less likely to see such in-depth questions as intrusive. Especially important, judges almost always find this line of questioning relevant and acceptable.

Questions About Identification With the Plaintiff

Sometimes jurors have worked for companies where questionable practices were commonplace and accepted. If the juror has felt

trapped and unable to leave the company, these individuals can become so jaded by the experience that their feelings can easily turn into a strong bias in favor of plaintiffs.

Consider asking these types of questions:

- Have you ever worked at a company where you thought management made deliberate decisions that hurt their customers?

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Tell me about that. How long were you employed by that company? What made you decide to leave? Do you think such practices are commonplace or do you think your company was unusual? Why is that?

- When there are problems occurring at work in your area, how aware is management of the problem? How quickly does management respond? Have you ever thought that management simply looked the other way when it benefited the company to do so instead of solving a problem? How did you feel about that?

— Questions About — **Identification With the Defense**

Defense jurors generally express positive regard for corporate defendants and identify with their employees, managers and executives. They understand the division of responsibilities and may themselves have been in situations where emotions had to be set aside and tough decisions made. Probing for experiences that might predispose a juror to identify with the defense can help plaintiffs’ attorneys uncover those who might be most sympathetic to managers and executives.

Consider asking these types of questions:

- Sometimes managers are called upon to make tough decisions in favor of the company that others see as hard hearted or even insensitive. Have you ever seen that happen in your company? What was your feeling about the way management handled the situation?
- Do you believe most managers follow the company line or do you think they are independent thinkers who use their own judgment in solving problems? Why is that?

Some corporate employees can be quite forgiving of company conduct and accept a certain range of behavior as the sort of thing that is regularly encountered in a large bureaucracy. These questions may be instructive:

- How often does it happen at your company that bad mistakes are made because things fall through the cracks? How are mistakes handled once they are discovered?

— Questions About — **a ‘Punitive Juror’**

Both pro-plaintiff and pro-defense jurors access memories and impressions of business conduct over their career to determine whether the defendant engaged in fraud, malice or oppression. If a juror has been exposed to intentional wrongful conduct, that knowledge will inevitably color his or her view of the evidence.

Consider asking these types of questions:

- Have you ever felt that a company got away with making a deliberate decision that hurt customers? What were the circumstances? Was that situation ever resolved? How satisfied were you with the outcome?
- Have you ever felt that a company was wrongly accused of bad conduct? What were the circumstances? Was that situation ever resolved? How satisfied were you with the outcome?

Questions About Jurors Attitudes Towards Punitive Damages

Jurors report struggling in deliberations with how to be fair to the defendant and still assess an amount of money that will get the company's attention. In *voir dire*, attorneys must attempt to evaluate how each juror will make a determination about punitive damages.

Consider asking these types of questions:

- Some people are very concerned about how excessive punitive damages are affecting corporations today. Others feel that punitive damage awards are the only means con-

sumers have to force corporations to take notice of the harm they cause. What are your thoughts about punitive damages and the impact they might have on corporations?

- How do you feel about an individual plaintiff receiving more money in punitive damages than he or she might be able to earn in a lifetime?

While punitive awards are smaller and more rare than commonly perceived, juries have demonstrated that they are willing to issue headline-making awards if circumstances demand it. When we interview jurors who have awarded substantial sums of money to plaintiffs, as well as those who have not, we learn how jurors bring to deliberations moral and ethical perspectives sharpened by the realities of interacting with others in their daily lives, especially what they see and hear at work. Most jurors use common sense when assessing punitive damages, but attorneys can use the tools at their disposal to spot troubling jurors with strong biases. Constructing a careful and probing *voir dire* focusing on individuals' work experiences can pay off in civil cases where punitive damages are at stake.

