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Case preparation

Using Focus Groups to Discover and Meet the Needs of the Jury

by Jeffrey D. Boyd

This article is dedicated to the magnificent ability of real people to make wise and fair decisions when they are given the information they need to make those decisions.

Lawyers who represent people who have been harmed by the acts of others have to look into their hearts and decide:

- Do I believe in the jury system?
- Do I trust jurors?

If your answer is "yes," then our clients need us to get out of our offices and off our computers and go talk to the kind of real people who fill out the verdict forms in our trials. We expect jurors to put aside their prejudices and return a fair verdict. But trial lawyers must ask ourselves: are we willing to put aside our prejudices and deal with jurors as they are, and not as we think they should be?

If you listen to enough real people talk about cases, you will learn that jurors:

- Often consider facts that lawyers don't feel are relevant
- Judge the importance of evidence according to standards that they bring with them into the courtroom
- Evaluate liability on a continuum that is based on moral fault, not on instructions of law
- Base the type and amount of damages awarded on where the defendant's conduct falls on that continuum

If you have the courage to expose your case to real people and are willing to listen to what they say, you can learn how to create a presentation at trial that meets the needs of the jury and provides the foundation for a great result.

Why Focus Groups?

Trial lawyers often tell me that they feel squeezed between "things happen" liberals and "personal responsibility"[1] tea-partyers. Fortunately, most of the time there is common ground to be found among Americans, and a common language that can be used to express the values of your case. You can build your case on principles that a majority of citizens will agree with (and which a defendant can only disagree with at their peril), but only if you take the time to figure out what those principles and values are.

Plaintiff's trial lawyers need to use well-run,[2] interactive,[3] focus groups as an integral part of case selection, discovery, and case evaluation - long before the trial homestretch[4] - because we don't try that many cases any more. We have only one trial for every thousand pages of documents we read, for every hundred depositions we sit through, and for every ten experts we hire. But we don't learn anything about how to get a jury on our side while sifting through documents, doodling in a deposition, or by paying too much for too many experts to do our thinking for us.

Have you ever had a verdict come in where you said "*What were they thinking?!?*" If so, the disconnect was probably between what you thought the case was about and what the jury thought it was about. In fairness to those jurors, had you talked to any real people about your case to learn how they felt about it, or what they needed you to prove for them to support or even advocate your side of the case? In a world where we spend hundreds of hours "getting ready for trial," focus groups are a small investment that pays big dividends.

Trials are exercises in processing information. People process information by putting it into mental containers. Since it is uncomfortable to have information flying around in their brains, jurors start to put evidence and arguments into containers as fast as possible. As the trial lawyer, you can work furiously try to build new containers for them, or you can shape your case so that your arguments and evidence slide right into the containers they brought with them to the courtroom.

Lions vs. Giraffes

Imagine this: a potential donor comes to the zoo to decide if it is worthy of her support. All of her life she has heard conflicting and sometimes wild stories about what zoos are like and whether they are good or bad, but she has never been to one. She does know something about lions. She thinks they are the best, most interesting animals there are - she loves their speed and their cat-like faces - and she certainly expects to see a lion at the zoo. However, she is afraid of giraffes, and doesn't like them for any number of reasons.

You work for the zoo. You want the donor to be happy with the zoo, to like you, and to write a big check. Unfortunately, you were taught in zoo school that giraffes are what potential donors should be shown at a zoo. So you have a choice. You can try to convince your visitor that giraffes are the best, most interesting animals there are, or you can show her a lion. Which way are you more likely to get a check? Even the best of us can move the pre-conceived attitudes and beliefs of donors/jurors only so far – and that is not as far as we would like to think.

Meeting the needs of jurors does not involve deception. If you don't have an honest-to-goodness African lion in your briefcase, you don't want to pretend that you do. But if you (a) know that the jury expects to see a lion in the courtroom, and (b) identify the characteristics that make a lion interesting and desirable to them, you can then show them that your case/animal has a lot of the same characteristics as a lion. If jurors want lions, if they like lions, if they expect lions, why not make your case look like a lion? Why burn the energy and credibility trying to explain why the visitor is all wrong about giraffes and that it's good to be tall and slow and have a blue tongue?

You can also use this knowledge in the reverse. Jurors all "know" that the legal system is awash in frivolous lawsuits which are destroying America. If you ask jurors in voir dire what the characteristics of a frivolous lawsuit are, they will be happy to tell you. You can embrace what they say, and then spend the rest of your trial showing them that your case isn't anything like those cases. Or, you can tell them that they are wrong, and spend your time trying to explain that Stella Liebeck really wasn't driving the car when that hot coffee spilled, or that a system that allows someone to make a claim of $54,000,000 for the loss of a pair of pants is not out of control. Can you guess which approach is more likely to get you where you want to be?

Building a Case vs. Evaluating a Case

Focus groups can be used to evaluate a case; to find out if the existing case, as presented, is a winner. However, the far better use is to learn:

- How a jury fits the facts of your case into the mental boxes we call liability and damages
- What people need to know that you aren't telling them
- What problems your case has from their perspective, and how to fix those problems
- How they feel about your witnesses and exhibits

You can take that knowledge and improve your presentation to get a great verdict. I tell the lawyers I work with that "I can make you feel good, or I can help you to find out how to get a better result, but I can't do both." You have to be willing look the ugly in the eye and lose the case at the focus group level to find out how to win at trial.

Build Your Case on Principles the Jurors Accept

Jurors today are hard sells. Tort-reform hysteria and "news of the odd" reporting has lead them to believe their job is to protect defendants against unfair accusations of fault and against runaway verdicts. They consider themselves torch-bearers of "common sense" and of "personal responsibility." The #1 fear expressed by almost any juror who is asked is that they will award "too much."

Most prospective civil jurors think they are there to figure out if the defendant is "guilty," even in a civil case. That's not just a word, it's an idea – an idea that has been drilled into their heads by a thousand movies, TV shows, and books. Not surprisingly, they associate "beyond a reasonable doubt" with that word.[5] Further, "guilt" is only tried one person at a time. Most jurors have no idea that fault can legitimately be divided between more than one party.

Overlooked by too many plaintiff's lawyers is this basic fact - most prospective jurors are surprised to find that they will be asked to decide damage issues. Many are downright perplexed to find that

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"pain and suffering" is compensable, let alone that they have to "put a value" on it. How, they ask, do you put a value on pain and suffering?[6] How well do trial lawyers answer that fearful question?

Focus groups universally reveal that jurors think the majority of things that happen are "accidents,"[7] and that an "accident" is an event for which no one is legally responsible. To many jurors, the fact that the defendant "didn't mean" to cause any harm is a valid defense. Your job is to show the jury why it is fair, in your case, to award money damages. To do that, you have to know how juries think about what is fair.

Liability Drives Damages

The most important thing you will learn in focus groups is that jurors never stop talking about liability. Unlike law-school-addled lawyers, real people don't think of fault as a "yes" or "no" decision, but as a long sliding scale that takes all kinds of things into account. Those factors include the evidence and the jury instructions, but in the decision-making continuum, those sacred pillars are often secondary to their personal life experiences and values. What happened to Uncle Joe or what they learned in Sabbath School will carry more weight than the instructions that Judge Smith reads to them at the end of the case.[8]

Jurors evaluate damages only through the context of liability. Gruesome X-rays and million-dollar life care plans mean nothing if the jury thinks the injuries were caused by an "accident." Juries spend 80% of their time discussing liability and 20% of their time discussing damages, even in so-called stipulated liability cases.[9]

If lawyers explain their case in the language of the juror's beliefs about liability issues, they will get greater damage awards. In fact, you should constantly talk about what the defendant did wrong, even in cases where liability is admitted or seems obvious.

EAMPLE 1

DEGREE OF FAULT	CAUSES OF WRECK
1	Meteor hits following car (Act of God)
2	Rain or ice – if driver tried to be careful
	Brake failure – no prior knowledge
3	Sudden lane change
	Inattention
4	Texting
	Alcohol Involved
	Brake failure- prior knowledge of problem
	Old age or infirm driver
5	Intentional collision

EXAMPLE 2

WHAT KINDS OF DAMAGES ARE FAIR? JUROR #1					
Degree of Fault	Property Damage	Past Medical Bills/Wages	Past Pain and Suffering	Future Pain and Suffering	Loss of Consortium
1	X				
2	X				
3	X	X			
4	X	X			
5	X	X	X	X	X

WHAT KINDS OF DAMAGES ARE FAIR ? JUROR #2					
Degree of Fault	Property Damage	Past Medical Bills/Wages	Past Pain and Suffering	Future Pain and Suffering	Loss of Consortium
1					
2	X	X			
3	X	X	X		
4	X	X	X	X	
5	X	X	X	X	X

The Fault/Damages Continium: Categories of Damages

Many prospective jurors say they don't believe in compensation for pain and suffering. But when you push a little, you find their belief is not absolute, but conditional. If you ask "You mean that if I caused you intense pain, you would not think I should have to pay you for that?," the reply is almost always "Well, tell me how you caused the pain? Was it an accident? Did you mean to do it?" This response shows they are not really opposed to the idea of non-economic damages, they just see those damages through the lens of the moral fault that caused the injury. They need to see that damages right a wrong, not fill a pocket. If you understand that, you can tailor your message to meet that need.

I have asked many focus groups to think about fault in all types of claims, but the most common type of car wreck claim - a rear-end collision – is illustrative. There are many, many reasons that one car hits another, and I ask the jurors to list all the possible reasons. I then ask them to sort those causes by the degree of fault they associate with them, and rank them on a scale of 1 (no or very little fault) to 5 (the highest fault). The results look something like this (see example 1):

A lawyer would look at this and say, "Great! I win on 4 out of 5 of those!" and would expect a verdict including all categories of compensatory damages for any fault that is #2 or higher. The reality is different. In most jurors' minds, not all damages are created equal. They think of the types of damages as a hierarchy. The range goes from the easy-to-understand and measure (the cost of repairs of the vehicle) up through the esorteric and philosphical (e.g. future pain and suffering, or the monetary value of the loss of consortium of a child).

Jurors award types of damages based on the degree of the fault of the defendant, not on the severity of the injury or loss. Put another way, what type of damages they think are fair depends on how "bad" the conduct of the defendant was (and how that degree of fault compares to the plaintiff's degree of fault). For our rear-end collision example, this is what many think is fair (see examle 2):

This is not what you were taught in law school.

The Linear Relationship Between Fault and the Amount of Damages

The continium effect continues into the evaluation of the amount of damages, too. Any juror will tell you that they want to award a fair amount for damages. The problem is that they don't really decide what an injury is worth, they decide what

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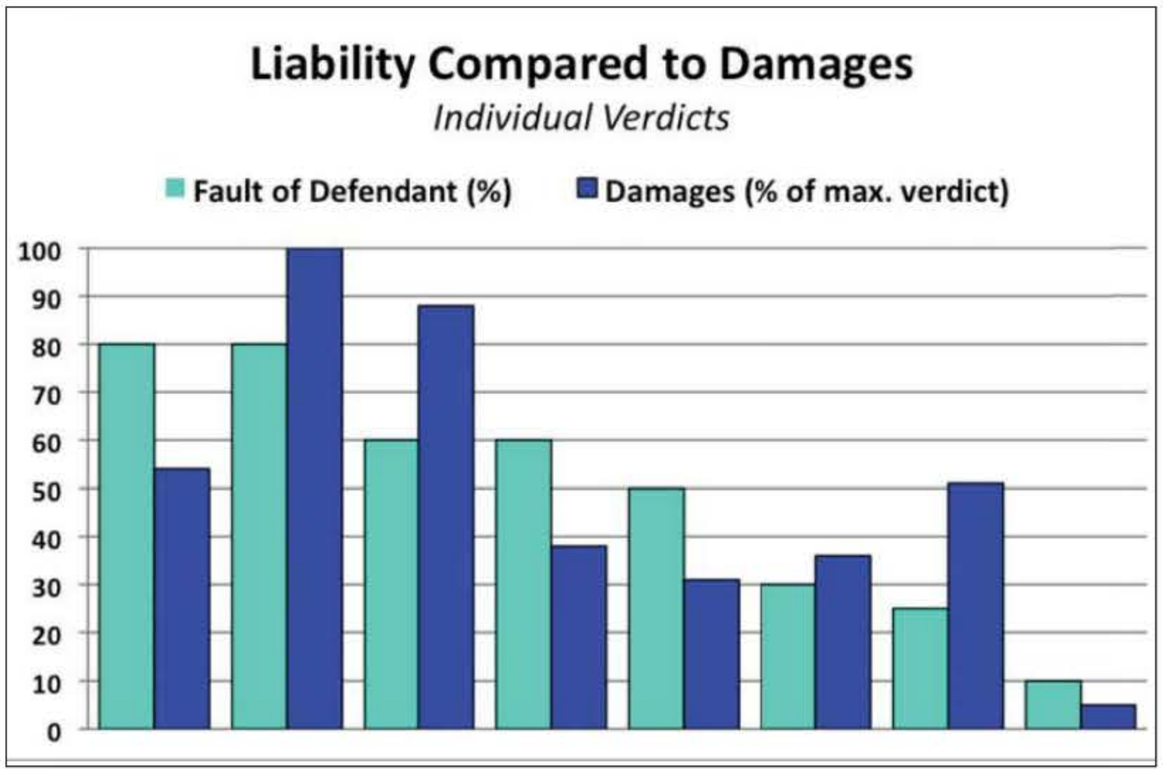
the defendant's fault is worth.[10] The graph, below, charts the results of a recent focus group in a product liability case.[11] It is typical of the relationship between how jurors see fault and how they evaluate damages. Although the primary injury was objective (a below-the-elbow amputation), the assessment of damages strongly tracked the perception of fault. Result – a strong correlation between fault and damages.

How To Use This Knowledge

Let's go back to the facts of the most basic car wreck – a rear-ender that happened on a dark and rainy night. You can let the defendant get away with calling it an "accident," and go home with your "1.8 times specials" verdict. Or, you can prove that your client was hurt because the defendant deliberately made a series of bad choices, and that anyone should have known better than to make those choices. Everything a defendant does involves many, many choices. Even if some of them don't appear significant to your scholarly mind, line them all up, and then knock down them all down. For example, in the rear-ender, you can highlight these choices:

- To drive a car at all: Was the trip necessary? Did it have to be made at that time, or could it have waited until later?
- The route taken: Were there other ways to get to where they were going that might have been better illuminated, or where there would have been less traffic?
- The amount of attention they were giving to driving: Was the radio on? Were they talking to passengers? Were they playing with a GPS system? "Would you agree with me that when you are driving in the rain at night that the radio can be a distraction?" "Would you agree with me that when you are driving in the rain at night you should give all of your attention to driving the car?"
- The speed at which they were driving: A driver has admit that they controlled the speed of the car they were driving. This defendant chose an unsafe speed; they could not stop before ramming your clients.
- The distance they were keeping between the car in front of them: No one is forced to tailgate. "You made a choice about how much space to keep between you and the car in front of you, correct?"



Then explore their knowledge:

- The effect of bad weather: "You agree with me that your stopping distance is greater when the road is wet than when it is dry?"
- The effect of speed: "You agree with me that it takes a greater distance to stop your car when you are driving faster than when you are driving slower?" "You would agree with me that more distance between cars, the safer it is?"
- The duty to be safe: "You would agree with me that if a driver has a choice of more than one way to do something, they should always choose the safest way of doing it?"

Put it all together, and instead of the collision being an "accident," you have shown that your client got hurt as the inevitable result of a driver who deliberately chose to drive their car on a trip that could have waited until later, intentionally driving at an unsafe speed even though it was raining, and that they meant to drive so close to the other car that they couldn't stop, even though they had other choices about how close to follow them.

Accidents are things that happen to you. Moral fault is based on choices you make. Defendants always say "I didn't mean to do it." By emphasizing what the defendant did mean to do, most jurors will conclude it is fair that the defendant should pay for the damages caused by their deliberate indifference to everything that was going on that night.[12]

Is there a legal duty not to drive on a rainy night or to listen to the radio? Maybe not,[13] but these things matter to jurors, and so they should matter to you. Don't just tell the jury that a rear-ender is "negligence per se" and then start talking about damages.

Knowledge Is Power

You can use the principles outlined above in any case. Here are a couple of real-life examples. Case #1 was a slip-and-fall on water in the frozen food aisle of a grocery store. The lawyers were concerned about the juror's perceptions of the somewhat thin evidence about (a) how the water got there and (b) how long it had been there. After hearing the facts, the focus group said what they cared about was (a) whether there was evidence that the store was poorly maintained in general, and (b) if the store treated its customers with respect.[14] As it turns out, there was good evidence that the store was behind on maintenance and that they did not treat this plaintiff with respect after she fell. When we did a new focus group and emphasized that evidence, the likelihood of a plaintiff's verdict and the categories and amounts of the damages increased dramatically.

Case #2 was a collision caused by a defendant who failed to yield at a stop sign. The plaintiffs were motorcycle operator and his passenger.[15] Despite telling the focus group that no one, not even the defendant, said the plaintiff had any fault, most of the jurors still said the plaintiffs had some fault. So we did a new group, and before the jurors were given any specific information about the case, we asked "What are the characteristics of a 'good' or 'safe' motorcyclist?" The panel produced a long list of things that mattered to them,[16] including things like whether they were riding a "cruiser" style bike (vs. a "Ninja" style bike). As lawyers, we would say there is no jury instruction that says fault can be based on the style of a motorcycle. In reality, when we emphasized that the plaintiffs in this case met most of these "safe" standards, the results got much better.

Conclusion

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We are lucky to have a system of justice where citizens from a broad spectrum of life make the ultimate decision. The fact that they think about the world differently than lawyers is a blessing, not a curse. Every day, hundreds of juries across the country try very hard to do the right thing under what is to them a system with very strange rules.[17] We tell jurors they have the power to bring justice to the plaintiff. We owe it to them to give them the tools they need, the facts that matter to them, and some common sense reasons why giving your client a full measure of justice is the right thing. Quit thinking like a lawyer if you want the support of real people. Enjoy showing your jury the lion they want to see!

Endnotes:

1. Unfortunately, when jurors use "personal responsibility" they usually mean "the degree to which the plaintiff must take personal responsibility for what they did." Flip that to your advantage by arguing that "personal responsibility" (1) should apply to both sides, (2) should apply to corporations or other entities as well as individuals, and (3) includes paying for what you did wrong.

2. Can you "do your own" focus groups? Yes, but the odds that you will get great results are slim. From the day you met your client, you have been an advocate for the case. After investing your blood and treasure, you will almost certainly carry a bias into the focus group. Focus group jurors are very sensitive to the nuances of the moderator. It doesn't take much negative reinforcement to tell them you don't really want to hear the worst of what they have to say. There are many, many reasonably-priced professionals who can carry that burden for you.

3. Interactive focus groups, where the emphasis is on learning, are different than mock-trial-style groups, which can be used to evaluate presentations. In my opinion, interactive techniques wring much more usable information from the jurors than mock trials. Interactive groups are unsettling and unpredictable, but if you have the stomach for them, much will be revealed.

4. No plaintiff's lawyer should enter a courtroom without having first become intimately familiar with these books: Ball, David, Ph.D., *David Ball on Damages* (all editions), Friedman, Rick and Malone, Patrick, *Rules of the Road*, Friedman, Rick, *Polarizing the Case*, Ball, David and Keenan, Don, *Reptile*, Feigerson, Neal, *Legal Blame: How Jurors Think and Talk About Accidents*, and Hamilton, Sonya, *Now What Makes Juries Listen?*

5. Jurors are comfortable with that burden because they are used to it. Many, however, are uncomfortable with "a preponderance of the evidence." What does that mean, really? Why is it fair that some people are tried with a higher burden of proof, while some are tried with a lower burden? Since many see non-economic damages as a form of punishment, the explanation that a preponderance is OK for a civil case it is "only about money" and not about a loss of liberty can sound a little disingenuous.

6. My experience is that jurors relate to "loss of enjoyment" better than "pain and suffering," which has a negative connotation with many people. "Loss of enjoyment" seems to be easier to comprehend as something worth compensation, and it's easier to explain through examples.

7. Never, ever, use the word accident. I have done groups where plaintiff's counsel used that word, and during deliberations, a juror says "Why are we here? Even the plaintiff's lawyer said it was an accident!" Case closed.

8. Try to get your jury instructions read as early as possible in the case. The jury needs to know what the legal standards are before they know what to think of your evidence. Am I the only one who thinks it is madness to have a jury sit there day after day without knowing, for example, the legal standard for a property owner, or that the law imputes the conduct of an employee to her employer? All that time they are uninformed, they are guessing about those things, and it is my experience that most guessing works against the plaintiff.

9. Believe me, jurors discuss fault in stipulated liability cases. They just don't have as many facts to work from, and so make up more facts, again, usually to the detriment of the plaintiff.

10. This is not to say that bad injuries don't get greater awards than minor injuries. It is to say that bad injuries are not as important, overall, as bad actors doing bad things.

11. The black bars show the percentage of fault the juror assigned to the defendant machine manufacturer. The gray bars show the damages award, before deduction for comparative fault, as a percentage of the highest award.

12. However, beware of defensive attribution, the self-protective self-delusion that kicks in to let jurors feel safe in a world where the reality is you can be doing everything right and still get hurt. It is always worth asking jurors if they think they could have been injured the way the plaintiff was: "Do you think this would have happened to you?" Those that say "NO!" most forcefully are probably not good plaintiff's jurors.

13. Don't forget, ordinary care is ordinary care under the circumstances. Nearly everything is a "circumstance" if you argue that correctly!

14. Both issues, not coincidentally, are about the juror's needs: safety (poor maintenance = unsafe food) and ego (respect).

15. One of the things we wanted to test was whether jurors would place some of what I call "per se" negligence on the operator or on the passenger ("when you get on a motorcycle, whatever happens is your fault"). Legally, the fact that a motorcycle is involved has nothing to do with liability. Practically, it makes a big difference.

16. The complete list was: courteous driver, aware driver, driver and passenger wearing safety gear (helmet, boots, protective clothing), driver following the rules, using signals, using more caution than average because they are on a motorcycle, eye contact with drivers that are turning, no weaving in and out of lanes, following the law, riding "cruiser" style bike (vs. a sports or "Ninja" style bike), pride in the bike, as seen in appearance of bike (clean and shiny), not having "too much bike for the rider," riding in appropriate weather, an experienced driver, good knowledge of what the bike will and won't do, driver in good health.

17. Every juror wants to know about insurance. We tell them it doesn't matter. Every juror wants to know "who got the ticket?" We don't tell them. Every juror asks "has the defendant done this before." We don't answer. We don't let them talk to each other about the case during trial. They are told to ignore all of the sources of information they usually count on to help them figure things out, such as friends, books, or the internet. We don't give them any information about what other juries have done in similar cases. All this may make sense to lawyers, but jurors don't like it, and the resulting confusion and anger ("You said we could ask questions, but then you tell me the answer wouldn't be relevant!") is more likely to hurt the plaintiff than the defendant.

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