What's on Jurors' Minds?

By || Jeffrey D. Boyd

Medical negligence lawsuits hold doctors accountable, but many jurors believe they do more harm than good by making medical care more expensive and less accessible. Overcome this obstacle by understanding what jurors believe and why.

New research indicates that medical errors kill about 251,000 people in the United States every year.[1] But medical negligence cases are the most difficult to win at trial—and defendants win a significant percentage of cases.[2] What is the disconnect, and what can we do about it?[3]

While rhetoric about a "medical malpractice crisis"—claims of doctors being forced out of their profession due to frivolous lawsuits—has died down, some jurors still believe that medical negligence claims threaten their ability to obtain affordable and accessible health care. As I see again and again in focus groups and trials, jurors begin their decision-making process believing that malpractice claims increase costs, cause doctors to leave practice, drive people away from entering the medical field, and result in unnecessary "defensive medicine" (tests or treatments to safeguard against a malpractice claim).

You must structure medical negligence cases to meet the mindset of the jurors. Focus groups help you understand those needs.[4] I commonly ask two questions in focus groups: "Out of 100 patients, how many will file a medical malpractice claim against their health care providers?" and "How much of a $100 medical bill is attributable to medical negligence claims?" The replies are illuminating: In a recent focus group I conducted, participants believed that nearly 20 percent (and up to 75 percent) of patients file medical negligence claims, and that 20 percent (and up to 40 percent) of their medical bills is attributable to those claims.[5]

For jurors, medical negligence claims are personal. In addition to believing that these claims will raise their costs, jurors think these lawsuits threaten their sense of personal safety. Jurors see doctors doing good work and saving lives nearly all the time.[6] In this world, a juror's self-interest is a huge factor and a prime driver of verdicts. The question in a medical negligence juror's mind is straightforward: "Will it be better for me if the plaintiff wins, or will it be better for me if the defendant wins?"

We can start to see what "better" looks like by considering what jurors identify as "legitimate" medical negligence cases.[7] Focus group participants almost always identify four kinds of cases as "legitimate": cases where the doctor cut off the wrong body part, left an instrument inside the patient during surgery, gave the wrong drug to the patient, or purposefully hurt the patient.[8] In these fact patterns, three common factors emerge: Jurors can understand these facts without specialized knowledge or additional education; the harm is obvious and proximate cause is not an issue; and the patient was helpless to prevent the harm.

Jurors fear that if they don't hold the defendant accountable, the conduct will happen again—and that they, or someone they love, will be harmed. What else drives decisions? Generally, jurors feel better about finding for the plaintiff when they believe the verdict will

- help someone in need
- help the plaintiff or the plaintiff's attorney, who they have come to like during trial
- send a message that things need to change
- make the world safer for themselves and others
- right a wrong
- apply the law to the facts as they see them.

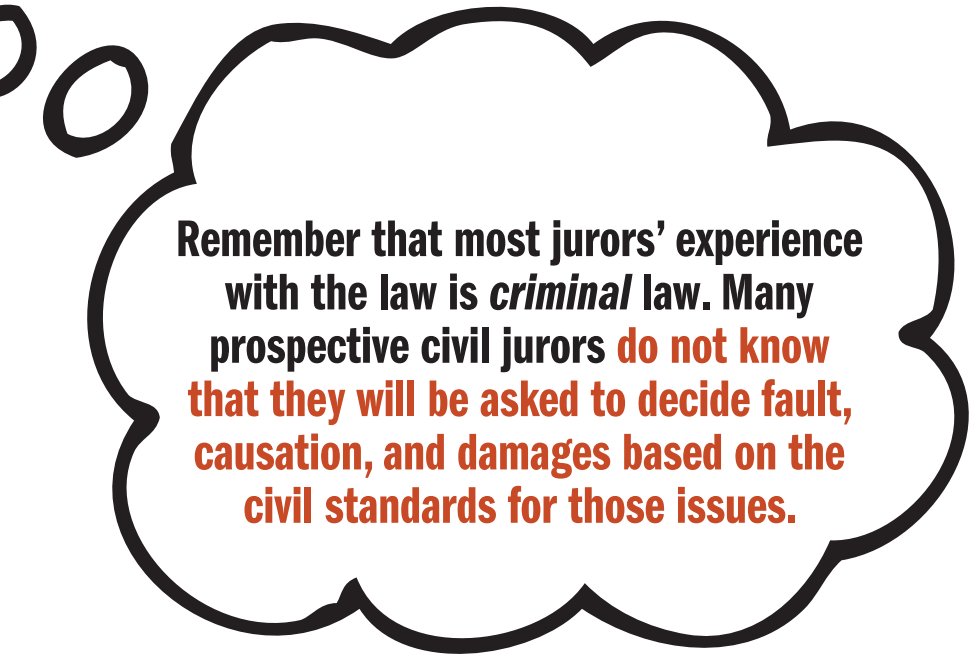
Jurors feel better about finding for the defendant when they believe the verdict will

- protect the medical profession from frivolous lawsuits
- support the individual doctor, who they have come to like during trial
- support the jurors' "brand"—for example, the local doctor, the hospital associated with a university they attended, or the medical group that sponsors prominent local charities
- keep a lid on their own medical costs or tax rates
- punish a lawyer or a plaintiff they didn't like
- validate their anger—for example, if they received poor medical care but did not sue[9]
- affirm that we live in a world where "stuff happens"[10] or "things happen for a reason"
- apply the law to the facts as they see them.

What can you do to win in such a world?

Have a simple, clear answer as to what the defendant did wrong. Don't over-try your case. In any case, only a few things matter. Use focus groups to find out what those are, and stick to those issues. Time and time again, I see doctors who are not held accountable for their negligence because the issue of what they did wrong is lost in an endless parade of facts and experts. Remember that complication favors the defense.

In voir dire, ask about jurors' personal experiences with the specific issues in your client's case. For example, how close are they with their doctors? Have they had a loved one in a hospital for a length of time? Have they or someone close to them had the kind of surgery, taken the kind of drug, or experienced the kind of procedure that is the subject of the trial? If so, you need to know what that was like for them. Their experiences will drive their interpretation of your evidence far more than your experts will. For example, be very wary of jurors with strong emotional



connections to their stories—they have an enormous influence in the jury room, and it is difficult to predict which side they will favor. Also be wary of jurors who believe patients should double check everything their doctor does and who imagine they would have done things differently from the plaintiff, such as researching their doctor or getting additional opinions.

Ask the jurors if they can tell you about any verdicts in their jurisdiction against doctors, hospitals, or nurses. While it is almost certain that no one can, the question also sends an indirect message: "Many of you said that medical negligence cases were a big problem, yet no one can tell me about an actual case—so maybe it's not so bad." However, beware of jurors who talk about "outrageous" verdicts. Those jurors will almost always be detrimental to your case, because they see it as their job to make sure that doesn't happen again.

Start your trial with the basics. Trial attorneys often have absorbed so much knowledge that they have a difficult time putting themselves in the shoes of most jurors. "MRI," "non-reassuring fetal heart tones," "peer-reviewed research"—you get it, but they don't. Don't forget to explain legal issues as well. Remember that most jurors' experience with the law is *criminal* law and its higher burden of proof. Many prospective civil jurors do not know that they will be asked to decide fault, causation, and damages based on the civil standards for those issues. If you want jurors to accept that there is fault even if the doctor did not purposefully harm the plaintiff—or even if they are not "completely convinced" of fault—then you must educate them early and often. Be sure to explain the purpose and validity of noneconomic damages as well. While lawyers accept that damages compensate for loss, jurors may view damages as profit.

Ask for extensive preliminary jury instructions about liability and burden of proof. Most jurors walk into the courtroom thinking the bar for proving medical negligence is higher than it is. The earlier you can get the actual law in front of them, the better. Do not let jurors sit through weeks of trial before they hear—straight from the judge—the correct burden of proof or the definition of "standard of care."

Ask for a preliminary jury instruction about insurance. Jurors expect to hear about the defendants' liability insurance and about whether the plaintiff had medical or life insurance. When they don't, they fill that lack of information with guesses that are almost always wrong and which mostly favor the defendant. For example: "The doctor must not have insurance or we would have heard about it." But because most courts will not allow you to address this topic directly, ask for a strong preliminary jury instruction that explains they should not consider insurance because it is not relevant.[11] Although this may not remove the topic from deliberations, it explains to the jurors why the parties aren't talking about it.

During closing, explain the jury instructions. The jury must be looking at the instructions during your closing. Put the instructions on a large poster board—or use PowerPoint—and go through them in detail, guiding the jurors through the facts you have proven to show how they fit into the jury instructions. For example: "The instructions here say that a doctor must practice with 'ordinary care.' In this case, ordinary care means double checking available test results before surgery. Here, the doctor did not look back at the CT scan before opening the abdomen. That is a failure to exercise ordinary care."

Find a 'chorus' that works for every juror. Come up with a short statement, repeated frequently, that captures the soul of your case and is compelling to all jurors, regardless of age, education, career, gender, or any other metric. A chorus is different from a theme. While a theme can be a single thought or concept, such as "safety," a chorus is more than that—it is explicit. For

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example: "Safe doctors always double check the patient's test results before surgery." You can repeat a good chorus at every stage of trial and with every witness to drive it home: "And why, Ms. Expert, does that matter?" "Because safe doctors always double check the patient's test results before surgery."

Define your case as a 'system failure.' Jurors are reluctant to criticize one decision made by one doctor on one day. But dig deep—why was that doctor faced with making a life-or-death decision under difficult circumstances? Sometimes, it is because the planning, procedures, and available support were flawed—for example, if the X-ray results were not accessible during surgery.

Use visuals at trial for all important facts and concepts. Cognitive research has shown that people process information in this order: color, pictures, shape and symbol, printed word, and spoken word.[12] But lawyers tend to use spoken word the most, asking jurors to absorb important information based on lectures (opening and closing) and question-and-answer sessions (direct and cross-examination) without extensive visual support.

Holding medical professionals accountable for their actions keeps all of us safe. Help the jury see that, and you can help your client prevail in these challenging cases. T

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Notes

1. Martin Makary and Michael Daniel of Johns Hopkins University estimate that 251,000 deaths per year are caused by medical errors, making it the third-leading cause of death in the United States. Interview with Martin Makary, surgical director of the Johns Hopkins Multidisciplinary Pancreas Clinic, and Mark Daniel, research fellow, Brit. Med. J. (May 3, 2016), dx.doi.org/10.1136/bmj.i2139.
2. Amy Norton, *Docs Win Most Malpractice Suits, But Road is Long*, Reuters (May 23, 2012), tinyurl.com/lv7nxtx.
3. In writing this article, I stand on the shoulders of giants: David Ball and his *Damages* series; Amy Singer and her pioneering work in focus groups and jury consulting; Greg Cusimano and David Wenner and decades of work from AAJ's Jury Bias Litigation Group; Rodney Jew, the master of "Purple Box" critical thinking; Pat Malone and Rick Friedman, whose 2012 book *Winning Medical Malpractice Cases: With the Rules of the Road™ Technique* is the best medical negligence resource I've ever read; and Mark Mandell's *Case Framing*.
4. By "focus groups," I refer to interactive focus groups where jurors are exposed to the evidence and asked their opinions, not mock trials where lawyers play roles and present evidence themselves.
5. These numbers are from a November 2016 focus group I conducted in Washington state.
6. In a Gallup poll from December 2016, participants rated the "honesty and ethical standards" of the professions. Nurses were rated at 84 percent, pharmacists at 67 percent, and medical doctors at 65 percent. Lawyers were rated at only 18 percent. *See* Gallup, *Americans Rate Healthcare Providers High on Honesty, Ethics* (Dec. 19, 2016), www.gallup.com/poll/200057/americans-rate-healthcare-providers-high-honesty-ethics.aspx.
7. In any focus group, begin a conversation about what constitutes a "frivolous" medical negligence case and what constitutes a "legitimate" one. Drill down on the characteristics of each, and apply what you learn to help the jurors view your case as legitimate.
8. The fact that doctors can be legally responsible for harm even if they did not intend the harm must be communicated to jurors at all stages of trial. Some jurors in car wreck cases express this concern—"the driver didn't mean to hit anyone"—but their familiarity with the rules of driving enable them to move beyond it. They understand that running a stop sign equals fault. The challenge, then, is to set up your medical negligence case so that jurors understand and—as Pat Malone and Rick Friedman suggest—adopt the "rules of the road" for medical practitioners.
9. I see this paradox all the time. Even in communities where jurors say their care is bad, there is still a strong reluctance to find against that hospital.
10. Jurors rarely believe that "stuff happens." In fact, most people go to great lengths to believe just the opposite. I believe "stuff happens" is just an exit door out of the jury room when the case is too complicated. And the responsibility to make the case simple falls on the plaintiff's lawyer.
11. For example: "Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case." Wash. Pattern Jury Instr. Civ. 2.13 (6th ed. 2013).
12. Amy G. Hall, *Demonstrative Exhibits: A New View*, AAJ Education's Refocus Seminar with Rodney Jew: It's All About the Optics (Sep. 30–Oct. 3, 2013).

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