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## WINNING THE CREDIBILITY BATTLE IN PLAINTIFFS' PERSONAL INJURY CASES

Personal injury lawyers face an uphill battle nearly every time they step into the courtroom. Tort reform ideas have created the widespread, almost palpable belief that we live in a "sue 'em" society, where frivolous lawsuits are commonplace and plaintiff's lawyers are no more than hired gunslingers. While such concerns have always been an occupational hazard for the personal injury lawyer, in the last decade or so, anecdotes such as the McDonald's coffee case have been manipulated to condition jurors to be suspicious and distrustful of personal injury plaintiffs and their lawyers. In one national survey, 92 percent of respondents agreed with the statement: "There are far too many frivolous lawsuits today."<sup>1</sup> As a result, personal injury plaintiffs and their lawyers have to work hard, from the outset of each case through trial, to dispel negative stereotypes jurors may have about them.

This article will highlight studies on juror perceptions of plaintiffs and then offer some practice pointers to deal with the potential problem of juror bias. Specifically, it will attempt to answer some important questions that all personal injury lawyers must address, including:

- 1) In initial client meetings, how do you select cases so as to maximize your chances of overcoming any negative perceptions of plaintiffs that may exist among jurors?
- 2) During voir dire, how do you identify

jurors who may be unable or unwilling to give the plaintiff a fair shake?

- 3) At trial, what can you do to develop and maintain credibility with the jury for you and your client?

### THE (LACK OF) EVIDENCE OF A LITIGATION CRISIS

There is a growing public perception that many people who sue are not negligently injured; instead, they are just trying to blame others for their problems.<sup>2</sup> Personal injury lawsuits are increasingly viewed by the public as attempts to avoid personal responsibility.<sup>3</sup> Even worse, many jurors are conditioned to believe that personal injury plaintiffs are greedy and complaining. This perception has even been encouraged by President George W. Bush, who recently addressed the perceived problems of "junk lawsuits" and the "litigation culture" in advocating his administration's plans for tort reform.<sup>4</sup> "We're a litigious society," the president proclaimed. "Everybody is suing, it seems like."<sup>5</sup>

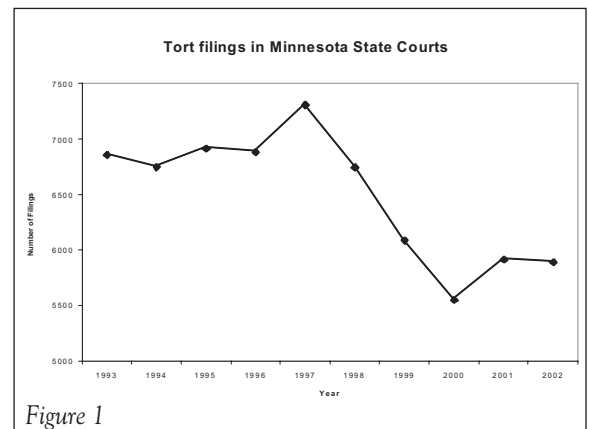


Figure 1

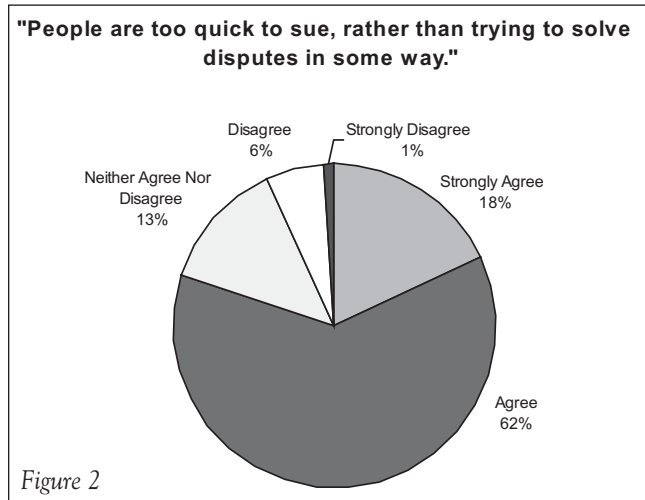
In reality, however, research shows that there has been no litigation explosion, at least in personal injury cases. In fact, there has been a *decrease* in tort litigation, both nationally and in Minnesota. Since 1993, state court tort filings have declined by 5 percent nationwide<sup>6</sup> and by 23 percent in Minnesota.<sup>7</sup> (See Figure 1.) Contract filings, meanwhile, which are less likely to involve individuals than tort cases, rose by 21 percent over the same period.<sup>8</sup> Jury damage awards also have decreased. The median inflation-adjusted award in all tort cases nationwide dropped 56.3 percent between 1992 and 2001.<sup>9</sup> The most systematic research has found that only about 10 percent of accident victims file claims and only 2 percent bring lawsuits.<sup>10</sup>

#### HOW BELIEF IN A LITIGATION CRISIS HAS AFFECTED JURY DECISION MAKING

Empirical research shows that the belief in the existence of a litigation explosion, however inaccurate, has sig-

nificantly influenced how jurors assess the claims of personal injury plaintiffs.<sup>11</sup> Although there exists a long-held assumption that juries are overly sympathetic to injured plaintiffs, national studies frequently find that people doubt the credibility of plaintiffs.<sup>12</sup> Even more disturbing for personal injury lawyers is the finding that jurors believe that fraud among plaintiffs is rampant.<sup>13</sup> Respondents in one national poll estimated which was more likely to occur—an insurance company denying a valid claim or a person attempting to bring a fraudulent claim.<sup>14</sup> Incredibly, over half of the poll respondents thought that an individual was more likely to bring a fraudulent claim.<sup>15</sup> These preexisting beliefs clearly influence

how jurors respond to personal injury claims. For example, research has shown that jurors who believe there is a lot of frivolous litigation are much



more likely to question a plaintiff's credibility in personal injury claims.<sup>16</sup> (See Figure 2.)

In an illuminating research project, actual and mock jurors were interviewed about their decision-making processes

after reaching verdicts in personal injury cases. Instead of assessing the competing claims of the plaintiff and the defendant, the study found that jurors focused instead on the actions and credibility of the plaintiff, not on the negligence of the defendant:

Jurors' suspicions about plaintiffs' claims led them in most cases to dissect the personal behavior of plaintiffs, with seemingly no limits. Jurors criticized plaintiffs who did not act or appear as injured as they claimed, those who did not appear deserving, and those with preexisting or complicated medical conditions.<sup>17</sup>

Overall, the study found that jurors tended to blame the victim rather than show sympathy. Jurors searched for ways that plaintiffs could have contributed to their own injuries, and worried about fraudulent or exaggerated claims. Jurors often raised concerns about money-hungry plaintiffs: "I think, probably, looking at these medical claims, [the plaintiff] said, 'Well, maybe I can just cash in on this knee injury.'"<sup>18</sup> Jurors also discredited the motives of the plaintiffs' attorneys, which in turn further threw the issue of the legitimacy of the plaintiffs' claims and their injuries into doubt.<sup>19</sup> (See Figure 3.)

In another study, researchers conducted a scenario experiment in which the plaintiff's blameworthiness varied between experiment groups.<sup>20</sup> The study found that, even when the plaintiff was completely blameless as a legal matter, some participants still held him accountable.<sup>21</sup> Jurors, striving to make sense of why the plaintiff was victimized, sometimes believed that the plaintiff in some sense had it coming, perhaps because the plaintiff was a bad person.<sup>22</sup>

### HOW SHOULD PERSONAL INJURY ATTORNEYS ADAPT TO ANTI-PLAINTIFF BIAS?

The belief in a litigation explosion has unquestionably embedded an

anti-plaintiff bias in the public psyche. In addition to proving the wrongful conduct of the defendant, plaintiffs must now seemingly prove their own credibility. Because of this, personal injury lawyers must address head-on the potential beliefs of jurors that: (1) plaintiffs refuse to accept personal responsibility for their actions; (2) plaintiffs and their lawyers always exaggerate; and (3) plaintiffs are money-hungry and are just looking for somebody to sue. It is imperative for personal injury lawyers to make it clear that the plaintiff is an honest, decent person who does not overstate or overtreat his or her injuries.

#### Case selection

Personal injury lawyers can exercise some control over this problem by

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making good decisions as to which cases to take in the first place. Given the importance of a plaintiff's credibility, personal injury lawyers can dramatically increase the likelihood that he or she will have a "good case" by making calculated case-selection decisions. There are multiple red flags which attorneys need to inquire about, from the time of the first meeting with the prospective client. While not all of these red flags should discourage a lawyer from undertaking representation, being surprised by them down the road can prove fatal. For example, lawyers need to know:

A. Does the client have a criminal record that will impact a jury?

Potential clients tend to minimize their criminal record if a record exists. Insist on obtaining a release from the potential client so you can do independent research and determine whether criminal convictions will be admissible or otherwise detrimental to the case.

B. Has the client previously made claims for damages?

If so, the lawyer needs details as to when the claim was made, the nature of the claim, and whether or not a lawsuit was filed. If possible, contact the potential client's former lawyer for more detail. This is a wise thing to do because a potential client's prior claim might have resulted in an independent medical examination or reports written by treating physicians at a former lawyer's request. Both situations could have implications for the case you are evaluating.

C. Does the client have a history of severe and persistent mental illness?

Have the potential client provide mental health information and records to determine what part, if any, such a history will play in the case. Going through this exercise will help you explain to the potential client that, by filing a personal injury lawsuit, his or her mental health history will likely, to some extent, be open for inquiry. Make the individual aware that anything less than full disclosure will be taken advantage of by defense counsel later on.

D. Does the client have preexisting injuries?

Again, insist on past medical records for verification. Potential clients often have a general idea regarding their previous injuries, but many are unaware of information contained in past medical records. You do not want to be surprised by damning, or even unrelated, information in past medical records. The easiest way for a personal injury plaintiff to lose credibility is to be perceived as hiding information about prior injuries.

E. Is your client a hard-working person?

Jurors like hard-working people. Generally, when a person is injured he or she will be unable to work for some period of time. Find out if the potential client has

a solid work history and whether he or she will be able to provide credible evidence in support of a wage loss claim. No lawyer would want to be surprised at the eleventh hour with the revelation that the client had never paid taxes, which would effectively preclude a past-wage-loss claim at trial.

### Voir dire

After selecting the case and working it up through the discovery process, the personal injury lawyer must directly address the issue of potential juror bias during voir dire in state court and, on a more limited basis, in federal court. The constitutional guarantee to a fair trial requires the presence of an unbiased, impartial jury. If the underlying motivations and feelings that affect or influence the jury are not explored, the right to a fair trial is in jeopardy.

The overall goal in the voir dire process should be to attempt to identify jurors who are “against you” without pointing out those who are “with you.” Some ideas to aid in jury-selection questioning, whether by the attorney or by the court, include the following:

- **Background**—Keep in mind the goal of determining whether the juror has an anti-plaintiff bias by looking for inferences that may be drawn from the potential juror’s background characteristics. Is there any potential for juror identification with any party or witness based on his or her background characteristics? For example, would coming from certain upper socio-economic status groups lead to a more calloused, anti-victim attitude?
- **Experiences**—Find out whether potential jurors have had experiences that may cause them to favor the defense. For example, in excessive-force

cases against law enforcement officers, jurors who have had positive contacts with law enforcement officers may have a pro-defense bias. Conversely, and importantly, you will want

**"Most people who sue in court have legitimate grievances."**

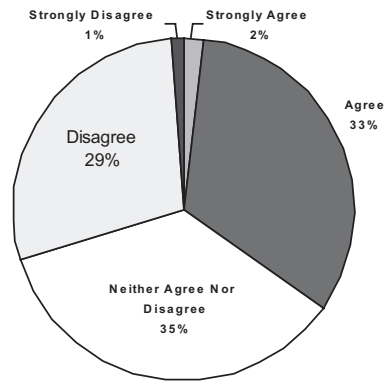


Figure 3

to find out if the potential juror has had a common experience with the plaintiff that would help make that juror an advocate for the plaintiff in the jury room.

- **General Opinions**—One study analyzed juror responses to the question “How many of you feel that people who are well-off have an obligation to help those of us who are less fortunate?” Jurors who felt people who are well-off did not have an obligation to help the less fortunate rendered more defense verdicts (40 percent versus 10 percent) as compared to those who supported or were neutral concerning the obligations of the well-off to help the less fortunate.<sup>23</sup>
- **Case-specific Opinions**—Jurors’ reactions to the strengths and weaknesses of your case are critical. If the plaintiff has a prior injury or if certain witnesses are not available (i.e., the plaintiff is dead and never told his or her story), try to find out which jurors may hold that against you. Conversely, think about striking jurors who seem

unimpressed with the strengths of your case.

- **Damages**—Despite empirical evidence to the contrary, research shows that many jurors feel that verdicts are becoming too high. To ferret out attitudes about damages, you can ask potential jurors, “What elements of damages would you feel are appropriate to consider?” Jurors who cite only out-of-pocket losses are apt to side with the defense. Another approach might be to ask jurors, “What would be your definition of a fair verdict in this case?” Obviously, a juror who believes that fair is “getting what you’re entitled to” would be more likely to favor the plaintiff’s recovery.
- **The Verdict**—Identify jurors who may be uncomfortable being associated with a significant plaintiff’s verdict. You could ask, “Does anyone believe that a substantial

verdict for plaintiff could hurt you or others?" Another approach is to inquire, "Can anyone see themselves, after the verdict, telling your co-workers or friends, 'I don't know how I got picked for that jury?'"

- Ultimately, anti-plaintiff bias in the damages area can be overcome by a clear showing of the plaintiff's credibility, evidence of wrongdoing invoking jury anger against the defendant, and a powerful presentation showing the profound negative effects on all facets of the plaintiff's life as a result of the injuries. However, it is essential not to overstate the plaintiff's claims.

### The Trial

Once the jury is seated, and the presentation begins, personal injury lawyers need to always keep in mind that, even with a seemingly thorough voir dire, there will still be jurors who may have an anti-plaintiff bias. There are things the lawyer can do during the trial of the case to overcome this problem, however, including:

- Establish common ground between the jurors and the plaintiff. Jurors frequently rely on their own personal experiences to judge the plaintiff's behavior, the injury, and the legitimacy of the claim. Emphasize that a plaintiff's attitudes and background are similar to those of the jurors. Research suggests that jurors are more lenient toward people who are similar to themselves, compared to their feelings regarding people with dissimilar personal characteristics to themselves.<sup>24</sup>
- Underscore the plaintiff's lack of personal control over the incident. Frame the story such that the plaintiff is merely a


passive participant. Instead of arguing that "Plaintiff did X," tell the story in terms of "X happened to Plaintiff."

- Directly address presumptions about the plaintiff's blame. Even when the actual degree of control that a plaintiff has over a situation is relatively modest, jurors are strongly motivated to examine how a plaintiff could bear responsibility for an incident.

**[P]ersonal injury lawyers need to always keep in mind that...there will still be jurors who may have an anti-plaintiff bias.**

- Establish the impossibility or low likelihood of fraud, either by referring to the plaintiff's personal characteristics or to external confirmations of the injury.
- Emphasize the theme of the personal responsibility (or irresponsibility) of the defendant.
- Focus on concrete ways in which the injury has done serious damage to the plaintiff's quality of life. Provide both emotional and rational appeals and use effective analogies to the plaintiff's injury. Do not exaggerate.

### CONCLUSION

Even using your best efforts, no plaintiff's personal injury lawyer can ever completely counteract the possibility of bias against his or her client. While experience teaches that "a good case is a good case," personal injury lawyers have a professional obligation to do everything in their power to minimize anti-plaintiff bias during case selection and voir dire and at trial. 

<sup>1</sup> Valerie P. Hans & Nicole Vadino, *Whipped by Whiplash? The Challenges of Jury Communication in Lawsuits Involving Connective Tissue Injury*, 67 *Tenn. L. Rev.* 569 (2000). In fact, 76 percent of respondents said that they "strongly agreed" with the statement, suggesting an emotionally laden endorsement. *Id.*

<sup>2</sup> *Id.* at 572 (stating that 77 percent of national poll respondents agreed that people who bring lawsuits are just trying to blame someone else for their problems).

<sup>3</sup> Valerie P. Hans & Juliet Dee, Symposium: *Responsibility and Blame: Psychological and Legal Perspectives: Whiplash: Who's to Blame?* 68 *Brooklyn L. Rev.* 1093, 1096-97 (2003).

<sup>4</sup> Stephen Labaton, *Bush's Calls for Tort Overhaul Face Action in Congress*, *N.Y. Times*, Feb. 3, 2005, at A12.

<sup>5</sup> Richard A. Oppel, Jr., *With a New Push, Bush Enters Fray over Malpractice*, *N.Y. Times*, Jan. 17, 2003, at A24.

<sup>6</sup> Association of Trial Lawyers of America, *Court Statistics: There Is No Litigation Explosion*, available at [www.atla.org/pressroom/FACTS/tortreform/0504\\_CourtStatistics.aspx](http://www.atla.org/pressroom/FACTS/tortreform/0504_CourtStatistics.aspx) (last updated March 2005) (hereinafter "ATLA Court Statistics"). When adjusted for population increases, this figure changes to a 15 percent decrease in tort filings. *Id.* According to the Administrative Office of the U.S. Courts, tort actions in U.S. District Courts dropped by 28 percent from 2002 to 2003, and fell again in 2004. *Id.* In addition, over the last five years federal civil filings are not only down, but the percentage of civil filings that are personal injury cases has also declined. *Id.*

<sup>7</sup> National Center for State Courts, *Examining the Work of State Courts*, 2003, 24 (2004), available at [http://www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_SubCivil-TORTCON.pdf](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SubCivil-TORTCON.pdf). The findings hold true in federal courts.

<sup>8</sup> ATLA Court Statistics, *supra* note 6.

<sup>9</sup> Association of Trial Lawyers of America, *There Is No Litigation Explosion*, available at [www.atla.org/pressroom/FACTS/tortreform/0504\\_BJSLitigationStats.aspx](http://www.atla.org/pressroom/FACTS/tortreform/0504_BJSLitigationStats.aspx).

<sup>10</sup> Deborah R. Hensler, et al., *Compensation for Accidental Injuries in the United States* 121-26 (1991).

<sup>11</sup> Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* 38 (2000); Hans & Dee, *supra* note 3, at 38.

<sup>12</sup> Hans, *supra* note 11, at 75; Hans & Dee, *supra* note 3, at 1096.

<sup>13</sup> Hans & Dee, *supra* note 3, at 1097.

<sup>14</sup> Hans & Vadino, *supra* note 1, at 585.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 22-23. See also Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 *Am. U.L. Rev.* 805 (1991) (finding lower awards by mock jurors who supported tort reform); Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 *DePaul L. Rev.* 301, 307-09 (1998) (finding that mock jurors who believe plaintiffs receive too much in damages are less likely to hold the defendant liable).

<sup>17</sup> Hans, *supra* note 11, at 28-29.

<sup>18</sup> *Id.* at 29.

<sup>19</sup> Hans & Dee, *supra* note 3, at 1079.

<sup>20</sup> Neal Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* 101 (2000).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Jeffrey T. Frederick, *Tips for Understanding and Identifying Juror Bias*, *THE JOURNAL OF VIRGINIA TRIAL LAWYERS ASSOCIATION*, Summer 1996.

<sup>24</sup> Kelly G. Shaver, *Defensive Attribution: Effects of Severity and Relevance on Responsibility Assigned for an Accident*, 14 *J. Personality & Soc. Psychol.* 101 (1970).