

TALKING TO JURIES IN BRAIN INJURY TRIALS

From a presentation at the Trial Lawyers of British Columbia conference, Traumatic Brain Injury Litigation: Medical and Legal Issues, 2008

by James U. Buckley

A wise man once told me that there is no real difference between how you put together and present a big case, and how you put together and present a small case, except for the number of zeros after the result.

As a young(ish) lawyer I have been lucky to have the opportunity to spend a good deal of time talking to juries, sometimes in small cases and sometimes in big ones. In late 2007 this culminated in a jury awarding damages of \$2,400,000 to my client, who suffered a serious brain injury.

To succeed in a jury trial I believe that you must believe that when confronted with the evidence 8 disparate people plucked from their ordinary lives and routines will render a considered and dispassionate verdict. You must be convinced that when asked to do so and when given the evidence and ammunition to support them, 8 people will do the right thing. This is how I explained the makeup of my jury in my last brain injury trial to my jury consultant Debra Miller about a week into the trial:

Hi Debra,

Sorry for not responding sooner. The trial seems to be going ok- thanks for asking.

Our jury is 5 women and 3 men.

One nurse (woman 30's- seems very nice- smiling at all lawyers for both sides- seems happy to be involved)

One care aid (woman 60's- seems at times lost and other times very disinterested- conservative- seems distant from rest of group- nobody is helping her find things in her binders or handle the exhibits- scared of her)

One manager (woman 30's also seems quite interested-nods lots)

One nurses-aid (woman 30's- seems to be pal's with the female manager and seems keen- looks down whenever I look at her)

One manager (Male 30's-early 40's- likely to be loud voice- seems keen at times, bored out of his mind at others and not trying to hide it)

One machinist (male 40's - very likely to be loud voice- sits beside the male manager and seems way too keen- I think he is the source of most or all of the

jury questions to date and most of those are slanted against us on liability)

One student (female 20's- inscrutable- maybe totally lost or exceptionally self contained or scared out of her wits, hard to tell which)

Computer tech (male 30's or early 40's seems very not friendly- frowning lots)

It is difficult to imagine that this group of people would find much in common. It is even harder to believe that they could find themselves enjoying each other's company. It is harder still to conceive that within days they could be heard laughing together in the jury room and within weeks they would be exchanging phone numbers and patting each other on the back with pride after giving their verdict. They began as strangers and ended as friends.

Those eight people sat and listened and deciphered and laughed and cried not because of some parlor trick or slight of hand from a lawyer. Not because of some advocacy skill I rehearsed for hours or weeks or years to persuade them. They reached the verdict they did because it was the right thing to do. They reached the verdict that *they* had to reach.

Would you run this case?

Bob, a 47 year old man, is walking across a busy street in Surrey at 10:00 p.m. on a cold rainy night.

A witness says Bob is standing on a cement median that divides this busy street and that he steps off and takes one, two, at most three steps in front of a car that is turning left across his path, and hits him.

The witness is certain that Bob was well outside the marked cross-walk when he stepped from the cement median, and is even more certain that the driver who hit him was not going very fast and braked just before hitting Bob.

Bob had also been drinking heavily. His blood alcohol reading an hour after the crash is more than 3 times the legal limit for driving a car.

Bob was unemployed at the time of the crash, and he was living in a motel room a block away from where the accident happened.

It was not clear when Bob last worked before the accident but it had been a number of years. Bob was in Surrey because his brother had found out that his elderly mother was giving Bob a good deal of money to live on in California and had been for some years.

A short while before the accident Bob's brother made some inquiries and found that Bob was not working and seemed to be drinking heavily, so the family conspired to cut off the supply of money to Bob and to force him to move back to Canada to seek help for alcoholism.

Bob came back to Canada and move in with his brother and his family. But a few weeks before the accident Bob was caught by his young niece sneaking drinks of alcohol and he was told to move out and into a motel.

The family relationship had become so soured that after the car crash no member of Bob's family was willing to step forward and act as his committee or litigation guardian.

But Bob suffered a severe brain injury in the crash. He was shuffled from hospital to hospital until he was finally placed in a living arrangement at a local nursing home with elderly and demented patients where he was visited only infrequently by his brother.

In summary, your client suffered an indisputable brain injury, however, to get any damages for it you have to get past liability, contributory negligence, exceptionally high blood alcohol level, pre-existing alcoholism, lack of any provable work history, and a serious lack of friendly collateral witnesses from his family.

You'd be a fool to run a trial like that.

But what if you look at it another way?

But, what if you knew that Bob, perhaps as a result of his accident, but in any event, was one of the most polite and charming gentlemen you'd ever met. What if the nurse who took care of him at the Nursing home was so charmed by him she thought of him as her favourite patient? What if the 19 year old defendant driver of the car that hit Bob had just left the bar a block away where she had two drinks before driving into Bob? What if your engineer told you that the Defendant's explanation for the accident did not jive with the irrefutable evidence of where your client's body came to rest and where the vehicle came to a stop on the roadway. Not enough?

Well, what if all of your experts, your life care planner and most importantly the nurse in charge of Bob's care at the nursing home, tell you that for him to have any quality of life in the future Bob needs to be moved out of the nursing home to a place with the experience and knowledge needed to deal with persons with brain injuries. You know that the nursing home Bob is in has no staff trained in brain injury and a large patient to nurse or nurse-aid ratio. Bob has become violent and aggressive towards some of the other patients and, as a result, has been sent to the psych ward and heavily medicated to control his behaviour. He does not leave the facility, and rarely leaves his room. He is virtually imprisoned in the care home.

Now you have a theme, a cause and a purpose.
And so does your jury.

It was this theme that I built my case around, and it was this theme that wound through all of the evidence I called at trial. I am convinced that it is this theme that lead to the verdict in favour of our client.

I have attached as appendix "A" part of the opening statement I gave in this case.

But, be forewarned, defence counsel found some of this objectionable and the trial judge generally agreed with him. The remedy sought, and given, was a "corrective charge" to the jury in which portions of the opening were reviewed with the jury, and the jury was instructed not to take what I had told them as evidence but to decide those matters for themselves. This opening is not for everybody and not for every case and is best used with caution, or perhaps when caution is to be thrown to the wind.

Use Experts who Educate:

I called the ambulance attendants who treated Bob at the crash site, Dr Hugh Anton (Physiatrist), Dr Doug Cohen (Neuropsychologist), Jane Casey (Life Care Planner), John Millard (Executive Director Cheshire Homes) and Bob's primary care nurse from the nursing home.

I called Don Rempel (Accident Deconstructionist) to deal with the defendant's explanation for the crash. I called Bob and Bob stole the show.

Each of these experts spent more time educating the jury than referring to reports. Each advanced our case theme further toward the goal, and where they left off the next picked up.

Only Call the Evidence that Supports Your Theme:

I called Bob's former employer in California, and (not without some serious reluctance) Bob's brother.

I introduced about 20 exhibits, including *less than 20 pages* of the 2,000 pages of clinical records. We filed the expert reports but referred to them sparingly. In short, I talked to the jury.

This trial lasted 19.5 days including 3 days of deliberations by the jury. Something worked.

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| Negligence: | Plaintiff 30% | Defendant 70% | \$700,000.00 |
| Damages: | Non-Pecuniary Damages: | | \$700,000.00 |
| | Special Damages: | | \$137,892.08 |
| | Past Loss of Income from December 1, 2001: | | \$58,200.00 |
| | Loss of future income earning capacity: | | \$62,400.00 |
| | Cost of future care: | | \$1,439,000.00 |
| | Total: | | \$2,397,492.08 |

Much of the credit for that result goes to Debra Miller from Miller Malekpour & Ball, a jury consulting firm out of North Carolina. Debra's partner, David Ball is the inspirational and

superlative author of the bible on presenting cases to juries, **David Ball on Damages** and a frequent lecturer to trial lawyers whose presentation should not be missed by anyone intending to present a case to a jury. Debra is cut from the same cloth. With a sharp mind and quick and easy nature she can distill a jury-related problem for you in virtually no time.

Debra applied her vast experience and knowledge of jurors and the principles articulated by David Ball in his book to my case which should be the starting point for anyone who is about to set foot in the courtroom and try and persuade a jury to pay damages. She re-wrote my opening to keep my theme on track. She helped me think the way a juror would about hurdles in the case- the blood alcohol level, the pre-accident lifestyles/quality of life. My wife Sherelle has done the same for me over the years, but Debra did it from a place of objectivity and distance and with an insight based on thousands and thousands of hours spent talking to jurors about the trials they actually sat on.

One of the biggest obstacles I foresaw was that the jury would like Bob, and would want to make sure that we all listened to Bob about what he needs and wants and not impose our plans on him. This might not seem like such a bad thing but Bob fears change and Bob is absolutely certain that he does not want to move out of the nursing home. Not now. Not ever. If he stays in the nursing home it will be subsidized and he would only require \$200,000 for his future care, rather than the 1.9 to 3 million I was asking for.

Debra's suggestion was brilliant in its simplicity. Use the fact that they like Bob to his advantage. Ask them not to force such a tough decision on him in his state.

In closing after summarizing all of the evidence on what Bob's care needs are and why the amount I was asking for was so high, I said:

Now one or two of you may be thinking ... "What about Mr. K- he has feelings and he wants to stay at that nursing home. Shouldn't we listen to him?"

When that comes up in deliberations remember that Mr. K at this point is not even capable of making a meal by himself or deciding to have a shower more than once a week. It would not be fair to him to leave the decision to him on where he should live.

Remember, our American colleagues have a significant advantage over us in jury trials. They can use the *voire dire* process to actually learn something about what makes particular jurors tick. And, after the fact, they can discuss deliberations with their jurors to find out what the jury found helpful, what they focused on, and what they tuned out.

I found these invaluable resources:

- David Ball on Damages: the essential update by David Ball
- Rules of the Road by Friedman and Malone

- Addressing the Jury: Achieving Fair Verdicts in Personal Injury Cases- Second Edition by Roger Oatley
- Go to Howard Nations web site www.howardnations.com
- Hire a jury consultant: debrazmiller@portbridge.com

Ball's book is a fantastic starting point and the resources available in places like Howard Nations' website and in Roger Oatley's text on jury trials is exceptionally empowering. Arming yourself with these tools will give you the confidence that you can succeed. These tools will help you to understand the importance of things like:

Case Themes

Empowerment of the Jury

Instructing the Jury

Achieving Credibility

The Attribution Theory on Causation Issues

Coping with Bias

Psychological Tools of Structure

Thematic Anchoring

We can and should take advantage of the work that is being done by Howard Nations, David Ball and Debra Miller and many others in assisting us with how jurors think and react to messages they receive in the court room. There may be differences between Canadians and Americans and it is important to allow for those in your thought process on how you message and theme your cases but, fundamentally, people are people and good people, when asked to do the right thing, and armed with the tools they need, and shown a way to do so, will.