THE (ONCE PRESUMED DEAD) THREE DAY JURY TRIAL

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A behavioural study commissioned by Lloyds TSB Insurance reveals that the average attention span is now just five minutes and seven seconds, compared to more than twelve minutes a decade ago. The study attributes this decline in attention span to busy lifestyles, modern technology, television and the "instant gratification" now provided by the internet.
Ironically, despite the declining average attention span, the length of jury trials appears to be increasing. We live in an era where even the simplest of cases seem to require escalating amounts of court time. On average, a civil jury trial in British Columbia now requires approximately ten days of court time (albeit down slightly from 11 days in 2007). In the United States, the average length of a jury trial in a tort case is reported to be just four days.[1]

SUPREME COURT; Average Hours for Civil Jury Trials in British Columbia[2]

	2005	2006	2007	2008	Grand Total
Total number of trials proceeded	51	33	38	52	174
Total Average number of hours	37.49	39.47	46.64	43.34	41.61

Why are Trials taking more Time?

Polarized system. Our advocacy system has become polarized and parties seem less willing to make concessions or reach accord on even small points before trial. This is combined with cynicism, fear, and ignorance of how jurors will react to and interpret what is presented to them. The result is generally that lawyers call more evidence than might be necessary.

Concern over "adverse inference". Trial counsel have become increasingly concerned with leaving even the smallest issue unaddressed by a witness (or sometimes two) at trial. Say, for example, the client missed time from work. The fear is that her explanation of this may not be convincing. It may seem less risky to call her workmates or her boss to buttress the plaintiff's evidence. Or perhaps the physiatrist and family doctor don't address her shoulder. So, maybe it is better to call in an orthopaedic surgeon. In this way counsel (often unwittingly) create more issues which must be addressed at trial, and more witnesses to be called and cross examined at trial and resulting, inexorably, in longer trials.

Long cross examinations. During trial the well-intentioned desire to leave "no stone unturned" in cross examination frequently results in time spent focussing the jury on minutiae that is not particularly helpful, or even material, to the issues at trial.

Legal culture. The "ideas, values, expectations and attitudes" as well as practices and behaviours of judges, lawyers and court staff in each jurisdiction make up the "legal culture" of that area. Proponents of this perspective maintain that it is the legal culture of a jurisdiction that tends to dictate the speed with which cases are processed, with the argument being that "this local legal culture in some jurisdictions fosters a leisurely pace of litigation."[3] In short perhaps jury trials in British Columbia take a long time because lawyers and judges have an ingrained, mistaken, belief that these trials should take a long time.

What can be done?

The goal at trial is to capture the attention of jurors long enough to turn them into advocates. Trial lawyers should cater their approach at trial explicitly to those jurors.
On November 26, 2008, a Vancouver Jury awarded a 41-year-old plaintiff over $500,000 in damages for soft tissue injuries. While the award is staggering, what is truly amazing is that the trial was completed in less than three days. Not three weeks – three days. Of course, not every trial can be done in a short amount of time but lessons can be drawn from this outcome which may be applied to all jury trials and especially to personal injury cases involving soft-tissue injuries.

First, simplify. A trial lawyer has three enemies in a jury trial – complexity, confusion and ambiguity. Every trial lawyer can successfully combat these enemies throughout the trial by ensuring that complex legal issues are rendered simple, unambiguous and crystal clear for the jurors.

In their useful text *Rules of the Road*, Rick Friedman and Patrick Malone emphasize the importance of "spoon feeding" to the judge those facts and principles the judge will need to decide the issue in favour of your client at trial.[4] The authors remind us that the job of a trial lawyer is not to impress the judge with how hard counsel has worked, what a long, complicated brief they can write, or how strongly counsel feel the righteousness of their client's cause. The real job of a trial lawyer is to make it easy for the judge to decide in their client's favour. The same principle applies, only more so, to jury trials.

Don't be afraid to send a witness home. Witnesses are called to prove things. That includes the plaintiff, particularly in soft-tissue cases. However, a good deal of trial time is used up out of concern that the judge may accede to a request to charge the jury on the drawing of an adverse inference from the failure to call these additional witnesses.

The seminal case in British Columbia on adverse inference is *Barker v. McQuahe* (1964), 49 W.W..R. 685 (BCCA), in which Mr. Justice Davey established that an inference adverse to a

litigant may be drawn if, without sufficient explanation, that litigant fails to call a witness who might be expected to give supporting evidence. Mr. Justice Davey went on to say that a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so."

So, trial lawyers dutifully obtain expert reports from the treating specialists and the family physician and the chiropractor and the IME doctors. Not surprisingly when it comes to estimate how much time will be needed for trial, what seemed like a simple case now is expected to take up 7, 10 or 12 days.

But is this really necessary? Recent case law has indicated that adverse inference, in the context of personal injury matters, might not be as much of a concern as it once was. *Austin v. Jim Pattison Industries*, [1995] B.C.J. No. 1569, *Hamilton v. Vance*, [2007] B.C.J. No. 1495 and*Qiao v. Buckley*, [2008] B.C.J. No. 2533 provide some comfort to counsel for the plaintiff concerned with avoiding a charge to the jury on adverse inference, depending on the circumstances of the case.

Recently the Court of Appeal in *Buksh v. Miles* [2008] B.C.C.A. 318, noted that "the tactic of asking for an adverse inference is much over-used in today's legal environment, and requires, at the least, a threshold examination by the trial judge before such an instruction is given to the jury." Saunders, J.A. writing for the court noted that significant evolution has occurred both in the delivery of medical care and in the discovery process since 1964, when Barker was decided.

> …The proposition stated by Mr. Justice Davey does not anticipate this present model of medical care. Likewise, the discovery process available to both sides of a lawsuit is not now as it was in 1964 when, in explaining his view on the need to call all treating physicians, Mr. Justice Davey referred to the professional confidence between a doctor and the patient. Today, the free exchange of information and provision of clinical records through document discovery raises the possibility that an adverse inference may be sought in circumstances where it is known to counsel asking for the inference that the opinion of the doctor in question was not adverse to the opposite party.
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> Taking the admonition of Mr. Justice Davey to the extreme in today's patchwork of medical services raises the likelihood of increased litigation costs attendant upon more medical reports from physicians or additional attendances of physicians at court, with little added to the trial process but time and expense, and nothing added to the knowledge of counsel. Perhaps the idea that an adverse inference may be sought, on the authority of *Barker*, for the reason that every walk-in clinic physician was not called fits within the description of "punctilio" that is no longer to bind us, referred to by Mr. Justice Dickson in *R. v. Sault Ste. Marie (City),* [1978] 2 S.C.R. 1299 (S.C.C.), in a different context.

> In this environment, and bearing in mind the position of a lawyer bound to be truthful to the court, it seems to me there is a threshold question that must be addressed before the instruction on adverse inferences is given to the jury: whether, given the evidence before the court, given the explanations proffered for not calling the witness, given the nature of the evidence that could be provided by the witness, given the extent of disclosure of that physician's clinical notes, and given the circumstances of the trial…a juror could reasonably draw the inference that the witness not called would have given evidence detrimental to the party's case…

And what do juries really make of this concept? The standard Civil Jury Instructions in British Columbia, used to instruct and charge the Jury virtually without fail in this province, provides the following means by which the trial judge may explain to the jury the notion of adverse inference:

1. As a general rule, neither party need call every witness who has knowledge about the matters concerning this dispute. However, in some circumstances the failure of a party (to call a crucial witness/to give evidence (himself/herself) may entitle you to draw an adverse inference against that party. I will discuss this concept with you as it arises from the circumstances of this case.
2. Where a witness is available to give evidence on a matter in issue but is not called to testify, you may, not must, draw an inference that the witness would give unfavourable testimony against the party who did not call that witness. Before drawing any such inference you should take into account the following things:
    a. Was there evidence satisfying you that the witness was not available to be called because of ___? If you are satisfied that there is a reasonable explanation for the absence of the witness, you should not draw any inference because of the failure of the witness to attend.
    b. Was the witness equally available to both parties so that either one could call the witness to testify? If the witness was available to both sides, you should not draw any inference against either party.
    c. A witness may be available, in the sense that the witness can easily be subpoenaed to come to court and testify, but that is not the test of availability in law. If because of the witness's relationship to one party (he/she) could reasonably be expected to testify against the other party, then, for the purposes of this rule, the witness is not available to that party. Therefore, no adverse interest should be drawn.
3. In these proceedings the plaintiff claims damages for personal injuries arising out of _____. Evidence was presented that (he/she) was examined by Dr. _____. Dr. _____ was not called by the (plaintiff/defendant) in this trial. In these circumstances you may draw an adverse inference against the (plaintiff/defendant) for (his/her) failure to testify. In other words, you may conclude that:

a. The evidence of Dr. _____ would not have supported the evidence of the plaintiff and the other medical testimony called by the plaintiff;
b. The evidence of Dr. _____ would not have supported (the medical testimony called by the defendant/the defendant's suggestion that the plaintiff's injuries are not as severe as the plaintiff testified).

Lawyers may read nuance into that portion of the charge and nod along knowingly. It is no doubt a simplified explanation of a complicated legal principle. However, to the average person the very concept is cumbersome and difficult to comprehend. It is also quite difficult to implement. Jurors are not familiar with how trials "usually" work. Jurors don't know if it is "reasonable" to expect the plaintiff's childhood doctor or wife or grandma to testify. Yet jurors are asked to decide whether the absence of testimony from someone they heard about but who never came to court, seems "reasonable". If it does not seem reasonable, then they may *do something about it* by drawing a conclusion that the witness they never saw would not have supported the person who did not call that witness to the stand.

Drawing such a "conclusion" is of little direct assistance in accomplishing the juror's task of rendering a fair verdict. Jurors, seeking clarity and craving simplicity and assistance in performing their duty may find the results of the mental gymnastics required to reach such an intangible "conclusion" rather unsatisfying.

And, if the jurors understand the following in simple, clear, unambiguous terms it is likely they will concern themselves with who did *testify* at trial, rather than with *who did not*:

1. The harm that was caused to the plaintiff ;
2. The "worthwhile ness" of the money the plaintiff is asking for;
3. That it is their "job" to fix, help, or make up for the harm; and
4. How the defendant's conduct caused the harm to the plaintiff.[5]

That is not to suggest that counsel ought not to be concerned about an adverse inference in every circumstance. Rather, it seems that comfort may be drawn from two things. First, convincing the trial judge to charge the jury on adverse inference ought to be a significant legal hurdle. Second, concern over what the jury might do if asked to consider the issue ought to be tempered with common sense. If the information complained about is seen by the jury as something outside the framework of what *the jury believes the case is abo*ut, they will probably ignore it. Consider what is needed to prove the case and to have the theme and key points sink in to the jurors. The rest is probably not necessary or helpful.

Cross-examination – "*If you must, be brief*." This basic tenet of cross-examination is often ignored. Counsel may assume that if they do not cross-examine a witness it will be interpreted as a sign of weakness, or a concession to the position of the opposing party. In some cases, of course, cross examination is important. It may be necessary to illustrate the biases of the

opposing side's expert, or it may be that the expert opinion is based on unsound principles or incorrect assumptions. If so, by all means counsel should cross examine. But do so efficiently, with purpose in mind. When the purpose is achieved, stop.

In acting for the plaintiff in jury trials there are a couple of main objectives in cross examination. Use the opponent's expert to prove your case, or make the expert seem unreasonable for not doing so. Use the defence expert to undermine the defence theory of the case by having the expert agree with general statements that assist you in showing your client was not malingering or lying about her pain. Even the most hardened, litigation savvy doctors should agree that they have treated patients who never got better, even from modest injuries. They should agree that pain is subjective, not medically quantifiable and can permanently disrupt a patient's life, and that even *they* have had patients thus affected. Jurors know the right answer to these questions. If the expert agrees, it helps. If the expert disagrees, they will probably look silly and adversarial. This also helps. Counsel is unlikely to persuade the jury of the righteousness of their client's case even with the most scathing two day cross-examination.

Arming Jurors. In *David Ball on Damages, The Essential Update,* Dr. Ball opines that lawyers never win cases. In fact, he says, no lawyer has ever won a jury case. According to Dr. Ball, all trial lawyers can do is arm the jurors to go into deliberations and win the case for them. Understanding this is important. *Knowing how to* arm their favourable jurors (Ball refers to these as "your juror advocates") is terribly important.

Be mindful that your favourable jurors are looking for you to provide them with a means of addressing the jurors who are undecided (or leaning against your client) in the jury room. They believe in your client's case and need help to convince their fellow jurors of your position.

To arm favourable jurors Ball encourages trial lawyers to boil down each of the important themes of the case to a brief, plain-English sentence of ten words or less. These themes permeate the case and are incorporated into opening statements, direct and cross-examinations and closing arguments. Juror advocates understand the harm caused to the plaintiff; the "worthwhile ness" of the money the plaintiff is asking for; that it is the jury's job to make up for the harm with their verdict; and that the defendant's conduct caused the harm to the plaintiff.[6]
Dr. Ball encourages counsel in closing to let the jurors know that they are being armed for their deliberations by returning to the themes of the case. "If someone in that jury room asks you why you should give the plaintiff so much money, remind them it is because her pain will never ever get better or go away". Dr. Ball's studies show that advocate jurors will defend a position they believe in when properly armed to do so. This is a tool recommended for closing arguments but to be effective it requires careful consideration before the trial starts and methodical return to the themes of the case during each part of the trial.

There is a second, significant benefit to arming advocate jurors. It will help relieve jurors of concerns that their family or friends might react poorly to their decision. Dr. Ball notes that

some jurors are reluctant to award much money in a case if they anticipate criticism afterwards by people close to them or in their community. Although jurors are barred from discussing their deliberations in Canada (pursuant to s.649 of the *Criminal Code*) it is fair to assume that the underlying concern may be real to some jurors and should not be ignored. To help address that concern Dr. Ball recommends that trial lawyers strive to allow jurors to be proud of their verdict, to feel prepared to justify their verdict if need be: "We did the right thing because the plaintiff's*pain will never ever get better or go away*."

Quit While You Are Ahead. A significant drawback of lengthy trials is that it can overwhelm jurors with too much information, take their shrinking attention span away from the important issues and dilute the impact of those points that should be emphasized. If the evidence to prove the case has been presented clearly in a manner the jury understands, you are ahead. Quit. Better to leave on a "high note" than to bury your clear evidence underneath a mountain of potentially complex and confusing information that undermines the simple and easily grasped evidence that went before it.

A "Shining Example"

Patrick Gordon and Scott Morishita of Slater Vecchio were counsel for the plaintiff in a "shining example" of a personal injury trial that required less than three full days of court time and resulted in a very favourable verdict for the plaintiff. This trial may help expose some flaws and misconceptions about the time "required" for jury trials. In doing so this case may provide a useful template for others.

The plaintiff called three witnesses: the plaintiff, her doctor and an expert functional capacity evaluator. The defendant called no witnesses. In this way Mr. Gordon simplified the case, and the language he used to explain it. This allowed him to abridge his opening and closing significantly and make them readily accessible by the jurors. The plaintiff's "chronic myofascial pain symptoms and underlying osteoarthritis" became simply "pain." The complex issue of the various heads of damages claimed by the plaintiff became "payment of a debt that by law is owed to her." Mr. Gordon's opening and closing statements each averaged approximately 20 minutes.

In his closing submission Mr. Gordon armed the jurors on dealing with what was likely to be their greatest concern, the size of the award being sought. He suggested that the answer to any question of why so much money was needed was simple: "Because she will hurt for the rest of her life." Thus, in ten words, arming his advocate jurors to deal with a critical question in deliberations.

In a great example of quitting while ahead, approximately ten minutes before the plaintiff's physiatrist was scheduled to take the stand, Mr. Gordon decided to cancel this expert witness. While Mr. Gordon was certain that the expert's testimony would support the plaintiff's claim, he was concerned that this evidence could nonetheless muddy what seemed to be clear, concise, easily distilled and graspable testimony already provided by the plaintiff's

family doctor and expert occupational therapist. In other words, the important issues had been adequately addressed in a way the jury could easily understand, in a manner he could use to arm his favourable jurors. There was no need to add the additional corroborating evidence.

With the agreement of counsel, Mr. Justice Savage used the Abbreviated Charge to the Jury from the Civil Jury Instructions. This reduced the length of the charge to about forty minutes. The jury deliberated for two hours and rendered their verdict just before five p.m. on the third day of trial.

In less than three days of trial, the jury awarded the plaintiff over $500,000 in damages.

Conclusion

A great deal is asked of jurors. Eight good men and women are virtually plucked out of their daily routine and informed they have the grim and serious task of assessing damages for someone they know nothing about. They are told repeatedly during the trial, by the judge and by counsel that they are the sole judges of the facts and that their decision as rendered is final. After nine or ten days of evidence they are then left to their own devices to assess the quantum of damages for pain and loss of enjoyment of life.

Most jurors take their role very seriously but the attention span of the average juror is decreasing. Expect jurors to appreciate everything that can be done to shorten the length of the trial and to make their daunting job easier. It is the duty of trial counsel to help jurors to distil the critically important from the mundane and render a verdict that is fair and just in the least amount of time possible.

References

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[5]David Ball, Ball on Damages; The Essential Update (Chicago: National Institute for Trial Advocacy, 2005).

[6]David Ball, Ball on Damages; The Essential Update (Chicago: National Institute for Trial Advocacy, 2005).