



# Avoid juror judgment: Keep the plaintiff out of the courtroom

A trial consultant looks at the pros and cons in this long-running debate over the value of having your plaintiff in the courtroom

By CAROL BAUSS

Trial practice evolves as we learn more about juror decision making. Trial attorneys have shifted from having personal-injury plaintiffs in court every day to limiting their time in the courtroom. The old school of thought was the plaintiff should be in the courtroom to show jurors the lawsuit was important enough to the plaintiff to show up to court. A more recent trend is to keep the plaintiff out of the courtroom to focus jurors' attention on the defendant's wrongful conduct and to keep the spotlight off the plaintiff.

The plaintiff is in a fishbowl in a trial. Jurors scrutinize the plaintiff's every move, looking for evidence to prove or disprove her claims. Over my career, I have changed my opinion about whether the plaintiff should always be in court based on hundreds of post-trial interviews with jurors. I have learned jurors evaluate a plaintiff's medical condition based on their observations of the plaintiff in the courtroom. These inaccurate evaluations can undermine the liability case and lower damages.

## The prevailing opinion was plaintiffs should honor the trial process by showing up to court

In the past, the theory was, if jurors have to be in court, so too should the plaintiff. The plaintiff initiated the lawsuit and is the reason everyone is in the trial. Jury service disrupts jurors' lives for days or weeks or even months. The concern

was that an absent plaintiff feeds into the stereotype of someone abusing the civil justice system to get a windfall they do not deserve. The thought was jurors will penalize the plaintiff for using valuable court resources when she does not bother to be present, and her absence will weaken her claims and make her less credible.

Post-trial juror interviews belie the theory that jurors expect the plaintiff to be in court and punish the plaintiff for being absent. Most jurors do not have preconceptions about whether the parties will attend the trial. They do not ascribe bad motives to an absent plaintiff. A typical post-trial juror response to questions about an absent plaintiff is, "I never thought about why [plaintiff] was not there. I guess I thought he was taking care of himself. We did not talk much about him in deliberations until we started talking about money, and then everyone felt bad for him." An absent plaintiff is rarely a factor in a defense verdict, and when it is, it is usually cited by jurors in the minority in deliberations.

## Jurors connect to the plaintiff's story throughout trial independent of observing the plaintiff

Another popular opinion was that jurors bonded with the plaintiff by observing her in court. Connecting to the plaintiff is important and starts in jury selection before the jurors have met the plaintiff in person. Trial counsel can develop that connection without the plaintiff being in court. A trial is a story, and the attorney can bring the plaintiff to

life like a good author can make a reader feel deeply connected to a character in a fiction book. A connection is created during opening statements, witness testimony, and closing argument.

The jurors get to know the plaintiff through testimony from treating doctors and medical experts as they explain the effects of the injury or illness on the plaintiff. Jurors hear testimony from family, friends, and co-workers about how different the plaintiff is post-injury. By the time the plaintiff testifies, jurors feel like they know the plaintiff and have an intimate understanding of how devastating the injury is to the plaintiff's life. The plaintiff's testimony should be the icing on the cake.

In post-trial juror interviews, when asked about the impact of the plaintiff's testimony, one juror said, "I found [plaintiff's] testimony moving and heard from her what I expected to hear. I do not think her testimony impacted how I determined the outcome of the trial."

In another juror's words, "In my opinion, having the plaintiff share her stories did not make her more sympathetic or deserving of the money."

Sometimes it is hard for jurors to connect to the plaintiff. Many plaintiffs are flawed, and some are unlikeable. In cases where jurors will have a hard time relating to the plaintiff, the best strategy is to minimize the time jurors spend with the plaintiff and limit fodder for negative opinions. Likewise, some plaintiffs have a difficult time controlling their emotions or reactions when listening to the defense



case, and it is best to keep them away from the jury.

### **Jurors judge the plaintiff based on what they see in trial**

The plaintiff's actions are evidence that can be used against him. Jurors are curious about the plaintiff. They watch him in the courtroom, the hallway, the restroom, and going to and from the parking lot. Trials have downtime where the attorneys and the judge are at the sidebar or in the judge's chambers, and the jurors have the opportunity to observe the plaintiff. They watch the plaintiff to see his demeanor, his reaction to testimony, and if he acts like the jurors expect an injured person to act based on their personal experiences. The plaintiff's actions are magnified in a courtroom where they are the center of attention.

Often the severity of a plaintiff's injury and the toll it takes on the plaintiff is not visible. Even plaintiffs who have a terminal disease have good days and may not look sick during the trial. Brain injuries are the toughest because brain-injured plaintiffs look healthy. In a brain injury trial, one juror said in a post-trial interview, "I do not know whether the plaintiff had a permanent brain injury. He talked to his friend in court, laughed, and showed a natural emotional reaction that was contrary to the picture painted. That made me question everything the plaintiff was saying."

Most plaintiffs put on a good face to come to court each day. They have been waiting for this moment to tell their story and seek justice. Many plaintiffs are also stoic and try to hide their pain and keep it together in public until they get home at night and collapse in agony. But the jury never sees that pain. Instead, during the trial, jurors have a small glimpse into the plaintiff's daily life; and they use that imperfect snapshot to render life-altering verdicts.

Jurors also want to believe the plaintiff will beat the odds even where all doctors agree the injury is permanent or the illness is fatal. It is psychologically more

comfortable for jurors to think someone is not as injured as they claim than to believe the defendant's actions could cause significant harm.

### **The plaintiff with a back injury**

Jurors judge plaintiffs with debilitating back injuries harshly. Plaintiffs with back injuries drive to court each day, sit in a chair all day, and drive home from court. On the outside, they look fine. No one sees the toll the trial takes on their physical and mental health. Telling plaintiffs that they can get up and stretch in court or stand in the back of the courtroom has its downsides. Plaintiffs feel self-conscious about drawing attention to themselves in court and worry about how the jurors will perceive their actions. While some jurors may see the plaintiff's attempts at managing his discomfort as proof he is injured, other jurors may see him as manipulating the jurors to focus on his injuries.

There is no one way to act when injured or ill, and that is a problem for injured plaintiffs where jurors say after the trial, "He did not get up out of his chair like you expect someone with a back injury would."

"He did not seem like he was in pain at all. I found the chairs uncomfortable, but he seemed to sit there with no problems through the whole trial. I kept looking to see if he would shift around or wince in pain. He never did. I did not think he was as injured as they said he was."

These juror sentiments are the same for shoulder, leg, or soft tissue injuries.

### **Horrific injuries**

Repeated exposure to horrific injuries can inure jurors to their severity. Consider a case with bad burn injuries, including to the plaintiff's head and face. By the end of a long product liability trial, where the plaintiff came to court every day, the shock of the burn injuries wore off. The jury awarded damages, but the amount was lower than it might have been if they were not as comfortable with the plaintiff's disfigurement and scars.

After trial, jurors downplayed the severity of the injuries and argued the plaintiff would not have as difficult a time in the workplace and out in the world as counsel argued. After so much time together, the jurors assumed that everyone would see the plaintiff as they saw her and overlook her injuries.

Jurors may picture the effects of an injury or disease on a plaintiff as worse than the plaintiff presents at trial. In asbestos cases where plaintiffs have mesothelioma, usually a terminal illness, some plaintiffs may be bedridden at trial; in contrast, others may look "normal." How they look does not change that they will, in all probability, die within one to two years. However, if the plaintiff's appearance or conduct does not match the jurors' perception of the injury or illness, jurors may question the plaintiff's prognosis. Jurors, especially those leaning toward the defense or on the fence, look at the plaintiff each day in court and see confirmation that they are not as sick as they claim. As one juror said after a talc trial where the plaintiff was exposed to asbestos in baby powder, "Based on our discussion in jury selection, we thought she would look much worse. We expected her to show up with tubes coming out of her body."

### **The trial should be about the defendant's bad acts**

The plaintiff should not be the center of most trials. Removing the plaintiff from the courtroom takes the focus off the plaintiff and keeps it on the defendant's bad acts. Everyone is in court because the defendant broke the rules and caused harm. The jurors' job is to hold the defendant accountable. At the end of the trial, the jurors compensate the plaintiff, but the goal is for the jurors to understand the defendant's poor choices could have harmed anyone. In another talc case, a juror summed up this view, "[Plaintiff's] testimony was helpful about how much talc she used, and it was nice to put a face to what they were talking about, but it did not affect my



decision-making. What [the defendant] did was wrong. We know how much she suffered. She will lose her life because they covered up what they knew.”

In court, there are many opportunities for jurors to judge the plaintiff, and the way to minimize negative judgments is to reduce the time the plaintiff is in court.

Granted, some jurors may resent that the plaintiff is not in court and may hold that against him, but that usually happens when the plaintiff’s case is weak, and the jurors are not convinced of the defendant’s wrongdoing and resent the plaintiff for wasting their time. Where the plaintiff has put on a strong case, and jurors are convinced of the wrongdoing, it does not matter that the plaintiff is not in the courtroom.

### Deciding when the plaintiff should be in court

In practice, minimizing the plaintiff’s presence in the courtroom takes many forms, depending on the plaintiff’s condition. Counsel may decide a plaintiff should be in the courtroom for voir dire, opening statements, testimony, or closing arguments. Here is the rationale for having a plaintiff present at each phase in the trial:

#### *Voir dire*

Some attorneys like to have their client present for voir dire so prospective jurors can see him and express any biases they may have based on his appearance: He doesn’t look injured, or he is Black, wears a turban, or has tattoos. However, it is advisable to keep the plaintiff out of the courtroom for jury selection to allow jurors to speak honestly in voir dire. Jurors may censor themselves if they have to say something negative in front of the plaintiff. It is better to introduce your client to the jury at the beginning of jury selection so jurors can get a look at him and to show jurors he is invested in the process. Then have him leave the courtroom. Explain to the jurors you told him to go so jurors can speak freely and honestly.

#### *Opening statement*

Some attorneys may introduce the plaintiff to the jury at the start of the opening statement and then have him leave the courtroom. Or the plaintiff may stay for the opening statement and not return to court until her testimony. Either way, having the plaintiff present for introductions or the entire opening lets jurors put a face to the case, and the plaintiff’s presence provides context to the story.

#### *Testimony only*

It is not uncommon for the plaintiff to be in court only when she is on the stand. Jurors are primed to hear from the plaintiff. By the time she testifies, even brief testimony can be powerful as a juror explained after a recent trial: “Everyone got choked up and emotional when deciding damages and talking about how the illness affected the plaintiffs. It was very personal and very real. I was surprised the testimony was so brief, even though I understand she is ill. Her testimony shook me to my core. It was hard to watch her without crying. It was so hard to see the pictures of her before her illness. We wanted to take care of her family.”

The elements of suspense and surprise are essential to good storytelling, and having jurors wait to meet the plaintiff and hear her story for the first time when she is in the witness box is compelling.

#### *Closing argument*

By the end of the trial, the jury has met the plaintiff during her testimony. Some attorneys like to have the plaintiff in court for the closing argument to show the plaintiff is committed to the lawsuit and to remind jurors this case impacts an individual.

### Addressing the plaintiff's absence in voir dire

After deciding to limit the plaintiff’s time in the courtroom, counsel may choose to address the issue in jury selection. In voir dire, talk to jurors about how your client will not be in the courtroom and ask whether this decision would make jurors biased against the plaintiff. This

approach can lead to a cause challenge. However, raising the issue in voir dire has two downsides. First, the average juror does not have a blueprint for a trial and highlighting that the plaintiff will not be in court tells jurors the plaintiff is violating the norms. Second, savvy jurors who may not be biased will seize the opportunity to get out of jury duty by saying they would be biased if the plaintiff were not in court every day. Strategically, the decision to address the absent plaintiff in voir dire depends on the rationale for the absence. Where the explanation is strong, for example, the plaintiff is in the hospital or frequently gets terrible migraines, there is less of a need to discuss the issue with the jurors before trial.

### Explaining the plaintiff's absence to the jury

A plaintiff may be absent from the courtroom for a variety of reasons. Explain in jury selection or the opening statement *why* the plaintiff will not be in court; and where possible, have the treating or expert doctor or mental health expert explain from a medical standpoint why the plaintiff will not be in court. Here are some reasons it is not feasible for the plaintiff to be in court all the time:

- The plaintiff’s illness or injury prevents her from being in court all day. Examples include a plaintiff who is bedridden, hospitalized, requires specialized medical equipment, or needs to rest frequently. Or plaintiffs with injuries that prevent them from sitting all day, especially in uncomfortable courtroom chairs or on hard wooden benches.
- The plaintiff has ongoing medical appointments, such as regular physical therapy sessions, chemotherapy treatments, counseling sessions, or other medical appointments that make it difficult to attend court each day.
- Plaintiffs, especially those with psychological injuries, find it challenging to listen to the defense attorney malign their character and blame them for the injury or accuse them of exaggerating their injuries or malingering. It can also harm a



plaintiff's well-being to listen to witnesses discuss in excruciating detail how the plaintiff is not the same person he was before the injury and how he will get worse. A plaintiff may have PTSD, and reliving the circumstances leading to the injury and its aftermath can trigger symptoms.

- For clients with terminal illnesses, explain that the defendant has already stolen the plaintiff's life, and he does not want to spend the little time he has left in a courtroom rehashing what happened to him.
- Many plaintiffs take medications that affect their ability to concentrate or stay awake, impeding their ability to sit through a trial.
- In a pandemic, many plaintiffs may be at higher risk of contracting COVID-19 because of compromised immune systems and should stay home.

### **Deciding to have the plaintiff in the courtroom**

Sometimes you have a fantastic client, and you know the jurors will fall in love with her and fight for her as hard as you are fighting for her. Some clients radiate positive energy, and in those cases, it may be better to have the client in court where the jurors can see how she interacts with the attorneys, court staff, and family members on breaks. On balance, the force of the plaintiff's personality and the nature of her injuries might tip the scales to having her in court.

The decision to have your client in the courtroom depends on whether jurors' negative scrutiny and superficial conclusions about your client's condition outweigh the benefits of having them in front of the jury daily. After interviewing jurors for years, I find that when jurors watch the plaintiff every day in trial, it can be more harmful than beneficial to the plaintiff's case.



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