

# **JURY SELECTION AND DAMAGES DURING THE CORONAVIRUS PANDEMIC**

BY CAROL BAUSS



**When trial lawyers head back into the courtroom, they will likely be speaking to a jury that may look different demographically, at least temporarily, and may view the world through an altered lens. It is not hyperbole to say the world is forever changed.** The pandemic of 2020 is more far-reaching than in past crises. Almost everyone across the globe has been affected by Covid-19, forced to stay home while economies ground to a halt. The coronavirus pandemic is also unique in that it represents a double whammy – a threat to health and safety and financial security.

While it is too soon to know how these changes will affect juror decision-making and verdicts, we know that plaintiffs' attorneys can strengthen their cases by recognizing these changes and embracing society's shared experiences in this time of crisis. This pandemic provides opportunities to explore critical topics in voir dire to assist in evaluating jurors for peremptory and cause challenges.

### **Changes to the Jury Pool**

Living through the pandemic is a scary and traumatic time as the economy is in freefall, and the health risks of the coronavirus remain. More people than usual may ignore their jury summons, and hardship requests will increase dramatically, including for,

- The unemployed, underemployed, and those worried about job security;
- The medically vulnerable – the elderly, those with compromised immune systems, and pregnant women; and
- Women, who as a group, have been harder hit economically, are more likely to be responsible for childcare, and are more concerned about getting the virus.

NJP Litigation Consulting/West conducted a survey June 12-18, 2020, of more than 400 juror eligible respondents from Los Angeles and six Bay Area Counties (Alameda, Marin, Santa Clara, San Francisco, San Mateo, and Contra Costa). Fifty-eight percent said it would be too difficult to serve on a jury and give a trial their full attention because of Covid-19 concerns. Seventy percent were afraid to be in a large group and risk exposure to Covid-19, and 22% had a Covid-19 related financial hardship.

When trials resume, juries are likely to be less diverse. The black and Latinx communities have been harder hit by the virus, economically and with higher rates of illness and death. In the NJP study, 64% of Latinx said it would be too difficult to serve on a jury now compared to 46% of Blacks, 58% of Whites and 58% of Asians. Blacks may be more willing to perform their civic duty given the recent protests in support of the Black Lives Matter movement and against police killings of Black people. Another recent survey found that younger, white, non-college-educated, conservative males were more likely to report for jury duty in this pandemic.

More jurors will have difficulty concentrating and will be frustrated at another disruption in their lives. In a post-Covid-19 era, jurors will be critical of repetitive witnesses or unnecessary experts. The NJP survey found that 58% would not be willing to participate in jury deliberations that lasted more than one

day.

### **Changes in Juror Attitudes and Damages**

Past crises provide guidance on how juror attitudes and verdicts are affected in times of societal upheaval. Understanding how jurors assess damages and what factors drive damages up or down can help attorneys think strategically about conveying a client's harms and losses. Damage awards have a great deal of variability because each verdict is dependent on the facts, venue, attorney skill, judicial rulings, and makeup of the jury. It is difficult to predict whether jury awards will generally go up or down in volatile times. Instead, focus on how individual jurors process their experiences in the crisis, and the attitudes formed as a result.

The pandemic provides opportunities for increased damage awards, but it can also lead to decreased damages and increased skepticism of plaintiffs.

### **NJP Survey Findings on Damages**

Our survey found a split of opinions on damages. Respondents were almost evenly divided over whether the current economic problems from the pandemic would influence the amount of money awarded to an injured person: 49% said it would influence the amount, and 51% said it would not. Of those who said the current economic problems would influence damage awards, slightly more than two-thirds would increase damages. Those who lived in a household where someone lost a job or experienced a decline in income during the pandemic were more likely to increase damages. At the same time, 43% of respondents agreed with the statement, "With everything that is going on in the country now, a company that made a defective product which badly hurt someone should only have to pay for medical costs and lost wages, and very little if anything for emotional distress."

### **Financial Insecurity Can Drive Damages Down**

Poll after poll shows a great deal of uncertainty about the economic future of the U.S. Many think the economic recovery will take many months or even years. People are being forced to tighten their belts to ride out the recession. Uncertainty and pessimism about the direction of the economy can lead to lower awards.

Everyone is struggling financially. When assessing damages, jurors may think about how they have had to make do with less after losing a job or having their income reduced. Compensating someone in the millions of dollars while unemployment is rampant, food banks cannot meet the demand, and retirees have seen the value of their 401k's plummet may be perceived as overreaching. Damages for pain and suffering may go down. With so much suffering in their communities, some jurors may be unwilling to compensate the plaintiff for



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what everyone is experiencing – “*Why should the plaintiff get money when we are all hurting?*”

### **Sympathy for Defendant Companies**

Sympathy for companies shuttered during the quarantine or experiencing a steep decline in business can lead to lower damage awards. Jurors may think hitting defendant companies too hard will put them out of business or lead to more employee reductions.

### **Skepticism of Plaintiffs**

Skepticism of plaintiffs is always a problem. Jurors will be critical of a plaintiff’s claims if they think she is wasting everyone’s time or does not have a sufficiently meritorious injury; what seemed important before the pandemic may not seem so important today. Some jurors may measure the plaintiffs’ harms against the suffering in their own lives and the country and find the plaintiff’s suffering comes up short.

### **Anger and Empathy**

Some jurors will come out of this pandemic bitter and unsympathetic to plaintiffs. Attorneys can identify those jurors in jury selection the way they always have; by using voir dire to identify bias against plaintiffs, lawsuits, and damages.

Emotions are high in our country now, and plaintiffs’ attorneys can tap into those emotions to argue the value of their clients’ losses. Anger and empathy are two emotions that impact damage awards.

### **Learning From Other Historical Events**

In looking back, three recent historical events had the potential to shift juror attitudes and impact damages: the terrorist attacks of September 11, 2001, the Enron Scandal, and the sub-prime mortgage crisis and resulting Great Recession of 2008. Each event has conflicting claims and data about whether plaintiffs’ verdicts across the board went up, went down, or stayed the same.

### **Who Do Jurors Blame?**

It is instructive to understand who jurors blamed for those events to know how they affected jury attitudes and verdicts. After 9/11, there was a documented rise in anti-Muslim bias. Muslim American plaintiffs were at risk of having their cases devalued because of the fear and misinformation surrounding Islam and its role in the 9/11 terrorist attacks. Similarly, in the current Covid-19 crisis, Asian-Americans are reporting an increase in bias related to misrepresentations about the origin of the virus. We can expect to see this bias in the jury box in upcoming trials, and it may affect the value of claims.

The Enron scandal and the 2008 Recession resulted from corporate misconduct and lax government regulations. After both, we saw an erosion of trust in corporations, corporate executives, and government institutions responsible for corporate oversight. People were angry at the culture of corporate greed and the price paid by the working class. Some jurors may have used that anger to send a message to corporate America with the only platform available to them – the jury verdict. This anger was likely strengthened in jurors already predis-

posed to find against a company.

### **Tapping into Anti-Corporate Attitudes During the Pandemic**

People are closely watching corporations’ responses to the current crisis on two levels – how corporations are protecting the health and safety and financial security of both their employees and the public. In future cases, how corporations responded in this pandemic will influence jurors’ views of corporate conduct. We have seen anger at the lack of corporate responsibility for the common good. The backlash against publicly traded companies like Shake Shack and Ruth’s Chris Steak House forced them to give back millions received from the SBA’s Paycheck Protection Program intended to help small businesses. Meat producers and factories have ignored the scientific and medical evidence about best practices to prevent the spread of Covid-19, sickening workers on the job, and threatening public health. These failings have set the bar high for good corporate citizenship. Plaintiffs’ attorneys can frame the wrongdoing of their case to align with this public anger about corporate greed during the pandemic. Did defendant companies listen to the science about whether its product could be harmful? Did the defendant company choose to take reasonable efforts to prevent harm to the public? Did the defendant company act out of self-interest and put its profit motives ahead of public health and safety?

### **Damages Decision-Making Model**

What does not change, even after a pandemic, is the process by which jurors determine damages, and most importantly, pain and suffering damages. A model of juror decision-making helps explain how jurors come up with an amount for pain and suffering. This “Gist” model of damages shows that after determining the defendant is at fault, jurors make a subjective judgment as to whether damages should be high or low based on their view of the severity of the injury, or if they aren’t sure, somewhere in the middle. They then translate that gist-based judgment of high or low onto a number they consider high, low, or in the middle. To help determine high and low numbers, jurors look to numbers in the case, like economic damages, and their own life experience. For many, a low number is \$1, and a high number is \$1,000,000. Each juror has a different sense of what is high or low based on their own life experiences. Focus group research often shows jurors may agree a plaintiff’s injuries are permanent and debilitating, yet some think pain and suffering should be \$250,000, and others think it should be \$5 million. Studies of this model found that meaningful anchors, such as one year’s income, were more successful at driving damages up than meaningless anchors like the cost of courtroom construction, the example used in the study.

### **High Anchors in the News**

This pandemic is likely to recalibrate how we think about the severity of injuries and high and low numbers. The fiscal response to this crisis has introduced some huge universal anchors. Congress passed a \$2 trillion economic relief plan. To help small businesses, Congress authorized \$659 billion for its Paycheck Protection Program. The number of unemployed could rise to 30 million. On the flip side, the govern-

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# Voir Dire Questions During the Coronavirus Pandemic From Practitioners:

## Personal Injury (Jennifer Fiore, Lori Andrus and Kevin Osborne)

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1. Have you suffered financial hardship during the pandemic?
2. Did you or someone close to you lose a job, work less hours or make substantially less money because of COVID-19?
3. Do you know any front-line workers/healthcare professionals?
4. Can anyone think of a situation where a company put profits before the health and safety of its workers?
5. Do you have any issue or concern with the current social distancing rules?

## Employment (Leslie Levy and Sharon Vinick)

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1. If someone kept their job, but experienced emotional distress due to harassment, would you be willing to award emotional distress damages?
2. If someone kept their job, but their promotional/economic opportunities were limited, would you be willing to award damages to compensate them for that?
3. Do you believe you would award less money because of the impact of SIP on our economy?
4. How did you adjust to SIP?
5. Do you think any good came from the pandemic? If so, what?

## Medical Malpractice (Mark Zanobini and Doris Cheng)

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1. What was your first thought when you heard this was a case against a doctor?
2. In light of the fact that we have just come out of the Covid mess, and considering we are suing a doctor, do you think that it might make it challenging to be neutral in a lawsuit against a physician?
3. Would it be a struggle for anyone to be here in light of what we have come out of?
4. Anyone here believe that doctors/hospitals cannot afford to compensate patient-victims?
5. Anyone here worried that the doctor's personal assets are at issue?

## Insurance Bad Faith (Demian Oksenendler, Dan Veroff and Mike Duffy)

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1. Some people say that, in comparison to all that people lost during COVID-19, we shouldn't be spending time and resources on an insurance claim that went wrong 2, 3, or even 5 years ago. Do you agree?
2. Some people say that in order to justify going ahead with a trial these days, the behavior of the defendant has to be worse than it would have been before COVID-19. Does anyone else feel that way?
3. Some say that people who file lawsuits against insurance companies are trying to blame them for the bad things that inevitably happen in life. How do you feel about that?
4. Did you or anyone you know have an insurance claim during Covid-19? Was it handled fairly? Did the insurance company delay because of Covid-19 and if so, did you find that acceptable?
5. Did you or someone you know have a business close or lose income because of Covid-19? Did they make a claim and if so, did the insurance company pay? Do you think that was fair?

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ment sent stimulus checks for \$1200 to qualifying adults. The public criticized this amount for not being enough to pay the rent and put food on the table for most Americans. All of a sudden, to some, 1 million sounds like a low number.

### Everyone Has Experienced a Loss

As a society, we are experiencing a collective trauma. For many, life was humming along before Covid-19 slammed

on the brakes. A Gallup poll conducted April 13-19, 2020, found one in three Americans experienced a change in job circumstances: lost a job, was furloughed, took a pay cut, or had a reduction in hours. Similarly, a Kaiser Family Foundation poll administered April 15-20, 2020, found that 56% of people reported that their life had been disrupted "a lot" by the coronavirus.

The losses are incalculable, lost lives, lost jobs, lost

income, lost retirement savings, canceled graduations, weddings, and birthday celebrations. Family members of front-line medical workers worried their loved ones would die going to work. Medical professionals reported having PTSD. People staying home are socially isolated, leading to depression, anxiety, and substance abuse disorders. Sound familiar as a plaintiff's attorney? Suddenly, jurors in your jury box have a greater appreciation of what your clients experience: being knocked down by something beyond their control.

This crisis has forced everyone to slow down and appreciate what is essential in our lives: family, health, security. A crisis of this magnitude can result in some jurors having more empathy and a deeper understanding of how devastating an injury can be and the amount of money needed to compensate for that injury fully.

### Better Appreciation of What it Takes to Compensate Plaintiffs

Attorneys can make parallels to these shared experiences when conveying the severity of the harm and how much money it will take to fully and fairly compensate the plaintiff.

- An injured plaintiff who isolates himself – remind jurors of the anxiety, pain, and fear they or a loved one felt when they had to self-isolate for weeks during the quarantine. For many sheltering at home alone or away from family was a dark period.
- Those emotions are similar to what the plaintiff lives with every day. Except the plaintiff will live with those feelings for the rest of her life. Is that worth \$20,000

per week? Now multiply that by the suffering endured by the plaintiff.

- Loss of enjoyment of life: Important celebrations and milestones canceled to stop the spread of the virus – ask the jurors to remember what they gave up during the pandemic – vacations, weddings, graduations, work opportunities, just like the plaintiff has had to give up due to her injuries. Is \$1 million enough to make up for those losses? Would they have paid \$1 million to forgo their child's high school graduation? Would the plaintiff have paid \$1 million to give up all the things she enjoys doing in her life?
- This pandemic has robbed us all of security. No one knows what the future holds. Everyone has taken a financial hit. Plans for buying homes, sending kids to college, and retiring are now at risk. Security is also one thing a plaintiff loses when injured. Their injuries make the future uncertain and rob them of the security of knowing that their life was on track. Their plans and dreams are gone. What is that security worth? Is it worth \$500,000 or \$10,000,000?
- Future damages: Many injured plaintiffs now have medical conditions that make them a high risk in the event of another pandemic, and jurors may want to make sure they have enough money to weather the next pandemic.

Whether attorneys make these arguments explicitly or not, jurors can draw on their own experiences living through the Covid-19 crisis to advocate for more money in the jury room.

### Voir Dire



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In voir dire, first assess how this pandemic has affected jurors financially, physically, and mentally. Because these are personal and painful issues, a jury questionnaire will help to ensure honest and thorough answers. Jurors could complete a jury questionnaire online or by mail before the start of jury selection to save them from making a trip to the courthouse. Attorneys could stipulate to excuse those jurors who are clear cause challenges to winnow the panel further. The use of a questionnaire will also speed up voir dire.

For starters, you want to know the extent to which Covid-19 disrupted a jurors' life,

- Experiences losing a job, being laid off, taking a pay cut, working reduced hours;
- Knowing anyone who was critically ill or died from Covid-19;
- Knowing medical personnel who treated Covid-19 patients; and
- Experiences as an essential worker during the shelter at home orders.

### Identify the Rule Followers

Protesters around the country demanded that cities re-open and people go back to work. At issue is a debate over core values of protecting life vs. protecting the economy. Should people continue to follow the rules by public health officials? Whether the defendant followed the rules is at the heart of every case. In voir dire, explore jurors' opinions about the importance of following the rules during the Covid-19 crisis. People who followed the rules to stay home and wear masks did so out of fear for their health, or to keep others safe. Identify those jurors who put their self-interest first and saw the rules as an intrusion on their rights. Ask,

- Who knows someone who did not follow the rules during the pandemic? What was their reasoning? What was your reaction to that?
- Who here thinks the health risks of Covid-19 were exaggerated?
- Who thinks state or local government went too far in closing down the economy?
- How do you think those views will affect you in this case where we say the defendant did not follow the rules about safe driving?

### Science will Save the Day

Polarization of opinion is growing in this country around the importance of science and medicine, two areas often at issue in plaintiffs' cases. Find out how much stock the jurors put in the scientific evidence around protecting the spread of Covid-19 and treating the virus. What information sources did they rely on when assessing the risk to themselves and their families? Now, even more than before, knowing jurors' news sources may be one of the most important factors to consider.

### The Silent Jurors

Lastly, I always counsel my clients to have one or two stock questions for the silent jurors who did not volunteer any information in voir dire. Here are two that may be enlightening,

- What is the most significant change in your life since the Covid-19 crisis started?
- What did you learn about yourself while sheltering in place?

Our world has forever changed, and the only way we will know for sure how jurors' attitudes have shifted and how those shifts affect damage awards is to collect data from mock juror surveys, focus groups, and post-trial interviews. Some jurors will be harder on plaintiffs. As always, use jury selection to try and get rid of those jurors. Some jurors will be more emotional and empathetic and have a deeper understanding of your client's suffering. Attorneys should be aware of who will likely be in the jury box and look for opportunities to tap into anger and empathy and find ways to connect with experiences that unite us during this pandemic. [TL](#)

### End Notes

1. In a national public opinion poll June 8-11, 2020, conducted by National Center for State Courts (NCSC), 55% cited caregiving for an elderly family member, concern about someone in the household with an underlying health condition, and lack of childcare as an obstacle to serving on a jury now. Sixty-five percent of women over 50 said they had an obstacle to serving as a juror.
2. NCSC public opinion poll results reported in June 18, 2020, webinar.
3. Hans, V.P., Helm, R., & Reyna, V.F. (2018). From Meaning to Money: Translating Injury into Dollars. *Law and Human Behavior* 42:2, 95-109.

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