



THE JURY BOX

A Publication of
Edward P. Schwartz Consulting
©2005

Vol. 1, No. 2, March, 2005

Welcome to the Spring Training issue of **THE JURY BOX**. With a new season comes lineup changes and we have a very exciting one here at Edward P. Schwartz Consulting. We have established a strategic partnership with LRSolutions, a legal knowledge company (www.LRSolutions.com). LRSolutions offers legal expertise, research and writing services for law firms that may be outside their area of expertise, facing difficult deadlines, or otherwise in need of help from experienced legal professionals. LRSolutions also develops sophisticated on-line compliance training for business. Feel free to contact me for further information. I want to thank all of you who suggested topics to be covered in **THE JURY BOX**. I'll do my best to get to as many as possible. I am co-hosting a regional meeting of the American Society of Trial Consultants (ASTC) on the morning of March 11. We will be discussing the recently ratified American Bar Association "Principles for Juries and Jury Trials." If you or someone from your office would like to attend, please let me know ASAP.

-Edward P. Schwartz

A jury trial can be **Risky Business** (Don't worry – not all issues will make reference to Tom Cruise). In addition to the inherent uncertainty associated with putting your case in the hands of a group of laypersons, a jury trial is complicated by the fact that jurors themselves are notoriously unreliable at evaluating risk. In this issue I focus on how juries handle probabilities, risks and cost-benefit analyses.

If it weren't for bad luck, I'd have no luck at all

Most litigation involves a dispute over an unlikely event. A patient develops an allergic reaction, brakes fail, a grape rolls down an aisle to precisely the place where a little old lady is about to take her next step. These low-probability events turn into legal questions of foreseeability, reasonable care and adequate notice, all of which turn, to one degree or another, on just how unlikely the jury believes the event to have been.

One common problem that jurors have evaluating probabilities is known as *hindsight bias*. When someone learns of a low-probability event having actually occurred, there is a tendency to treat it as if were much more likely than it was. If a juror places greater likelihood on the event, she will believe it to have been more easily anticipated and will assign greater urgency to guarding against it. The result is that defendants are often blamed for not anticipating and preventing truly freak accidents.

An alarming second order effect is that the more bizarre the circumstances, the greater the hindsight bias. This may be because really weird circumstances are more easily remembered and recalled by jurors.

One strategy for overcoming hindsight bias is to argue by analogy to something with which jurors are likely to be familiar. The problem usually confronts defense counsel, so it is also wise to choose an analogy for which jurors might feel some responsibility. For instance, if one argues that an allergic reaction to a medication is as common as an automobile accident caused by a sneezing driver, jurors may conclude that the situation was not very dangerous, given that they never pull over their cars just because they need to sneeze.

All costs with no benefits

The economic theory of reasonable care in tort goes back at least as far as Learned Hand's opinion in *Carroll Towing*. A cost-benefit analysis showing that all economically efficient precautions were taken is supposed to be a defense to a charge of negligence. Many industry regulations make such calculations mandatory. One might imagine, then, that jurors would look favorably upon companies who perform cost-benefit analyses. One would be dead wrong. Typically, whatever appreciation that jurors might have for a company thinking hard about safety is overwhelmed by their discomfort in reducing human pain and suffering to a mathematical calculation, especially one involving money.

Several empirical studies have shown that defendants are almost always punished for performing cost-benefit analyses, regardless of how clearly the calculations support the measures taken. Plaintiffs' attorneys are wise to play up the cold, callous, calculating nature of the defendant's methods. By contrast, defense counsel has the difficult task of convincing the jury that her client cares about safety without the testimony being reduced to probabilities, statistics and dollar signs. Again, reasoning by analogy is often the best policy, alerting jurors to the many cost-benefit calculations they perform in their every day lives, with a focus on those costly precautions most people choose not to take. For instance, it is clearly safer for children to wear helmets on playgrounds but almost no parent makes her children wear them.

It is also worth noting that companies are actually punished for placing a higher value on human life in their cost-benefit analyses. While this high value might help marginally in avoiding liability, it creates a costly anchor when jurors are calculating damages.

The zero risk fallacy

Many jurors mistakenly believe that it is possible to make products, services and treatments absolutely safe. They conclude that any risk of loss or injury is unacceptable. They have essentially adopted a strict liability standard despite the law to the contrary. Others have simply decided that manufacturers or service providers, rather than consumers, should be responsible for all safety precautions because of perceived wealth or knowledge advantages.

Many jurors are troubled by the idea of bad things happening to innocent people. Some conclude that the world is unfair and that the poor victim is entitled to be compensated for her loss. The only source from which the jury can take money is the defendant, so liability is attached despite conclusions that the defendant did nothing wrong. The inadmissibility of evidence of insurance can exacerbate this problem since jurors often assume that the absence of any mention of insurance means that the plaintiff had none.

Plaintiffs face their own risks

Juror difficulties with risk and probabilities do not always benefit plaintiffs. Plaintiffs who are engaged in risky activities are sometimes entitled to compensation because defendant's conduct unacceptably increased the risk. Jurors sometimes conclude that risk-takers implicitly assume all responsibility for their well-being. For instance, a juror might think, "Hey, skiing is a dangerous sport. If you get hurt, you have no-one to blame but yourself." A plaintiff will have trouble convincing such a juror that the ski-binding manufacturer is liable for her injuries.

In most cases, both parties have behaved imperfectly. Some jurors implicitly adopt a contributory negligence rule, whereby any fault by the plaintiff bars compensation. I recommend that counsel make sure that the jury is given a very clear instruction on negligence. Ideally, the jury should be given the instruction in advance of opening arguments (an increasingly common practice, endorsed by the ABA). The idea is to get the jury to focus as quickly as possible on the defendant's conduct.

I also recommend that plaintiff's counsel consider a "defanging" strategy, whereby the plaintiff owns up to any personal mistakes. This will prevent defense counsel from raising the plaintiff's failings in a manner that suggests to the jury that they somehow excuse the defendant's conduct. If the plaintiff conveys confidence in the legitimacy of her claim despite a full appreciation of her own shortcomings, the jury is more likely to do so, as well.

In the News

USSC invalidates death penalty for minors

In an opinion authored by Justice Kennedy, a five-member majority of the Court struck down capital punishment for juveniles (*Roper v. Simmons*). For those of you unfamiliar with the strange duck that is Eighth Amendment jurisprudence, the holding rests on a perceived "emerging national consensus" against executing juveniles to show that the practice constitutes "cruel and unusual punishment." This is the same logic that gave us a similar prohibition against executing the mentally retarded in *Atkins v. Virginia*.

Typically, judicial review identifies constitutional limits on what legislatures can do. This is flipped on its head with respect to the Eighth Amendment, however, because the growing number

of state laws against executing minors caused the Supreme Court to declare the practice unconstitutional. This jurisprudential approach has an underappreciated ratcheting effect, in that an emerging national consensus can only form in the direction of prohibiting a practice, rather than allowing it. For instance, in *Coker v. Georgia*, the Supreme Court held that the death penalty was unconstitutional for rape. Given what we now know about the prevalence of sexual assaults on women and their debilitating consequences, a consensus *could* emerge that capital punishment, if used at all, should be available for some class of rapes. State legislatures, however, are not free to begin enacting such laws in light of *Coker*. As such, there is no way for the Supreme Court to know if a new consensus emerges in favor of the practice.

The Dissent in *Simmons* predictably disputed that a national consensus had emerged, at all, pointing out that relatively little had changed since the Court's last decision on the issue, *Stanford v. Kentucky*, in 1989. In addition, the dissent argued that whereas mental retardation is directly related to the psychological issues of culpability and responsibility, age is an imperfect proxy for these factors.

In response to the dissent's reminder that capital juries are always permitted to use a defendant's age as a mitigating factor in sentencing, the majority expressed concern that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth."

ABA ratifies "Principles for Jury Trials"

The American Bar Association has declared this the "Year of the Jury." A task force was assembled to identify key principles for jury trials. These principles were ratified at the annual meeting last month. The report advocates many reforms that jury experts have supported for years. They include pre-instructing juries on applicable law before trial, giving juries instructions written in plain English to take into the jury room, allowing jurors to take notes and even allowing jurors to submit questions to witnesses. These proposals are hardly earth-shattering, in that many jurisdictions have already adopted several of them.

I am disappointed that the report is completely silent about the two jury issues that have been dominating the headlines: jury sentencing in light of *Blakely*, *Ring* and *Apprendi*; and jury damages calculations (both compensatory and punitive) in light of the *State Farm* decision and the myriad efforts at tort reform across the country. Did the ABA panel completely forget these essential tasks performed by the jury? Do the ABA panel members really have nothing to say about jury sentencing in capital cases? I am certain that these issues will generate lively debate at our ASTC meeting on March 11.

Want to know more?

Access all issues of [THE JURY BOX](http://www.eps-consulting.com/jurybox) At
www.eps-consulting.com/jurybox