burden of proof
a look at juries

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A RAMBLING LOOK FROM THE BENCH AT JURIES, MOSTLY CIVIL, BETWEEN 1988 AND 2012

An introduction to jury trials

I was fortunate to be appointed to the County Court of Vancouver in 1988. In those days, you were expected to catch your breath for a week or two and then you were packed off with your blue paneled jury robes to Prince Rupert, or Smithers, or Port Alberni to sit on one or more criminal juries on an assize. In the north, they were usually sexual assault cases, with the occasional burglary, arson, and drug trafficking case. After the county courts merged into the Supreme Court in 1990, I also sat on about 20 murder jury trials, none of which lasted longer than three weeks, and numerous civil jury trials. The most unusual venue for a criminal jury trial was the gymnasium of the Curling Rink in Watson Lake (aka Signpost City), Yukon. I sat up on a stage behind a banquet table and in front of a piano.

One of many odd moments in a jury trial (and there were many) occurred in a murder trial where I had serious concerns about the mental capacity of one of the jurors. The jury deliberated for five days. After three days, late in the evening, the sheriff brought me a note from the jury. The foreman had written: "One of the jurors says that there is no proof that the victim is dead because no death certificate was put in as an exhibit." I stormed into court, read the note into the record, gazed for a moment at the stunned looks on the faces of the lawyers, and said: "I don't need any submissions. Just bring in the jury." The exhausted jury members filed into the courtroom, studiously avoiding the juror who had obviously raised the issue. I said: "The pathologist testified that she had removed the deceased's brain to analyze the trajectory of the bullet that killed her. The victim is dead. The death certificate is irrelevant. The Crown has proven beyond any doubt that the victim is dead! Please return and continue your deliberations." Eleven furious jurors and one disappointed juror returned to the jury room.

I alarmed counsel and the jurors in my first civil jury trial. In my opening address, I instructed the jury that at the end of the trial, they would be sequestered until they reached a unanimous verdict. What a commotion. Had I thought about who might pay for eight jurors' lodgings at the Boswell Motel? On the whole, though, civil juries are much less of a challenge than criminal jury trials. Unless counsel descend to inflammatory rhetoric, there are few risks of a mistrial in a civil jury.

I never sat on a lengthy criminal jury trial and I have nothing but sympathy for the judges, lawyers, and jurors who are engaged in one. I think it is critical that lawyers and judges empathize with, and respect, the jurors who are asked to serve on long cases. They do a remarkable job. They are plucked from their real life and immersed in a surreal setting – often for far longer than they anticipated.

It didn't take long to realize that some lawyers appearing before me understood the dynamics of a jury trial much better than others. I welcome the opportunity to share some of my observations and thoughts with you. I propose to talk generally about jury trials and then make some remarks specific to civil juries.

JURY TRIALS GENERALLY

Choose your jury as carefully as you can

Whether it was you or your friend who chose the civil or criminal jury, you must appreciate the fact that you are advancing your client's cause to eight or twelve different people with varying levels of education and literacy and comprehension. It is true that you don't get much information about potential jurors during jury selection but you do, at least, get their occupation. If you see "retired" beside their names, ask what their occupation was. You would be surprised how many retired police officers, ICBC managers, and the like there are in the jury pool. If any potential juror expresses concern with their ability to understand English or has a hearing problem, let them loose without a moment's hesitation. In fact, most judges will not want a reluctant juror on a lengthy trial, regardless of how flimsy and pathetic their excuse is.

Be sensitive to your jurors

Once the trial begins, watch your jurors' reaction to the evidence and to your submissions. I have seen jurors who have dissolved into coughing fits – distracting everyone in the court except the lawyers; jurors who obviously have to use the bathroom; jurors who have fallen asleep; and jurors who are a sort of greenish grey color and are moments from throwing up. I always tried to rescue such a juror by calling a break, but often one or both of the lawyers looked shocked or even irritated by the Bench's interruption.

During counsel's submissions to the jury, some of the jurors will be alert and clearly approving of what they hear. Others will have their legs crossed and their arms folded and a scowl on their face. Getting them to straighten out from their Pretzel Position is a challenge for any good counsel. Do they disagree with what you are saying or how you are saying it? Are you speaking loudly

enough and slowly enough? Are you speaking in simple terms they can understand?

Jurors are not lawyers. They didn't go to law school and they don't speak Latin or legalese. They won't tell you if they don't understand the evidence or can't hear it. They are not used to sitting in one place for hours and they have a very short attention span. Very few of them will take notes. It is your job to capture and hold their attention.

Lawyers and experts should speak plain English

You want to maximize the jurors' understanding of the evidence. Otherwise you are wasting your time and theirs. Regardless of the subject matter of the trial, it is unlikely that any of the jurors will be knowledgeable about the subject before the trial. You must make sure that your experts write their reports and speak in lay terms that the jurors can understand. Unclarified technical terms will fly over their heads like a volley of lead bullets. When every second word in an expert's report has to be translated for the jurors, his or her evidence will be twice as long as necessary.

When examining witnesses, avoid lawyer-speak. Real people do not say "prior to" and "subsequently"; they say "before" and "after." They do not "exit" cars and buildings. They quite properly consider "exit" to be a noun, not a verb.

CIVIL JURIES

Use appropriate visual aids

Use appropriate visual aids wherever possible. if you are trying a personal injury case, ensure that your expert brings a model of a spine or a foot or whatever is necessary to illustrate the evidence effectively. Chronologies, that you and your friend agree are neutral, are invaluable for the judge and the jury to refer to as the evidence is adduced. Maps, diagrams, and photographs should all go to the jury as soon as possible.

In *Walker* v. *Doe* 2012 BCSC 1112, the Plaintiff's action for damages following a motorcycle collision was heard before a jury. In closing submissions on the issue of damages, his counsel sought to utilize visual aids that were not in evidence. The trial judge held that those aids were appropriate. Mr. Justice Voith held that charts or summaries can be used during a closing to help illustrate or explain the evidence, even if they are not made exhibits at trial. However, he noted that trial judges have a wide discretion to permit the introduction of demonstrative aids such as blackboards, charts, models, and summaries that would assist the jury to understand the issues. Those aids do not, of course, constitute evidence and they should not go into the jury room.

On the other hand, there is a limit to what can be described as a demonstrative aid. In *Moore* v. *Kyba* 2011 BCSC 1422, the Court refused to allow counsel for the Plaintiff to use a controversial PowerPoint presentation to make an opening statement to the jury. Apart from any objections to the specific content of the presentation, Madam Justice Brown ruled that the matter

should have been dealt with at a Trial Management Conference and not on the morning of trial.

I would not expect a computer simulation of the Plaintiff's version of a motor vehicle accident to be allowed as a visual aid. Even though counsel insists that it is only the plaintiff's version of the crash, the simulation is so visually convincing, that it would be difficult for the juror to transplant that version with "mere" oral testimony by the defendant's witnesses. [The judge will realize that is, indeed, your purpose!].

Always have a document agreement

You should always have a document agreement so that you and your friend agree which documents are going in and the purpose for which they can be admitted. The practice of stuffing all of the plaintiff's clinical records into a binder and entering them as an exhibit, often by consent, is abominable. Jurors often sit in the jury room for long stretches while counsel argue points of law. Early on, in a straightforward whiplash case, I once made the mistake of not vetting the clinical records on the basis that counsel's consent meant that they had thought out the requirements for admissibility. During the break, I glanced through the document binder in my chambers. There were a number of specialists' consult reports attached to the GP records. Of course, the opinions in those consults are not admissible as expert evidence unless the specialists were qualified to give expert opinion under Rule 11. More egregiously, the binder contained a report indicating that the plaintiff had had an abortion – not just wholly irrelevant but also potentially highly prejudicial.

Avoid mistrials

Your opening statement to the jurors is a golden opportunity to engage them. However, you must be careful not to lose your jury by making inflammatory statements. Be passionate and persuasive but DO NOT express your personal beliefs as to the strength of your client's case. Do not refer to facts that you can't prove. Do not comment on the credibility of witnesses. Do not make prejudicial comments or appeal to the jury's sympathy. A single lapse is not likely to result in a mistrial but often counsel's aggressive approach will have a cumulative impact that will.

It is a waste of everyone's time and money when the trial judge has to declare a mistrial because of counsel's inflammatory comments. The Court of Appeal has made it clear on numerous occasions that inappropriate commentary by plaintiff's counsel will render the trial unfair. You simply should not appeal to juror's emotions in opening statements or closing submissions. Even if your friend does not object, if the resulting award is "wholly disproportionate," the Court of Appeal may conclude that a "substantial wrong" was occasioned by those unfortunate remarks: *Knauf* v. *Chao* 2009 B(CA)605.

Be aware that if the trial judge simply admonishes you and instructs the jury to disregard some of your remarks, you still run the risk of appearing foolish or unprofessional.

In the "old" days, one of the most famous trial lawyers was a man who could actually make himself weep on demand when addressing a jury. One of his routines was to get down on his knees in front of the jury, take out a crisp white hanky, burst into tears, and tell a story of how, at home, that very morning, his little girl had come down the stairs and asked him [… some variation on why was life so cruel and would daddy please, please, fix it]. One day, as I watched in amazement from the back of a courtroom, another lawyer leaned over and said to me: "Ted's daughter just graduated from university last month." Those days of melodrama are gone. They are not coming back. Your tears will leave the jury cold. You should confine your opening to the facts of your case, the evidence you propose to lead, and the basic legal issues that the jury will have to confront.

Civji

Invariably, judges will use Civil Jury Instructions (Civj)i as the basis for their jury charge. Mr. Justice Bouck and Professor (as she then was) Lynn Smith published the first edition of CivJi in 1989. Since then, it has been revised and expanded. It includes charges on a number of torts as well as procedure and damages: negligence, false imprisonment, medical negligence, occupiers' liability, wrongful dismissal, and defamation. Obviously, these instructions simplify life for both judges and lawyers. But they are merely a starting point and they need to be adapted to the particular facts of the case. You should always read through the relevant sections and determine if there is anything you want added or deleted from the standard charge. If your case has unusual features, you should consider drafting that portion of the charge for the judge's consideration.

In conclusion

Jury trials are a great experience for counsel and for members of the public who are chosen as jurors. A jury trial has a much different dynamic than a trial by judge alone. As lawyers, you need to develop a unique set of skills when your goal is to persuade eight or twelve triers of fact of the merits of your client's case.

I consider myself fortunate to have sat on many criminal and civil jury trials while I was on the Bench. In a future column, I hope to consider the future of civil jury trials in BC.

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