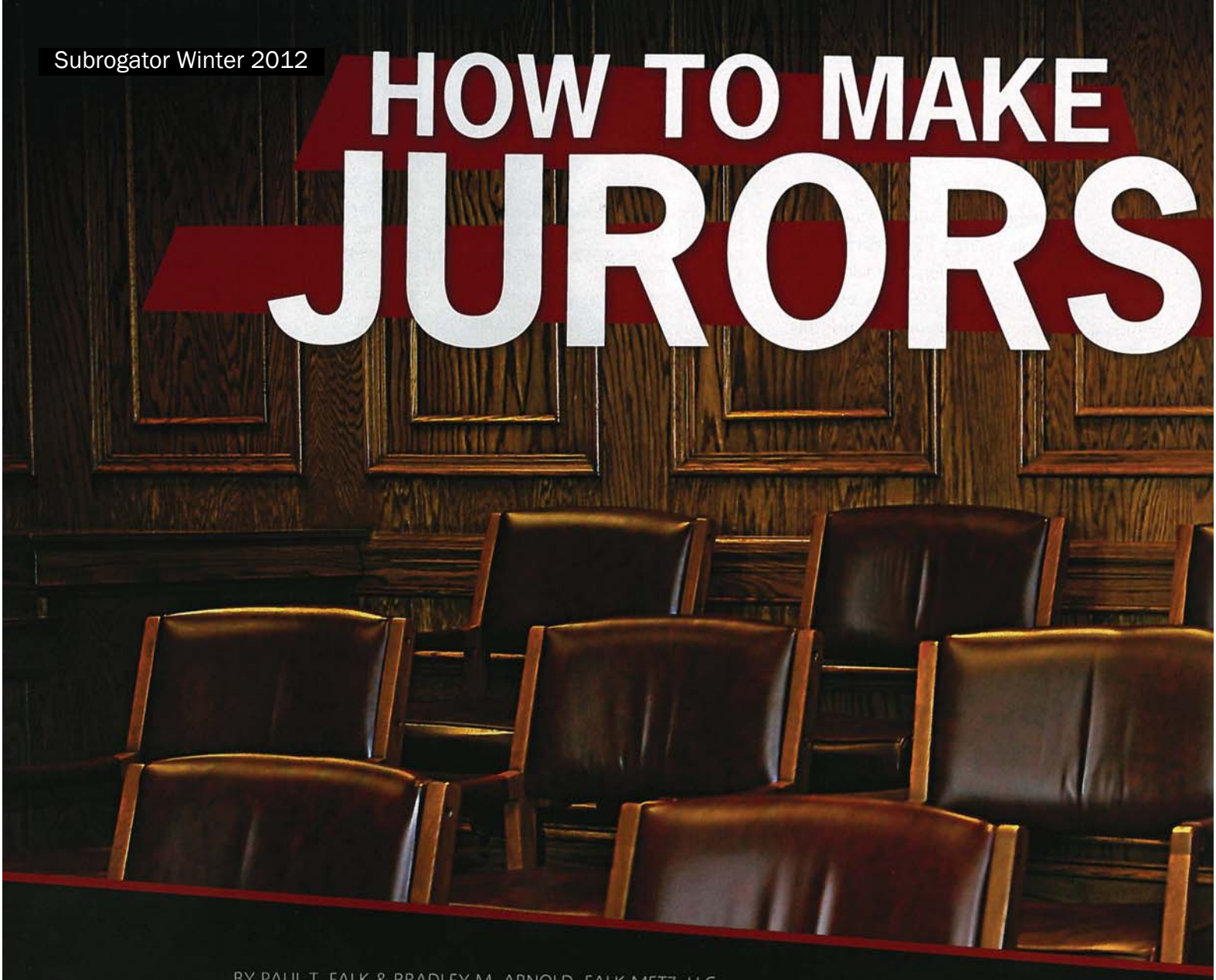
HOW TO MAKE JURORS



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"Insurance companies are major corporations. They can handle a loss and still survive. Insurance companies have a bad reputation. They find excuses not to pay for a loss or they provide paltry coverage. They can be associated with poor customer service like giving the run around over the phone. Plus nowadays people are leery of major companies that generate significant revenue while average citizens struggle with unemployment, bad mortgages, student loan debt, etc. I cannot identify with an insurance company. My heart does not go out to an insurance company even if they lost thousands of dollars. The company has not lost a sentimental possession, lifestyle, career, their good health, etc. I am more likely to award a great deal of money to an individual. At trial I can see their face, hear their story."

"I do believe though that if the Defendant was the one at fault, then they should be punished for their actions so that they can learn from their mistakes. I think once I heard the facts of the case and realized that someone or a company was at fault, I would definitely take the insurance company's side."

"No one ever feels sorry for the insurance company. The insurance company is the party with the money. Who are they to go after people for reimbursement, regardless of the reasons? Especially these days, with so many people being laid off and unable to find jobs. People will always need insurance, and therefore insurance companies will always be around and will probably always be making money. So why should the juror – an average American – want to help the big multi-million dollar insurance company recover more money, when they themselves can't even get a job?"

CARE

About a Property Insurer's Case

THESE ARE JUST A FEW OF THE RESPONSES RECEIVED FROM NON-LAWYERS AND PERSONS UNATTACHED TO THE INSURANCE INDUSTRY TO THE QUESTION, *"IF YOU WERE PICKED FOR A JURY AND AN INSURANCE COMPANY WAS THE PLAINTIFF, HOW WOULD THE INSURANCE COMPANY'S ROLE IMPACT YOUR DECISIONS IN THE CASE."* THE INABILITY TO EMOTIONALLY IDENTIFY WITH AN INSURANCE COMPANY IS THE KEY. THE BIGGEST PART OF PERSUASION IS TRIGGERING AN EMOTIONAL RESPONSE IN THE JURY. TRIAL LAWYERS, WITHOUT VIOLATING THE GOLDEN RULE, REACH THE JURY ON A PERSONAL LEVEL BY REINFORCING THE IDEA THAT WHAT HAPPENED TO THE PLAINTIFF COULD HAPPEN TO THEM OR TO SOMEONE THEY LOVE. ON AUGUST 4, 2011, THE AUTHORS OBTAINED A VERDICT IN THE AMOUNT OF $1,050,000.00 IN A PROPERTY SUBROGATION CASE WHERE THE PROPERTY INSURER WAS A NAMED PLAINTIFF. *KEMNITZ V. FOX VALLEY STONE & BRICK COMPANY, INC.*, NO. 09-CV-1690, (CIRCUIT COURT OF WINNEBAGO COUNTY, WI). THIS ARTICLE DISCUSSES SOME STRATEGIES USED IN THE KEMNITZ TRIAL TO OVERCOME NEGATIVE JUROR PERCEPTIONS OF INSURERS.

Case Background

The Kemnitz trial involved a ventless outdoor fireplace that overheated and started a fire at a homeowner's residence. The plaintiff insurer was a large multi-national insurer. The defendant Fox Valley was and is a respected small company in Wisconsin involved with selling and installing fireplaces. The plaintiff insurer had to prove at trial that Fox Valley caused the fire by installing the fireplace in an unsafe manner.

Before trial, the insurer settled with three defendants for $625,000.00, leaving Fox Valley as the sole defendant at trial. The settling defendants included: (1) the framing company who framed in the fireplace; (2) the utility installation contractor who failed to hook up a high temperature safety limit switch; and (3) the contractor who either delivered the fireplace to the construction site or installed the fireplace depending on who you believed. In Wisconsin, settling defendants are listed on the jury verdict form. Fox Valley, like many non-settling defendants in Wisconsin, attempted to push fault onto the settling defendants and onto the insured during trial. There were strong arguments against the settling defendants which increased the risk that the jury would perceive the property insurer as greedy in seeking a recovery against a party not responsible for the fire. If jurors did not want to reach a verdict in the property insurer's favor for any reason, the jurors could simply place fault on the homeowner or the three settling defendants and be home in time for dinner.

Theme Development

The underlying theme of the trial was forcing Fox Valley to finally take responsibility for its dangerous conduct which could cause future fires if not corrected. The underlying purposes of subrogation are directly related to this "responsibility" theme. Wisconsin courts allow subrogation actions in part to place responsibility on the wrongdoer who is primarily responsible for the loss. *General Accident Ins. Co. v. Schoendorf & Sorgi*, 202 Wis.2d 98, 549 N.W.2d 172 (1991) (citations omitted). This theme and purpose, in turn, ties in perfectly with the importance of the jury system as a key component of self-governance and to jurors acting as the community conscience in determining and driving proper conduct within our society. Subrogation actions are, therefore, consistent with the value this country has placed on accountability and self-governance since its inception and the jury plays a critical part in all of this when it decides subrogation actions.

The idea is not to over-emphasize the subrogation aspect of the case. The idea is to weave the purpose of subrogation into the theme of the case so that, when the jury deliberates, the plaintiff jurors have good arguments to counter defense jurors who do not want to award the insurer money.

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Voir Dire

For the Kemnitz trial, our team designed specific voir dire questions to determine whether any of the jurors had any bias against insurers in the context of a subrogation action. We did not start with this line of questioning but introduced it in the middle of voir dire. We used the following introductory paragraph and series of questions:

> One of the plaintiffs in this case is a property insurer. The property insurer met its responsibility in this case to Dr. and Mrs. Kemnitz. The property insurer did not cause this fire and is not responsible for the fire. The property insurer is seeking fairness and justice and Wisconsin law allows these subrogation cases to be decided by jurors so that you can place fault on the party who is primarily responsible for this fire.
>
> - What trouble would you have with being fair to the property insurer under these circumstances?
>
> - Who here would tend to favor the responsible party over the property insurer?

In our case, none of the prospective jurors volunteered that they would favor a responsible party over a property insurer. The questions were designed to find a juror who did have strong negative feelings about insurers so we could strike that juror.

We are certain that some of the jurors who would favor a responsible party over a property insurer simply remained silent. We agree that voir

dire questions should be designed to gather information to be used when exercising peremptory or cause challenges and not only to condition or to persuade, particularly in this tort reform environment. In our experience, the trial court in a property subrogation case has never explained to the jury the simple purpose of subrogation cases in any preliminary or final instructions to the jury. The jury is left to wonder why the insurer, who collected premiums for the risk, is now allowed to sue the defendant to get its money back. One byproduct of this line of questioning is that it educates the jury regarding the purpose of subrogation actions. In subrogation cases, defense attorneys often attempt to highlight the fact that the plaintiff is a property insurer throughout the trial. The exploration of plaintiff tactics to combat those efforts is beyond the scope of this article. However, at trial plaintiff's counsel should take advantage of their first opportunity of addressing the jury by discussing the important purpose of subrogation. This education not only empowers the jury, it also dampens later efforts by defense counsel to minimize the importance of the case because a property insurer is the plaintiff.

Opening

Unlike personal injury actions, the trial lawyer in a property recovery case does not want to convince the jury that the case is primarily about damages. In most property recovery cases, the trial lawyer wants to convince the jury that the case is primarily about the jury making the defendant accountable for its unsafe conduct. Even if there is a dispute regarding damages in the case, we do not spend a lot of time on that dispute during the opening. We wait until the jury has fully absorbed the liability case before arguing the damages case. We argue the damages case during witness testimony and in closing. We do this

for several reasons. Jurors are concerned about who gets the money and whether awarding money is an effective resolution. The fact that a property insurer rather than an injured person is getting the money can take the jury's attention away from the theme of "responsibility." During the opening, we want to remain focused on the theme. If the plaintiff jurors prevail during deliberations and persuade the others that the defendant must be held responsible, then the fact that the plaintiff is a property insurer will make no difference. Damages will follow because damages are the only way the jury can communicate its message to the defendant that unsafe conduct is not acceptable in this community.

"Lawyers are born liars." This quote from a mock juror who was being videotaped has always guided how we shape our openings. For the Kemnitz case, a simple adjustment to this statement might be appropriate: "Lawyers are born liars and the liar wants me to give money to an insurer?" How do you persuade someone who thinks you are a liar? You let the evidence speak for you. Start slowly, respectfully and methodically and build trust with the jury. In our opening at trial when we stated Fox Valley promised to install the fireplace, our paralegal pulled up the contract to display on the projector screen and highlighted the promise. When we said in opening that the fireplace was not installed safely, we rolled in the actual fireplace on a dolly and showed the jury the evidence to back up our statements. When we said in opening that the defendant sent servicemen out to service the fireplace, we displayed the emails and highlighted the proof.

Save the rhetorical flourishes for later in the opening after the jury has already on its own begun to make the logical connections between the facts and your rhetoric.

We do not presume to make every logical connection for the jury. The jury will start making logical and emotional connections and these connections are stronger when made by the jurors. For example, the defendant sent out servicemen who performed tests in response to a high flame customer complaint. The tests established that the gas pressure was proper and that the pressure regulator was working. After doing these tests, the defendant told the homeowner it was safe to use the fireplace. When we first introduced these facts, we did not immediately note that if the tests found nothing wrong with the fireplace, then the defendant had not explained the high flames and should not have told the homeowner it was safe to use the fireplace. We let the jury puzzle over this while we went on with the story.

Save the rhetorical flourishes for later in the opening after the jury has already

on its own begun to make the logical connections between the facts and your rhetoric. These arguments should be directed to the "responsibility" theme toward the end of the opening and should be brief. It is at this point of the opening that you can make the connection again between accountability, subrogation and the jury's role:

> Now, we will prove that the defendant caused this fire by failing to verify proper clearances and failing to discover that the high safety temperature limit switch was not hooked up. The defendant has not accepted responsibility for these mistakes and continues to this day to refuse to accept responsibility. You will hear the defendant attempt to place blame on its subcontractors, on the framers and even on the homeowners who were exposed to great danger in this case. And, (pause here), you will hear that the defendant continues to believe its conduct was acceptable. The Court will instruct you that if we prove that the defendant caused this fire, then the law requires that you place responsibility on the defendant. The law allows the property insurer to bring these lawsuits for this very reason, so that you the jury, and not the defendant, can be the sole judges of what is and what is not safe conduct in our communi ties.

Evidence Phase

Keep the focus of the jury on the "responsibility" theme through the property insurer's case in chief and through cross examination of the defense witnesses. It is during this phase that you can begin to weave in the consequences of irresponsible conduct. It was Fox Valley's unjustified reliance on others who were not shown to be fit to confirm safe installation that caused this fire. This was particularly problematic because the dangerous nature of the improper installation was hidden from the homeowners. The Kemnitz fire started in the wall cavity just opposite the insured's bedroom which meant there was no smoke build up in the bedroom to trigger a smoke alarm. Dr. and Mrs. Kemnitz were sleeping at the time the fire started and could have continued sleeping until it was too late. The Kemnitz' dog started barking at the sound of the fire in the wall cavity. The barking woke Dr. and Mrs. Kemnitz and they were able to escape unharmed.

There was a dramatic picture taken after the fire showing how the walls and ceiling had collapsed onto the Kemnitz' bed. See Figure A. There was fire debris on the bed and it is easy to imagine burned bodies below that fire debris. We did not have the insured make this connection for the jury. We did not have any witness make this connection for the jury. We just used this photograph during the Kemnitz testimony, during our expert testimony and with our damages expert. In creating the scene diagram for the case, we made sure this bed was in the diagram. See Figure B. In post verdict interviews of the jury, it was clear that the jury made this connection.

Closing Arguments

In closing, we reminded the jurors that the right to a jury trial is, at its core, a right of our own community to judge the conduct of the parties as measured by the community's conscience as to what is right and what is wrong. The jury was reminded that this right was one that was denied by King George and the denial of this right is one of the fundamental reasons for our forefathers to declare their independence from Great Britain as stated in the Declaration of Independence. Explaining the juror's role in this context serves to empower them with a noble and historic purpose which tends to put them in the right mindset to judge what safe conduct is and what is unsafe conduct. The idea is again to emphasize that the trial is about responsibility, not about an insurance company trying to get their money back.

Figure A

Figure B

It is also advisable at the outset to echo the opening statement that the law calls for this type of litigation because the law requires that the party primarily responsible for causing damage to another be held responsible for the damage. Cloaking the insurance company's action in the protection of the law is a very persuasive way to battle the reluctance of jurors to award money to an insurance company.

The closing also emphasized that despite all the evidence on why this fire started, Fox Valley still had not learned its lesson and continued to do business the same way. The closing invited the jury to consider how many other homes were ticking time bombs that could erupt into flames without warning to the homeowners given that Fox Valley considered their practice as commercially acceptable. By phrasing the idea in this fashion, we were able to avoid violating the rule against asking the jurors to put themselves in the position of one of the parties, yet still evoke a similar emotional response.

Closing argument rebuttal is a very powerful tool. We knew that Fox Valley was going to blame others for the fire. We also knew that the defense would remind the jury that the homeowners had gotten paid by insurance and that this was really the insurer's case. Therefore, in rebuttal we reinforced our theme that the law calls for this kind of case because we, as a society, demand that *one primarily responsible* for harming another should pay for the damages he causes. Despite this, Fox Valley was continuing to do business as usual. Then we stated that the only way Fox Valley would learn this important lesson on how to fully install a fireplace was by entering a substantial verdict against it. The conscience of the community needed to be heard through a verdict so that Fox Valley and any others who may be doing business like this would know that this practice was unacceptable.

In the end, it did not matter that the party harmed in this case was an insurance company because the issue was bigger than any one plaintiff, insurer or not. The message was implicit so as not to violate any courtroom rules against punitive damage arguments, yet inescapable. Though the mechanism of justice in this matter involves the injury of the one, the results of such justice can protect the many. After all, isn't that what subrogation is all about?

Conclusion

It is often said that good strong themes must be used and reinforced for good trial results. We have provided what we believe are some such themes which can be used to great advantage even if the named plaintiff is an insurance company. Despite much rhetoric these days about tort reform and the poisoning of jury pools with such rhetoric, it is important to note that most jurors want to do the right thing. They want to be able to vote based on their conscience and rest easy that at the end of their service that they have done justice, without passion or prejudice. Even large insurance companies can benefit from this desire if the case is developed and presented in an organized fashion such that the evidence presented speaks to these themes.