Oregon State Bar Journal, February/March, 2000

The Genie is Out of the Bottle and the Jury is Out of the Box

By Kelly L. Andersen

On Aug. 25-26, 1999 I had the privilege of being the plaintiff's attorney in the first case in Jackson County in which three innovative procedures were allowed: 1) attorneys were permitted to make "mini" opening statements before jury selection; 2) jury questions were allowed during trial; and 3) a jury interview was permitted after the verdict. I found the experience overwhelmingly positive, and would encourage all attorneys to ask for and all judges to permit these three innovative procedures in all jury trials.

THE CASE

Our case involved a 78-year old woman who was struck in the crosswalk of a four lane highway by a car being driven by an 85-year old man. Two eyewitnesses sitting in a car near the end of the crosswalk testified that plaintiff had "just stepped off the curb" when she was hit. They swore that there was nothing the driver of the car could have done to avoid the accident. A driver behind the defendant said, however, that he could see that the pedestrian was going to enter the crosswalk, and that the defendant did have time to react, either by swerving or braking, but failed to do so.

The defendant had admitted to the investigating police officer that he had not seen the plaintiff before impact, and that he was taking a number of prescription medications. Four days later the defendant admitted to an investigator that he had had cataract surgery and as a result of that surgery had lost sight in his left eye. He also admitted that he had glaucoma in his right eye, and had been unable to see the "red dots" on a vision test administered by the Motor Vehicles Division. Initially denied a driver's license, he had gone to his doctor, who had said, "They can't do that to you," and had written a letter permitting the defendant to get his license.

Defendant retained an accident reconstruction expert who would testify that the average reaction time of a driver to perceive, decide and apply the brake is 1.5 seconds, and that the average walking speed of a person in her 70s is about three to five feet per second. He would conclude that it would have taken plaintiff less than 1.5 seconds to reach the point in the crosswalk where she was struck, and therefore the defendant simply would not have had enough time to react, must less stop, before hitting the plaintiff. In cross-examination the defendant would also admit, however, that the distance between the landmark where one eyewitness placed the defendant's car and the crosswalk was 76 feet, and that this was more than enough distance for the defendant to have reacted and to have stopped before hitting plaintiff.

Damages involved two broken legs and a fractured pelvis. In addition to medical expenses, the plaintiff had also incurred sizeable home health care expenses, both on

her own behalf, and also on behalf of her mentally impaired older sister whom she had cared for up until the time of the injury. Since plaintiff and her sister had lived together for years and had shared and commingled all their assets and expenses, the home health care for the sister was arguably a direct financial loss to the plaintiff. Although I had hesitated to stress it, the plaintiff also had moved out of her upstairs apartment that she had lived in for 28 years into a ground floor apartment because she could no longer climb the stairs. Although the ground floor apartment was the same size, and was still within the same apartment complex, it did not have the same view or the same memories.
The defendant died before the trial. Because I did not want it to appear that damages would be paid by his widow, I proposed to defense counsel that we simply stipulate that the case could continue as it had been pleaded before the defendant's death, and thus avoid the time and expense of naming a personal representative. I offered, in exchange, that we would agree to satisfy any verdict out of the available insurance policy, and not seek to collect any verdict in excess of policy limits. Because the case had the potential of exceeding policy limits, defense counsel agreed.

At trial defense counsel asked that the widow be permitted to sit with him at counsel table. This request was denied by the judge because the widow was not a party. Defense counsel worried throughout the trial that the jury would assume deep pocket insurance coverage.

THE TRIAL
After a brief introduction of the plaintiff and both attorneys, the judge permitted both attorneys to make "mini" opening statements limited to no more than five minutes. I took about two minutes and tried to state the case as neutrally as possible, not because the judge had required a neutral statement, but because I believed that to openly advocate the case at that point would steal the thunder of the real opening statement to come after jury selection. I also sensed that jurors wanted to know the issues as objectively as possible, and that to advocate in the mini opening statement would squander precious credibility.

Defense counsel essentially agreed with my characterization of the case, and added a few neutral statements of his own. Jurors now had a solid concept of the issues in the case, and neither attorney had needed to edge or sneak in the statement of the case during voir dire.

During voir dire one of the first questions asked by a juror was: "How do you collect money from a dead person?" I answered that it was not for the jury to consider how the money would be paid, but only to consider the issues of liability and the nature and extent of damages. I added that our system of determining these issues would be frustrated if the jury attempted to assume any other role than that. I then asked the judge if I had stated this concept to his satisfaction, and he confirmed what I had said. The jurors now solidly knew that they had an important but carefully defined role in a larger legal process. (This exchange with the juror would later prove to have been very important, as we would learn in the post-verdict interview with jurors.) During the free

exchange of information and feelings during voir dire I learned that virtually every juror had had a bad experience at one time or another with an elderly driver, and four jurors personally knew of someone suffering from glaucoma. (This information would also later prove to be very important.)

After voir dire the judge excused all prospective jurors, and the bailiff led them outside the courtroom. The judge then asked the attorneys to exercise their peremptory challenges openly on the record. This we did by simply naming, in alternating turns, the unacceptable jurors. As we did so we moved the replacements on paper into the vacant seats. (This was a vast improvement over the traditional method of passing folded notes to the judge, who then individually announces which poor souls among the jurors have been weighed in the balance and been found wanting.) When all peremptory challenges had been exercised or waived, the judge called the jurors back into the courtroom and announced the chosen Twelve. By exercising the peremptory challenges outside the jurors' presence, no prospective juror was made to feel that she had been hanging on a meat hook while curious inspectors had secretly concocted reasons for rejection.
After jury selection the judge gave a number of cautionary instructions and then informed jurors that they would be permitted to submit written questions to any witness during the trial. Such questions, if any, were to be passed to the table nearest the judge, who would then read the questions to the attorneys out of the presence of the jury. The judge explained that either attorney would be permitted to object to any question, and that if a question was not asked there was a legal reason for not asking it, and that the juror asking the question should not be offended. The judge did not encourage or discourage juror questions and announced the option but once.

Very few questions were asked during the trial (perhaps ten questions during a two day trial with 12 witnesses). One or two of the questions seemed irrelevant or already answered, but the remainder were solid gold. For example, one juror asked the police officer which tire had left the skid mark that was visible in the police photograph. (I flinched as I realized I had not made that clear.) Another asked if there was positive proof — in the form of a receipt — showing that the defendant had been at a certain drug store just prior to the accident. One question was even clothed with advocacy and went something like this: "Since the plaintiff had been able to leave her disabled sister for several hours during the day before the accident, why did the disabled sister need 24 hour home health care services after the accident?" (The advocacy in the question let me know that I was having a serious problem selling that part of our damages.)
After reading the permitted questions to the witness, the judge allowed each attorney to then ask follow-up questions. In so doing we were able to respond to juror concerns. I shudder to think what things would not have been stressed and perhaps not even mentioned had jurors not been permitted to ask a few questions.

The judge instructed the jury before closing arguments and also sent 12 copies of his written instructions into the jury room. After reading the written instructions, the judge then cautioned that often jurors become confused about whether they should reduce damages to account for comparative fault, or whether the judge would do that. He unmistakably and clearly explained that if jurors got that far in their deliberations, he

would reduce damages to account for comparative fault and that the jurors should not do that. (The verdict form also contained language to the same effect.)

The jury got the case at 4:15 p.m. on the second day of trial, and deliberated until 5 p.m., then returned the next day and deliberated from 8:30 until just before noon. At that point they sent out a written question to the judge, asking if they found each party to be at fault, should they reduce the total damages, or would the judge do that?

By 1:20 the jury announced that it had a verdict. After the verdict was read the judge asked the jurors to meet him briefly in the jury room. There he thanked them for their service and invited any jurors who wished to remain and talk with the attorneys. Meanwhile the judge had sent the attorneys to another room so that any juror could easily leave without having to make any excuse. To my delight and surprise all 12 jurors made the walk to the room where the two attorneys had been assigned.

THE POST-VERDICT INTERVIEW

I had always wondered how attorneys would conduct a post-verdict jury interview. I feared that jurors would be very reticent. I need not have worried. After a few tense moments, the jurors began to respond to our questions, and soon were volunteering all kinds of thoughts and information. Often several jurors were talking at once, adding to what another was saying. Soon the whole room was bubbling with gestures and enthusiasm as jurors told both attorneys and the judge how they had decided the case. After about half an hour the judge ended the meeting, before any juror showed any sign of wanting to go. What had always been a mystery -- how the jury had reached its decision -- was now plainly clear in this case. I learned that:

1. Despite the defense attorney's worries, the jurors had not even considered whether or not the defendant was insured. They seemed genuinely surprised, in fact, when defense counsel asked if they had assumed there must be insurance. Only one juror said that the thought had crossed his mind, and that was only after the verdict had been reached. They had taken seriously the caution that they were only to decide issues of liability and damages, and were not to be concerned about how any verdict would be paid.

2. They felt that the defense attorney should have produced some evidence about the defendant's eyesight. Absence such proof, they felt that defendant's vision must have been as bad as plaintiff claimed. (To defense counsel's credit, he had tried unsuccessfully to get that very testimony.)

3. They felt the defendant's accident reconstruction expert had been more helpful to the plaintiff than to the defense, and wondered why the defendant had called him as a witness.

4. Several of the jurors had valued plaintiff's loss of her apartment of 28 years as a much greater loss than I had ever imagined. One juror was on the verge of tears

as she described what a terrible loss that would have been.

5. The jurors were not consciously influenced by the personalities of the attorneys. In fact, one of the strongest advocates of the plaintiff volunteered that she did not like my style of speaking.

6. They unanimously agreed that the videotape of the treating doctor was boring and said that it was cruel for us to have subjected them to that late in the afternoon. They said we should have given it to them in the morning when they were fresh. (In retrospect, I should not have given it to them at all. It would have been kinder to summarize the salient parts of the deposition and simply read an encapsulated summary, rather than playing the video tape. The testifying doctor had frequently fractured his sentences with long pauses, and “ah...” articulated almost every sentence.)

7. Several jurors had applied their own special knowledge to the facts of the case. For example, one had just completed an accident reconstruction course, and well knew about average reaction times in emergency situations. Several others were very familiar with glaucoma, and what it would do to a person’s eyesight.

LESSONS LEARNED

Over the years some attorneys have paid handsomely to have mock jurors listen to a case in progress and provide questions and thoughts as the trial unfolds, so that likely concerns of the real jury can be addressed. Experts touting themselves as “jury consultants” have made jury profiling a cottage industry. But for years we have overlooked the best and easiest way of finding out what jurors are thinking, and that is simply to ask them. By allowing jurors to ask a few questions during a trial, and by permitting attorneys to interview jurors after a trial, the inscrutable enigma has been broken, and all who participate in jury trials are enriched by the process.

I predict that in years to come a new generation of lawyers and judges will ask how we could have been so ignorant for so many years in not recognizing the value of jury questions and post-verdict jury interviews. That same generation of lawyers and judges will laugh openly at our needlessly antiseptic tradition of not allowing mini-opening statements before jury selection. In allowing mini-opening statement, juror questions and post-verdict juror interviews, the genie has come out of the bottle, and no amount of stuffy pressing and starchy tradition can get it back in. A new era has brightly and happily dawned.

Kelly Andersen is an attorney in Medford. He can be reached by e-mail at kelly@andersenlaw.com.