

New York Law Journal

Thursday, May 4, 2006

HEADLINE: Trial Advocacy, Continuing to Try Your Case After the Summations

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BODY:

Anyone who has ever walked into a courtroom while the jury is off deliberating can attest that it is hard to find a more relaxed spot in the courthouse. Lawyers who have endured the oppressive day-to-day tension of a trial, culminating with the summations, can finally relax, and will typically be seen reading a newspaper or chatting on their cell phones, while they await their fates from the jury.

Deliberations

While the diligent trial attorney has no doubt earned some down time, it is vital to be mindful that your work is not yet done. Indeed, the proceedings which accompany jury deliberations and even the rendering of the verdict itself, and the advocacy skills of the attorneys involved in sorting through issues such as jury questions and inconsistent or confusing verdicts, can mean the difference between a successful outcome and a disastrous one. In short, the skilled trial lawyer must stay focused, even after the summations are delivered, and the work appears to be done.

The first issue which can arise during deliberations is a question from the jury, seeking clarification with regard to the court's charge or the verdict sheet. Often, a jury may have questions, reflecting that it does not fully understand a portion of the charge, and may ask for an explanation of a particular legal concept, such as proximate cause. It is the practice of many judges to simply read back the charge that they already read, the charge which caused the confusion in the first place.

Here, we believe the better practice is for the trial lawyers to urge that the court try a different approach, and meet the jury's question head on by offering a more detailed explanation, or at least attempt to communicate the concept in other words.

Even by the prefatory instructions to the Pattern Jury Instructions (PJI) themselves, there is no requirement that the court must stick to the charges contained therein, verbatim. Indeed, the section entitled 'How to Use these Volumes,' found at the start of the PJI (a must-read for any trial attorney or judge), goes to great length to confirm the notion that the pattern jury charges are simply a compilation of statutory language and case law, and do not represent any sort of mandate to which Trial Courts must defer. Specifically, this section states:

Judicial users of these volumes should be aware that a criticism leveled against pattern charges generally--and across the country--is that they are given by some judges without appropriate adaptation to the particular facts and circumstances of the case. The pattern charges are not intended for use as a rote method of merely stating abstract legal principles to jurors. The charge will be more intelligible to the jury and the jury's task will be easier if the pattern charge is adapted to the facts of the particular case by counsel in stated requests and by the trial judge in preparing the charge (citations omitted).

When a jury reflects its confusion regarding any point, it is incumbent upon the court to try to help cure the difficulty and assist the jury reach a fair verdict. Thus, the attorneys must be ready to quickly submit, orally or in writing, an appropriate answer to the jury's question. You may get your way, but if the court fails to heed your request, you must make as strong a record as possible, including the specific answer that you requested that the court give.

The Verdict Sheet

Jury questions also may arise with respect to the verdict sheet itself. Initially, attorneys must make good case-by-case decisions about the content of the verdict sheet which they request. Two particular issues that come up

relate to the number of negligence questions that should be placed before the jury, and how to deal with parties whose liability, if any, is solely vicarious based upon the acts of another party.

While plaintiffs' attorneys, particularly in medical malpractice cases, normally prefer to put as many departure questions on the verdict sheet as possible, secure in the knowledge that just one set of 'yes' answers to a departure, coupled with causation, will justify a plaintiff's verdict, there is a danger to this strategy as well. Breaking down the departures into minute detail involving specific times can confuse the jury and focus its attention on whether or not the departures occurred in a particular manner at a certain time, rather than the broader question of whether or not the doctors actually committed medical malpractice. Secondly, if the verdict sheet includes departure questions which are both narrow and broad (for instance, breaking down a doctor's alleged departures over periods of time, coupled with a general question asking if the doctor departed generally over the entire period of time) can lead to seemingly inconsistent verdicts, and give a defendant fodder for appeal, in spite of a well-supported verdict in the plaintiff's favor. Thus, while it is important that the jury sheet reflect the different theories upon which the plaintiff may prevail, less may be more in most cases from the plaintiff's perspective.

Another issue that often creates confusion is the vicarious liability situation. Specifically, if one party's culpability depends only on the findings regarding the negligence of a different party, it is necessary or appropriate to mention the vicariously liable defendant on the verdict sheet?

Because either the inclusion or the omission of such a party can cause jury confusion, it is imperative that the court give clear instruction to the jury on this point. If the vicariously liable defendant is placed on the verdict sheet, along with the alleged active tortfeasor, then the court must make it clear to the jury that liability against that tortfeasor is automatically established against the other party as well, and that there is no need to apportion liability as between these two parties since, as a matter of law, the acts of one are imputed to the other. This format, coupled with the savvy attorneys' explanations to the jury throughout the case (including voir dire, opening statements and summations) should give the jury its best opportunity to fully understand the respective rights and obligations of all of the parties in the case.

If the court chooses to omit the vicariously liable defendant from the verdict sheet, under the reasoning that that parties' liability will be determined by the answers to the jury questions relating to the party for whom it is answerable, then the plaintiff's attorney must request a charge which does not appear in the PJI--an instruction that the court has determined that defendant A is vicariously liable for the acts and omission of defendant B as a matter of law--and any finding against B will also act as a finding against A. In cases in which the vicariously liable party is represented by independent counsel, it is crucial that the jury be given this information so it can clearly process what is going on in the case.

Where a jury raises a question relating to the verdict sheet, it is again imperative that the court attempt to give the jury information that can help it decide the case. Moreover, if it appears that the jury does not understand something on the jury sheet, or the instructions by which it is to proceed, there is absolutely nothing wrong with suggesting a modification to the jury sheet which can be given to the jury prior to it reaching its verdict. The bottom line is assisting the jury in performing its function as trier of fact; if the jury indicates that it cannot understand the task, justice will seldom be achieved without appropriate guidance.

Testimony Read Back

Yet another issue that requires quick thinking on the part of a trial attorney involves a jury's request to have certain testimony read back. If the jury simply asks for a witness' testimony in its entirety, then, of course, it is a simple matter. More often, however, a jury will request testimony regarding a certain point, and here it is vital that the attorney have the transcripts on hand (assuming daily copy has been ordered) and review them to ensure that the read-back includes all of the relevant testimony the jury should hear, in its proper context. The reading of only certain parts of the testimony, without other portions which provide support or explanation for the testimony which is being read back, is misleading and will ultimately serve to unfairly prejudice the jury.

Instructions Not Followed

Even once a verdict is rendered, the trial is still not necessarily over. If the jury renders a verdict, but the verdict sheet reveals that the jury did not follow the instructions that it was given (such as answering questions that it should not have, such as damages questions without finding any defendant liable), or its responses result in an inconsistent verdict, the attorneys and court must act immediately in order to sort out the confusion. Without doubt, if the jurors did not follow the instructions that they were given, then by definition, the verdict which they have rendered is shrouded in confusion. We believe courts should not try to decipher the jury's message under these circumstances; where it is undeniable that the jury has not followed the instructions, the court should not accept such a verdict, but rather should re-instruct the jury and have it return to deliberations in order to render a verdict which comports with the law.

The losing attorney must make an immediate and forceful record on this point. The law gives little credence to affidavits from jurors, submitted after the fact from the privacy of their own homes, averring their mistake or misunderstanding about what happened in the jury room.

The court's only real chance to ensure a fair verdict is to speak to the jurors immediately and, where necessary, send them back for further deliberations. A defeated attorney must resist any urge to accept the loss with dignity or impress the courtroom that he is a good loser--instead, that attorney must do everything in his power to protect his client's rights before it is too late to do much good.

It must be noted that part of the goal in summation is to ensure that the jury understands the responses that you need in order to prevail in your case. By actually working with and quoting verbatim from the verdict sheet, an attorney can attempt to minimize the chances that a jury will render a verdict against his client, when, in fact, the jury was attempting to do the opposite.

A Clearly Confused Jury

These points are well-illustrated by the recent case of [Pavlou v. The City of New York, 21 AD3d 74, 797 NYS2d 478 \(1st Dept. 2005\)](#), in which, in a 3-2 decision, the majority reversed the trial court's granting of a new trial resulting from the obvious jury confusion that has clearly accompanied the verdict, and instead gleaned from the inconsistent verdict the grounds for a defense verdict, and dismissed the case. In that construction accident case, the injured plaintiff sought to hold, among other parties, the city of New York, as owner of the construction site, liable under [Labor Law 241\(6\)](#) for a violation of the Industrial Code which limits the weight load a crane may lift.

Although the City was a direct defendant in the case, the court found during the trial that the City would have full indemnification rights as against the plaintiff's employer, Felix Industries, for any violation of the Industrial Code. Since the City's liability was based on Felix's active negligence, the court did not list the city of New York on the verdict sheet at all, prompting multiple questions from the jury regarding its absence, and the impact which a verdict would have on it. It is clear from the court's answers that it interpreted the questions as an attempt by the jury to delve into inappropriate areas that it should not have concerned itself with, but a fair reading of its questions could reasonably lead to the conclusion that the jury was seeking clarification with regard to precisely what it was deciding, in light of the arguments it had heard from all sides during the trial. Later, the jury indicated it was having a problem deciding the causation issue regarding the violation of the Industrial Code, and asked if it could skip that question.

The jury rendered a verdict that found, inter alia, that the Industrial Code had been violated, but that violation was not a proximate cause of the accident, and also found the crane manufacturer not negligent in its manufacturing of the crane. If this was the jury verdict, damages, of course, should not be assessed. Despite that fact, the jury did award damages in the amount of \$12.85 million. The trial court considered this a defendants' verdict and released the jury.

Thereafter, plaintiff's counsel obtained affidavits from all the jurors, who explained that the verdict had been misrecorded, and that had they understood the effect of their answer regarding proximate cause, they would have answered 'yes.' As a result, the trial court ordered a new trial. On appeal, the Appellate Division reinstated the defense verdict, and dismissed the case.

While Jury Still Empaneled

This case underscores the need to clear up jury confusion while the jury is still empaneled, rather than attempt to reconstruct its motives after the fact. Where, as was clear here, the jury did not understand the court's instructions, the jury needed to receive the opportunity to straighten out its verdict.

In fairness, it is not the jury's job to simply decide who should win, but rather to answer questions of fact put before it and have the Court interpret those answers in accordance with our law. That said, it is difficult and unfair to attempt to fashion a logical verdict from the workings of a jury that either could not follow the court's instructions, or refused to follow them.

Particularly in this case, where making sense of this verdict requires acknowledgment of the jury's finding that a crane was operated with a negligently heavy load, but assumes a further finding that such excessive weight was not a substantial factor in the boom of the crane breaking and striking the plaintiff, courts should not wander down the path of interpreting jury's verdict which were caused by confusion. Making such a request while the jury remains intact may be the trial lawyer's only chance to achieve true justice in such a case.