

# Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

## Trial lawyers make bad jurors and I can prove it

BY CHARLES SHIFLEY

**Common lawyer wisdom is to eliminate lawyers from being jurors.** The common wisdom seems to be that the “regular” other jurors will defer in their decision making to any lawyer-juror, and the parties will get the decision of one person, the lawyer-juror, not a jury. That may or may not be true, but I’ve heard it. It’s beside the point, however, as lawyers make bad jurors. At least trial lawyers. I can prove it. I can so testify.

I can do that because recently, I was selected as an alternate juror, and heard a case in that role. The case concerned medical malpractice alleged against a doctor, and a medical care facility.<sup>1</sup> I was shocked when I was selected to the jury, even as an alternate. I told the courtroom in voir dire that I was a lawyer in trial practice, a jury trial practice, albeit of patent, trademark, and copyright cases, and in federal courts, not the state court I was in. But I was not only a jury trial lawyer, I had a degree in science too, specifically engineering. I also told the room that my son was a lawyer, and my daughter was an emergency room doctor. My mother, I said, had also been taken by ambulance to an emergency room, word I had learned the night before my voir dire, for a condition at issue in the case. All true.

Still, I was not dismissed. I was seated

as the second alternate juror, and the first day, I became the only alternate juror. I heard the opening statements, eight days of medical, patient, and family testimony, closing arguments, and jury instructions. Then I was excused, my jury service complete. I did not deliberate. I left.

But from the day of selection through the day I left, I passed every morning arrival, break, lunch, and evening departure from the jury room with 12 other jurors. We all became friends, from the effect of being selected, detained, and confined in the jury room together. We were somewhat stuffed in the room, as the table in the room seated 10, with barely room to walk around the people seated. The room had a side table, and a water cooler, and with 13 of us, we had to swap seats and maneuver around each other. One juror reported that a friend asked, “Which juror do you hate already?” And we all agreed we were not like that, we were an agreeable group of people. We were even fun loving. We laughed at each other’s jokes, and did silly things, like saying loudly, slowly, and in practiced unison, “Good morning, Miss Bitsy,” to our kindergarten school teacher juror when she arrived.

And I almost became a full juror. One juror’s coughing became so severe and

prolonged, during testimony, that we waited on a break while the judge quizzed the juror whether he could even continue. It was in doubt. He did, still coughing. Another day, we all waited in the morning as one juror called in with stomach issues, as from food poisoning, but soon soldiered on by coming in, albeit late, and visibly a bit ill.

We jurors did not discuss the case. So I have no insights into what the other jurors’ reactions and reasoning were as they heard all that I heard. Still, reading bumps on heads,<sup>2</sup> I thought I knew my fellow jurors. We had eight women and five men, an ethnic, socioeconomic, and geographical mix, all but one of the 13 of us appearing to be optimists, with stories of family, friends, events to go to, such as White Sox games—happy people. We brought each other cold medications, chocolates, farmer’s market strawberries, and a power strip for recharging our phones. (Our one “pessimist” lived at home, smoked, swore, wanted the trial to be over with every day, and had other “interesting” characteristics.) We heard emotional testimony for the person who had lost their life while in medical care from several children, and a spouse. They cried on the witness stand, they cried in the courtroom for their loved one. They told stories of

a loving, caring person, and we all cried, and tried not to cry, with them. We jurors dabbed tears together and were in silence together on breaks after these witnesses.

We heard the testimony of the doctor-defendant, care facility nurses, a care facility executive, the emergency room doctor who tended to the cardiac arrests of the lost person, the radiologist who examined x-rays to eliminate some causes of death other than as the plaintiff alleged, the pathologist who did the autopsy after death, and numerous medical expert witnesses, for all of the plaintiff, the doctor-defendant, and the care-facility-defendant. (More on them later.) In total, we heard more than 20 witnesses. I would like to think that the other jurors heard what I heard, the honesty and forthrightness from some witnesses, and the defensiveness, prevarications, contradictions, and admissions from others.

You see, as a trial lawyer, I knew the rule that I was present as a juror to test the testimony, to judge the credibility of the witnesses, to expect witnesses to contradict each other, especially the experts, and to make the decision who to believe, and why, based on the evidence. And I did my job during the evidence. I noted immediately when the first witness, a care facility nurse, did two things. The nurse was called as a hostile witness. First, he/she<sup>3</sup> was instantly, strongly defensive, quarreling with the cross-examining lawyer. The defensiveness was extended. It reflected, to me, untrustworthiness in the testimony.

Second, the nurse also took a position that laws regulating the care facility and the care they gave at that facility were “guidelines.” He had to admit, however, that even if the nurses and facility saw the law as guidelines, not regulations or the law, the nurses and the facility were obligated to follow and meet the “guidelines.” (More on this later.)

I also noted quickly, when the doctor-defendant was the next witness, the import of the testimony. He admitted that a few select choices were available for a diagnosis for the later-deceased plaintiff, while that person was in the care facility on the day of death, and he the doctor was not present. The choices all called for the person to be transferred from the facility

to an emergency room. The facility did not have available tests and treatments for serious conditions except by sending out for them, and waiting hours for returns. The emergency room, of course, had tests and emergency care, including fast-acting, life-saving drugs, readily and immediately available, “stat.”

Shortly, I noted more defensive witness answers on the law and “guidelines.” The plaintiff called the care facility executive, who repeated the witness testimony that the law that applied to the facility, both federal law, and state law, constituted “guidelines.” Again, he was contradicted by his admission parallel to those of the nurse that the “guidelines” set standards that had to be followed. I had to ponder, had the defense lawyers directed this testimony, had the care facility planned it for all their witnesses, or was the corporation of this facility a business that viewed regulation by “Washington” and “the state house” to be overregulation that could be ignored, should be repealed, and they trained their staff so? I eliminated only defense lawyer direction.

I heard and watched the plaintiff’s lawyers build a case with 18 witnesses. Witness by witness, topic by topic, question by question, brick by brick, they laid up their case. It was not torn down by cross-examination. It stood, solid. I have to say, I marveled to myself at the end that I had become convinced of the plaintiff’s case, that it was a solid “wall.” I had expected less strength, and more doubt. Still, I held myself in check, knowing that contradiction, doubt, and possible reversals of opinions, were to come. I resolved that I was in a great case, one where the plaintiff’s case had merit, and no doubt, the defendants’ case would, too. A clash of cases with merit was the point of worthy trials. I looked forward to the defense testimony.

But then odd things happened. The doctor-defendant did not testify again, this time without being confronted at the beginning by the hostile questioning of the plaintiffs’ lawyers, as before. Where was the build-up of the doctor as personal, warm, and caring, by direct testimony by her own lawyer? It did not happen.

Instead, the doctor’s case was two

medical expert witnesses. And in my opinion, they blew up on both the doctor and the care facility. I pondered why they allowed that the deceased had symptoms and signs for 12 hours, from first onset, that were not explained adequately by what the doctor was diagnosing, having tests run for, doing—and most importantly, not doing. Why did someone not testify that the doctor spoke to the care facility more than once, and more than briefly, on the day of death? Why did no one testify that the doctor checked in on the patient later? Spoke directly to the patient? The family calling for care? Why did the care facility not consult the doctor as patient conditions deteriorated through the day? They had left a voicemail for the doctor once, at the onset of symptoms, that had provoked the doctor speaking to them early, once, briefly. Why did they not call again? The law, we were told by testimony—a procedural surprise to a lawyer, to get testimony stating the law—was that with a significant change of patient conditions, the care facility was obligated to “immediately” “consult” the doctor. The patient had symptoms that could be associated with life-threatening risks. Where was the care by the doctor, and by the facility? Where the “immediacy”? Where the “consultation”?

And then, the first of the doctor’s medical experts, in cross-examination, admitted facts that gave rise to liability of the doctor. Speaking for a diagnosis that was not diagnosing the condition that led to death, but was the alternate diagnosis the doctor had, the expert stated that the alternate diagnosis was also a diagnosis of a quick-acting, life-threatening condition, that also deserved immediate, attentive care and a quick transfer to an emergency room for ER care.

Then the second of the doctor’s medical experts, in that expert’s cross-examination, admitted facts that gave rise to the liability of the care facility. Speaking of the care at the facility in the hours that set the deceased’s fate, the expert sold out the care facility as having failed to meet the requirements of the law, to immediately—or ever in the relevant time—even attempt to contact the treating defendant-doctor.

These were bombshells to me, my analysis of the facts, and their

consequences. And they exploded during the beginning of the defense case. The care facility lawyers did not even cross-examine the doctor's second expert on the adverse opinion. The doctor's redirect didn't either.

And then the defense case was truncated. Next came the testimony of one, and only one, witness for the care facility, another medical expert. He/she freely admitted testifying in over a thousand cases over 25 years, to gain most of his income, three-quarters of the time for the defense, and nearly 20 times for the very lawyer representing the care facility. I was skeptical; I suspected I knew who this expert was and where the testimony was coming from. I knew experts could say what they were paid to say.

But more happened. The care facility expert used facts to support an opinion against liability in their direct examination. The facts used were numerical facts. But when cross-examined, the expert denied the same facts, denied the numbers, and did so to support a point he/she wanted to make to contradict the direction the questioner was leading. I practically looked around the room to see if anyone else was noting the direct contradiction I had just heard between direct and cross examinations. I resolved there and then to judge the credibility of this witness. He didn't have any.

After this last witness, closing arguments came, and were followed by jury instructions. The law of the care facility staff needing to "immediately" "consult" the doctor was officially stated. The possible liability of other medical actors who were not part of the case, such as the ER and its doctor, where the plaintiff actually died by cardiac arrest, was eliminated from consideration.

Nothing had changed by the instructions. The law fit the facts, the facts fit the law. If I had been on the jury, instead of being dismissed as an alternate, I would

have voted for liability, with full requested damages, and stuck to my opinion. I had many reasons I could explain for doing so. I had judged the credibility of the witnesses; I had applied the law as stated to the evidence, i.e., the credible testimony, that remained after my credibility assessments. I was a plaintiff's juror as a matter of strict following of the jury instructions and weighing the evidence. I could explain my views in detail. I had notes that quoted the testimony. I'm a trained listener; my notes were accurate. I could remember—and my notes could corroborate me—as to who had said what, when, why some were believable, and why some were not. I could explain that the care facility nurse and executive had taken mutually-reinforcing and wrong positions on "guidelines" that cut into their credibility and the credibility of their corporation in its overall defense. I could explain that the doctor's medical experts had admitted facts that established liability for both the doctor and the care facility. I could explain the direct contradiction in the care facility's expert testimony that eliminated his testimony as not credible.

But I was dismissed, admittedly rightly, as only an alternate.

The jury, people I trusted, insofar as you can build trust in people in just over a week, took about four hours to reach a verdict. It was unanimous. It contradicted my analysis 100 percent. The verdict was for the doctor and the care facility: no liability, no damages.

I have not contacted the jurors, not one. I have their names and telephone numbers. We exchanged them with each other. I could call them. But I will not. They did their service. They go back to their privacy.

I love our country's jury trial system. I believe in juries. I am not someone who believes juries disregard the law and the evidence. I have tried cases to juries and seen their work. I trust them, and as I have said, I trust the people of the jury I

almost deliberated with. The upshot of my experience is not to rail against juries, or this jury. The upshot is to think about 12 reasonable, trustworthy people reaching a unanimous result that is the opposite of the one I thought was compelled. I can admit I missed the import of at least one bit of testimony as it occurred. A lawyer brought up that testimony in the trial in cross-examination of a later witness. I looked back in my notes, and saw the import that I had missed. So what else did I miss that the 12 of the jury did not? Or did they defer to the medical profession as doing its best in difficult circumstances, a deference that is respectful and worthy? What do I learn?

I learn at least that I as a lawyer, and probably more narrowly, a trial lawyer, was not a good juror in the subject case. I had an opinion that contradicted the opinion of 12 reasonable, trustworthy people by 100 percent. More broadly, and probably justified, I learn that trial lawyers are not good jurors, in not just one case or one type of case, but all cases. I learn that trial lawyers as jurors develop analyses based on their training and experience that are convincing to them and can completely contradict the analyses of large groups of lay people, i.e., our juries, whose reasoning and decisions are to be trusted if we believe in the jury system. I believe. My evidence is that trial lawyers are not good jurors. My evidence is an anecdote of one, but an anecdote is evidence. I can so testify, and I do. ■

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1. I use "care facility" to mask the true parties. I do the same "fuzzing" with some of the facts, to protect the privacy interests of all those involved.

2. <https://en.wikipedia.org/wiki/Phrenology>

3. Again, privacy. It makes no difference whether the witness was male or female. I will mix "he," "him," "she," "her," and "he/she" without regard to actual gender.

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