

FOCUS

ON CIVIL LITIGATION

Gotell it to a jury

Persuading
jurors in a
civil trial



MICHAEL RAPPAPORT TORONTO

Given that the vast majority of lawsuits – around 95 per cent – settle before trial, very few civil litigators spend much time in the courtroom before a judge. Even fewer have represented a client before a jury.

Enter Jack Fireman, one of the best known plaintiff-side trial lawyers in Ontario. With over 40 years at the Bar and hundreds of trials under his belt, Fireman pontificated for *The Lawyers Weekly* on the finer points of persuading a jury.

Jury or judge?

Just because your client may be entitled to

a civil trial by jury doesn't mean that you should automatically send out a jury notice, Fireman says.

When choosing a jury trial, factors to consider include the following:

- jury trials tend to be longer and if the case is appealed it can add another year or two to the process;
- if the case is clear cut, it may be better to opt for a settlement or trial by judge alone;
- judges have a far greater understanding of certain issues, such as chronic pain, than juries do.

"Judges, more so than juries, have come to understand that chronic pain is very real," Fireman says. He noted that the Supreme Court of Canada unanimously held that

"chronic pain" was a disability in *Nova Scotia (Workers' Compensation Board) v. Martin*, (2003) S.C.J. No. 54.

Identification

It is much more important that a jury like the lawyer than the client. As Fireman says, "the plaintiff is only in the witness box for a short time. But there is one person who is always in front of the jury: the lawyer."

How do you get a jury to identify with you? Appearance and demeanor are crucial. Pay attention to your dress. Don't wear anything that might put off a member of a jury like a nose-ring, gaudy jewelry or a tiny ponytail.

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Budgeting cost of disputes makes justice more affordable

Many people blame lawyers for a lack of access to the civil justice system. As a result of this public perception, the Benchers of the Law Society recently concluded that access to justice was one of the most serious issues facing the legal profession, and made it a top priority.

But the cost of lawyers is not the core of the problem; instead, it is a civil justice system that is not cost effective to individual litigants. The system doesn't set a priority on ensuring that the costs of resolving the dispute have a sensible relationship to the



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amount or issues in dispute.

The civil justice system could set a priority on making the system more affordable for individual litigants, using concepts such as budgeting.

Budgeting

Today, cases proceed to trial without any priority they be

resolved cost effectively. Motions are brought, documents are demanded and discoveries are held without lawyers or judges requiring that these procedures make sense in relation to the amount or issues in dispute.

Budgeting can resolve this issue. If the amount in dispute is, say, \$200,000, the lawyer should deliver a budget to the client beforehand that shows how the case can be brought to trial for a cost that is reasonable in relation to that amount. The client and the lawyer may agree that 30 per cent is a reasonable amount, or

“**Today, cases proceed to trial without any priority that disputes be resolved cost effectively.**”

\$60,000. Then the lawyer n tell the client, "We can at \$7,500 on pleadings, \$20,000 documentary and oral disc and \$32,500 on preparing fo attending on trial."

The lawyer would advise client that this plan would in two days on discovery and days at trial, and no more client and the lawyer would on to that budget. Or the r could say that he or she wa spend less than that amount. lawyer did not agree, the client would try to find an

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CIVIL LITIGATION

Demonstrative evidence persuades juries best

Jury

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As for demeanor, try to build rapport with the jury. Above all, don't be condescending. "If a doctor is in the witness stand and he uses medical jargon, it would be a mistake to say 'I understand what an MRI is, but can you explain it to the jury?'" Fireman cautions. He adds that the correct

response is, "Can you explain what an MRI is to us?"

Demonstrative evidence

The old adage, "a picture is worth a thousand words" is nowhere truer than in a personal injury case dealing with internal injuries.

For example, when dealing with a brain injury where there is no bleeding, bringing a model of a skull to court can

help illustrate the nature of the trauma better than any verbal explanation, says Fireman. He explains that you can show the jury the raised ridges on the model of the skull and demonstrate how injury can occur when the brain rocks back and forth in a collision and strikes the raised ridges.

Demonstrative evidence is an "attention grabber" and is much more effective at per-

suading a jury than a long-winded technical explanation, Fireman says.

Opening remarks

The function of opening remarks is to tell your client's story, not to argue the case. You should lay out a road map of where you are going and why. You should explain your function as the lawyer and also explain to the jury their role,

that they are responsible for weighing the facts of the case, deciding liability and assessing damages.

It is also essential to recognize the weaknesses in your case ahead of time and address them in the opening. For example, if your client is an alcoholic, you will want to tell the jury upfront and find a way to inoculate the jury from the defense attack, Fireman says.

"If you allow the defense to bring out that your client has a history of alcoholism for the first time, it's a mistake," Fireman says. "The way to inoculate the plaintiff against the full sting of a defense attack is to explain it in the opening."

He added, "If you feel you have to do something to arouse sympathy [in a personal injury case], perhaps you should take a second look."

Cross-examination

Forget the word "cross" when doing cross-exams, since "cross" tells the jury that you're angry, Fireman says.

"You may know that the other side's expert is biased, egotistical and in the insurance company's pocket, but the jury doesn't know that," Fireman says. Always keep in mind the relative popularity of lawyers versus other professionals, such as doctors, engineers and police officers.

"Take a look at opinion polls," Fireman advises. "Lawyers are as unpopular as George W. Bush." The moral? Be polite and respectful when cross-examining any witness or expert.

Closing arguments

Perhaps the trickiest issue to address in closing arguments is the quantum of damages. To a jury comprised of middle-class, blue collar workers and retirees, the sums being requested are likely to appear exorbitant.

"You really have to get the jury to understand how minuscule in the scheme of things \$300,000 is," Fireman says. "The maximum general damages are really peanuts. Even the worst hockey player in the NHL makes \$300,000 a year."

Fireman says that when dealing with damages the two points you want to drive home are first, the jury must not take into account the ability of the defendant to pay; and second, that the amounts at issue really are rather small in the grand scheme of things. ■

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