



Insights from Trial Analysts:

Understanding Runaway Juries

Much has been written in the popular press about “runaway verdicts” in civil litigation. While notorious cases like the McDonald’s coffee incident and the Florida tobacco litigation receive national coverage, excessive verdicts against pharmaceutical and automotive companies, toxic tort litigation, and securities fraud cases have dramatically changed the landscape of civil litigation and the risks associated with taking a case to trial. After a runaway verdict, lawyers and their clients often struggle to understand how juries can award such large damages. While excessive awards are often perceived as incompatible with the “objective case facts,” the communication and psychological processes that produce these verdicts are well understood by scholars in Communication and Social Psychology.

More than 40 years ago, James Stoner’s pioneering research on opinion shifts in group decision-making found that groups often make more risky decisions than individuals. Subsequent research concluded that groups often make more polarized decisions, either more risky or cautious, than the median pre-discussion opinions of group members.

Applied in the context of civil litigation, group polarization produces jury verdicts that can be more extreme than the pre-deliberation preferences of individual jurors. For example, in their study of 500 jury deliberations, Reid Hastie and David Schkade found that 27 percent of the juries that awarded punitive damages awarded amounts equal to or greater than the amount preferred by the most extreme juror prior to deliberations. In other words, the punitive damage award in 27 percent of the juries was as or more extreme than any individual damage award.

Group polarization can also produce verdicts that are less extreme than the pre-deliberation preferences of individual jurors.

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This paper discusses two group dynamics – social comparison processes and persuasive arguments effects - that help to explain group polarization effects in jury deliberations.

Social Comparison Processes

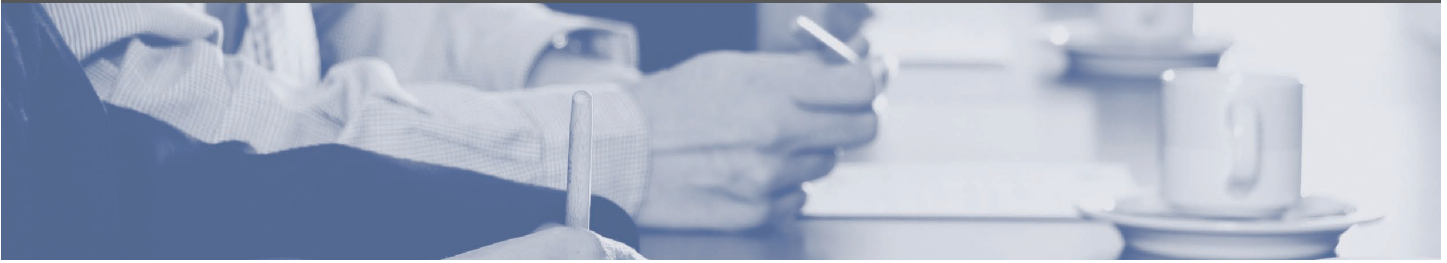
Leon Festinger’s Social Comparison Theory posits that people are motivated to hold the “correct” position on important issues. When people are uncertain about the correctness of an opinion or judgment, they seek to validate their position by comparing it with the positions held by others. The greater the uncertainty people possess, the greater their desire for social comparison.

In the context of jury deliberations, jurors are often charged with highly ambiguous tasks like determining an “appropriate” amount of exemplary damages to award or quantifying the amount of pain and suffering a plaintiff has experienced. In the absence of an objective scale or anchor, jurors struggle with these decisions and often lack confidence in their individual award preferences. Consequently, social comparison processes become quite important.

During the early stages of jury deliberations, as jurors are permitted to discuss their impressions of the case for the first time, social comparison processes define the group dynamic as jurors express and compare their positions with the positions of others. As these social comparisons unfold, some jurors will quickly adjust their position to more closely conform with the emerging group norms and perceptions of the case. These simple comparisons can produce rapid shifts in jurors’ verdict preferences.

Central to Social Comparison Theory is the assumption that some people tend to view themselves as better than the average group member in key abilities, attitudes, and judgments that are valued by the group. It is this distorted perception held by some jurors that contributes to cause polarized (or extreme) verdicts. For example, a juror who believes that he or she is more compassionate and understanding than the average person may be surprised to learn during the early stages of deliberations that most jurors favor awarding several million dollars to a plaintiff alleging medical effects from exposure to hazardous substances. This social comparison process may cause the “more compassionate juror” to up the ante and advocate a more extreme award in an effort to “take care of” the plaintiff, thereby validating their compassionate self-perception.

In contrast, a juror who perceives that he or she is more conservative than the average person may be surprised to learn that most jurors are skeptical about the legitimacy of the plaintiff’s alleged medical claims. Upon learning that several jurors hold the same viewpoint, the “more conservative juror”



may strengthen his or her resolve to award no damages.

Under both of these scenarios, social comparison processes cause jurors to advocate a more extreme position than they preferred before deliberations began. The effect of these individual position shifts is often a more extreme verdict than the median pre-deliberation preference of the jury.

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It bears mentioning that social comparison effects occur quickly and do not require careful consideration of testimony and documents in a case. In this regard, social comparison processes can be more influential than the evidence presented at trial. Moreover, social comparison effects are most pronounced when jurors are faced with ambiguous challenges like quantifying damages for pain and suffering or determining an amount of punitive damages to award.

Trial Analysts' Recommendations: When jurors are influenced by social comparison processes, their verdict decisions are the result of normative influences rather than a careful scrutiny of the evidence and arguments presented at trial. Because they are based on social rather than substantive factors, social comparison effects are less reliable and less predictable. Trial attorneys can take several steps to limit the impact that social comparison processes have on the ultimate jury verdict.

First, use juror questionnaires and voir dire to identify jurors who are likely to identify

themselves as “local experts” on the jury. Local experts are jurors who claim more knowledge or experience with a particular issue and they exert a disproportionate amount of influence during the deliberation process. These so-called experts are often wrong about key issues, yet others defer to their judgment because they claim to have special knowledge.

Second, devote ample trial time to providing tutorials that will educate jurors about key technical issues. The more jurors understand about an issue, the more confident they will be in their individual verdict preferences and the less susceptible they will be to social comparison processes. Remember that ambiguity creates the need for social comparison.

Third, provide jurors with a method for calibrating the abstract quantitative decisions they are required to make. Because abstract damage requests, like those for pain and suffering, are very difficult for jurors to quantify, one might discuss an alternative damage award for pain and suffering as an opportunity for a plaintiff to pay for college or put a down payment on a home.

Persuasive Arguments Effects

Persuasive Arguments Theory is a second explanation for group polarization effects that underscores the influence of information that emerges during deliberations. As described by Frank Boster and his colleagues, this explanation begins with the assumption that each piece of information has persuasive value and that exposure to new information serves to strengthen an existing position or cause a shift in opinion on a particular topic. In the context of jury decision-making, group polarization occurs when jurors exchange information that is

perceived as new by other members of the jury.

As they integrate the evidence and arguments presented during trial, jurors form individual verdict preferences that are derived from judgments about witness credibility and evidence quality. In preparation for their group deliberations, jurors create “arguments” in their minds that help to explain their individual verdict preferences. Of course, these arguments (or justifications) are selected from a larger pool of arguments that each juror has heard and understood during the trial.

Jury deliberations provide an opportunity for jurors to share the arguments they have created to justify their verdict preferences. Although a common pool of information or arguments is available to each juror, the weight or importance that is assigned to each piece of information or argument is likely to differ from juror to juror. Moreover, in addition to the common pool of information and arguments, jurors are likely to have different information based on their level of comprehension or recall. For example, some jurors may not have understood a particular aspect of expert testimony, others may have failed to realize the significance of a critical document, while others may simply be unable to recall the testimony of a particular witness. These differences in comprehension, perception, and recall create a different pool of arguments for each juror.

Jury deliberations have a synergistic effect that expands the pool of arguments available to each juror. As jurors express their initial verdict positions and the explanations for them, they are exposed to new arguments and evidence that can be very persuasive. Indeed, novel arguments and evidence considered during deliberations



are often more influential than information that was previously considered.

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For example, a company defending the validity of a patent may offer several arguments to support the position that the patented invention was not obvious when the patent was issued. However, it is unlikely that every juror will understand or recall each of the arguments. Instead, some jurors might focus on the commercial success of the invention, others might recall that competitors copied the patented invention, while others might focus on the time and money spent in research and development that led to the claimed invention. However, the deliberation process is likely to produce a discussion of many of the relevant arguments. The jury's consideration of a broader set of arguments will persuade jurors who were uncertain about the issue and reinforce the opinions of those who initially concluded that the patent was not obvious based on a single argument.

Although this explanation accounts for changes in individual preferences, how does it account for that fact that jury verdicts are often more extreme (polarized) than the average pre-deliberation position of jurors? The answer stems from the number and proportion of new arguments that are introduced on each side of a particular issue. For example, if deliberations begin with eight jurors favoring a plaintiff verdict and four favoring a defendant verdict, then the number of pro-plaintiff arguments introduced during

deliberations is likely to be much greater than the pool of pro-defendant arguments. This effect is compounded by the self-censorship that results from social comparison processes. Jurors who realize they hold a minority viewpoint will often limit their contribution to the group discussion.

The combined effect of the proportion of pro-plaintiff vs. pro-defendant arguments and self-censorship among jurors holding the minority viewpoint is the creation of a common pool of arguments that is biased in favor of the majority viewpoint. When this happens, jurors holding the majority viewpoint become more confident of their position and emboldened to advocate a more definitive outcome, particularly with regard to damages. In addition, those holding the minority viewpoint are confronted with a pool of new arguments and evidence that is biased in favor of the majority viewpoint, causing a shift in opinion among those holding the minority viewpoint.

Of course, jurors holding the majority viewpoint at the outset of jury deliberations are not always persuasive because they lack the ability or motivation to generate new arguments to defend their verdict preferences. Thus, it is possible that jurors who hold the minority viewpoint will generate the majority of new arguments that are considered during deliberations. In such cases, jurors who hold the minority viewpoint can be particularly persuasive.

Trial Analysts' Recommendations: The persuasive arguments explanation for shifts in juror opinions is based on a rational model of persuasion and emphasizes the importance of arguments jurors advance to defend their positions. This model suggests several strategies to increase the effectiveness of trial presentations and prepare

jurors to become effective advocates during deliberations.

First, research by James Stiff has demonstrated that the more involved jurors become with the case presentation, the stronger the persuasive effects of evidence and arguments. Thus, to maximize the persuasive effects of the case presentation, lawyers should develop arguments that help jurors identify with the central issue in the trial and increase their involvement with the desired verdict decision. For example, appeals to jurors' concerns about rising health care costs may heighten their involvement with a case about health benefits paid to exempt and non-exempt employees. A heightened involvement with the issue at hand will motivate jurors to process the evidence and arguments and become effective advocates during deliberations.

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Second, it is imperative that attorneys “fill in the blanks” when developing arguments in support of a position. In its most rudimentary form, an argument consists of a claim, data, and a warrant. The claim is the conclusion the speaker is advocating; data are testimony and documents supporting the claim; and the warrant is the logical connection between the data and the claim. Too often attorneys and expert witnesses fail to explicitly identify the claim and the warrant in the arguments they advance. Instead, they offer evidence in support of a position that is implicit in the argument. While the desired conclusion may appear obvious to members of the trial team, it is not always



obvious to jurors who are required to fill in the blanks.

Daniel O'Keefe's research has demonstrated that messages that explicitly describe an argument's conclusions are more persuasive than messages that implicitly suggest the desired conclusion. When attorneys leave it to jurors to "fill in the blanks" they require jurors to work harder to draw conclusions about the message. Moreover, when they are required to fill in the blanks, jurors may substitute their own thoughts and biases for information implied. Thus, it is important to explicitly state the conclusion to be drawn from the evidence and the logical explanation of why the evidence supports the conclusion.

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Third, research projects that involve mock jury deliberations should focus attention on the tone of the deliberation process. Too often clients become fixated on the mock jury verdicts and ignore important aspects of the deliberations that produced the verdicts. Jury deliberations can provide valuable insights into jurors' motivations, the respective ability of plaintiff and defendant jurors to advance arguments and defend their positions, and the warning signs of a polarized or runaway verdict at trial. Perhaps most important, mock jury deliberations will reveal the extent to which jurors are capable of processing complex testimony and the extent to which they will be influenced by social comparison processes.

Summary

Social comparison processes and persuasive arguments effects are active dynamics in jury deliberations that can produce verdict decisions that are more extreme than the pre-deliberation preferences of individual jurors. Observing these processes in pre-trial research and developing strategies to combat their adverse effects should be an important aspect of a jury consultant's contributions to the trial preparation process.

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Please feel free to share this paper with your colleagues and clients. Please call us if we can be of assistance on a case.

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