



GOT MULTIPLE DEFENDANTS? HOW YOUR VERDICT FORM CAN AFFECT JURORS' ASSESSMENTS OF LIABILITY AND DAMAGES

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In a recent products liability trial that Litigation Insights assisted with, which involved a dozen defendants, the judge grouped the defendants according to their “function”: manufacturers, distributors, or retailers. On paper, a minor change. But while the judge may not have realized it, he had just affected how jurors would view the verdict form – and perhaps even their entire verdict.

Some larger and longer-term defendants were grouped with smaller defendants with much less time in the industry. Further, each defendant had its own individual liability issues and potential damages amounts. Could that grouping together affect how jurors perceive defendant behavior and liability among all defendants, or do jurors judge each defendant independently of the others regardless of

grouping? Will jurors’ damage awards for one defendant company affect the size of the damage awards for other defendants?

A verdict form is, in essence, a questionnaire – it is a series of questions jurors answer as a way to determine what they believe happened, who is responsible, and how much, if any, damages are owed. There is a great deal of psychological research about questionnaires and how phrasing, context effects, and question order can influence responses. Verdict forms are therefore no different; how questions are grouped and phrased can have a significant influence on how jurors fill them out. This article examines psychological research on decision making to determine how grouping co-defendants on a verdict form may influence the decisions reached by jurors.

TO GROUP OR NOT TO GROUP?

In instances like our products liability trial above, a client may be helped or hindered depending on whether they are grouped with similar or dissimilar co-defendants on the verdict form or not. The format chosen can impact how jurors evaluate your individual client – as well as whether jurors can distinguish between each defendant – during deliberations.

How these findings impact co-defendants depends on their comparative position in jurors’ eyes. That is, will a jury believe your client is *more* or *less* liable than the others? If there is no difference, then the strategy may not matter. On the other hand, research suggests that different strategies should be used for defendants that are going to receive the brunt of jurors’ anger versus defendants that are “small

players” in the action at hand.

For example, in the products liability case with many defendants, there were several layers of issues. First, some companies’ functions were dissimilar to others (e.g., manufacturer versus retailer). Second, some defendants, even with similar functions, were likely going to be viewed in a much worse light than other co-defendants. Our client asked what effect it might have if the verdict form was structured such that each verdict question included the dozen defendants, with each defendant simply having its own line under every question. The alternative was that each verdict question would be asked and considered separately for each and every defendant (i.e., jurors complete all verdict questions for Defendant 1 before moving to all verdict questions for Defendant 2). Might grouping the defendants together in a single verdict question take some attention away from our client and prevent jurors’ anger from snowballing? Or might it instead create a “contrast effect,” amplifying jurors’ anger toward our client in comparison to the small, relatively innocuous co-defendants?

UNPACKING & TYPICALITY

The Unpacking Effect is a decision-making phenomenon regarding how breaking down evaluative judgments into components can affect decision making. For example, if we asked you to estimate “the GDP of all European countries combined,” that would be a “packed” version of the question. An “unpacked” question, in contrast, splits the broad categorization into more specific components: “Please estimate the GDP of England, Germany, France, and all other European countries combined.”

One factor that affects answers to unpacked questions is whether the specific components listed could be considered “typical” or “atypical.” Typical components are those that easily come to mind when thinking about the global decision, while atypical items are those that do not come to mind (or if they do, not easily). To your average American, “England, Germany, and France” would be considered “typical” items. Whereas, if we asked for an estimate of “the GDP of Latvia, Monaco, Luxembourg, and all other European countries combined,” this question would involve “atypical” items. Research shows that unpacked questions using atypical items lead to

lower estimates than unpacked questions that use typical items.¹

In fact, we conducted our own study to examine the effect of an atypical category within an unpacked question. Our prompt unpacked the global judgment of “non-economic damages” for a hypothetical trucking accident case into the following components: pain and suffering, loss of enjoyment of life, disfigurement, and anxiety. For a plaintiff who is paraplegic because of the accident, we expected that the first three components would be considered “typical,” while the last (“anxiety”) would be “atypical” (i.e., it is not representative of what a juror primarily would think they need to award damages for).

Our study found that the inclusion of this single atypical category actually lowered respondents’ damages decisions for the other three categories. That is, jurors awarded more money when they were asked only about pain and suffering, loss of enjoyment of life, and disfigurement than when they were asked about those categories plus anxiety. Consequently, we observed that the effect of an atypical category takes attention away from the typical categories and serves as a lower anchor for those categories.

But how does this apply to co-defendants on a verdict form? Well, the listing of co-defendants creates an unpacked question; it takes the global category of “those who may have harmed the plaintiff” and breaks it down into identifiable parties. Therefore, if there is a party that will likely receive very little blame, it would be an “atypical” item on the verdict form. Meanwhile, the party or parties most likely to receive the bulk of fault would be the “typical” item(s). Similar to our study results, it is likely that having jurors decide on the typical and atypical defendants at the same time will take some attention away from the “worse” defendant(s). Additionally, the atypical defendant will serve as a lower anchor, helping bring down judgments against the typical defendant(s).

AVERAGING V. ADDITIVE EFFECTS

Another psychological phenomenon relevant to our study above examines what happens when something of perceived high value is grouped together with something of perceived low value. Rationally speaking, adding something of small value to something of large

value should increase the total. Surprisingly, however, the grouping of the two tends to have an *averaging effect* rather than an *additive effect*.

Multiple studies have shown that people tend to think the high-value item is worth more by itself than in combination with the low-value item.² For example, one of the original studies that tested this concept showed that people were willing to pay much more for a 24-piece dishware set than they were for a 31-piece dishware set that had a couple chipped pieces.³ Note that the larger set still included the exact same 24-piece set, perfectly intact, and even some additional intact pieces. However, as the researchers postulate, the feeling that goes with seeing a complete set that is perfect is better than the feeling of seeing a larger set with a couple of imperfections. Therefore, people put a higher value on it, despite receiving fewer perfect pieces overall.

This phenomenon relates to co-defendants on verdict forms wherein one defendant carries significantly more responsibility than the other(s). Think of the defendant that will likely receive most blame as the high-value item: If that is your client, then a primary goal is to reduce anger toward them, as anger tends to be the strongest predictor of damages. Consequently, grouping your client with the innocuous co-defendant (which can be thought of as the low-value item) may be beneficial to your client—jurors’ anger may diminish via an *averaging effect* with the less liable party. This should result in reduced anger and damages for the “worse” defendant.

CONCLUSION

These two lines of research show that grouping items together for decision making tends to have an *averaging effect*, which can help or hurt your client depending on the position they are in. If they are the party with whom jurors will be most upset, grouping the defendants so that jurors must answer for each party within each question may be beneficial. However, if your client is a smaller player with fewer liability issues, the optimal strategy will likely be to separate the riskier defendant(s) from your client to isolate jurors’ anger elsewhere.



Dr. Nick Polavin has eight years of experience in jury research and the legal field. He uses this knowledge and experience both in-court during jury selection and in developing themes and recommendations for trial based on mock trials and focus groups.

¹ Sloman, S., Rottenstreich, Y., Wisniewski, E., Hadjichristidis, C. & Fox, C. R. (2004). Typical Versus Atypical Unpacking and Superadditive Probability Judgment. *Journal of Experimental Psychology: Learning, Memory, and Cognition*, 30(3), 573-582.

² Kahneman, D. (2011). *Thinking, Fast and Slow*. New York: Farrar, Straus and Giroux.

³ Hsee, C. (1998). Less is Better: When Low-Value Options are Valued More Highly than High-Value Options. *Journal of Behavioral Decision Making*, 11(2), 107-121.