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Study Highlights:

- Plaintiff injury photos affect liability verdicts
- Plaintiff injury photos affect damage awards
- Defense photos can counter some of these effects

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The Impact of Graphic Injury Photographs on Liability Verdicts and Non-Economic Damage Awards

Over the years, the use of graphic, and at times gruesome, visual imagery in the courtroom has become commonplace. In the criminal setting, particularly trials involving violent crime, prosecutors make every effort to put grisly photographs of the victim and crime scene in front of the jury.

These photos are typically selected on the basis of their shock value in an effort to portray the horrific nature of the crime. From the prosecutor's perspective, the more abhorrent the photograph the more effective it becomes. In the civil arena, plaintiff attorneys attempt to enter into evidence photographs of their client's injuries. These photographs are often taken immediately after an accident and may be far removed from their client's current condition. Although the use of such imagery has become the norm, the prejudicial nature of this evidence continues to be a contested issue in courtrooms across America. Criminal defense attorneys routinely submit *motions in limine* to restrict or exclude crime scene photos on the grounds that put undue focus on the victim and generate sympathy. Civil defense attorneys submit similar motions, positing that such evidence, which may be relevant for determining damages, has an improper impact on jurors' assessments of liability. Under both circumstances, judges exercise their discretion and usually allow some, if not all, of the images to be seen by the jury.

With the ever increasing availability of photographic evidence and the trend toward the admissibility of graphic visual images, it has become even more important to understand how these pictures influence jurors' verdicts. Little research has been conducted to address this important issue.

In civil litigation, photographic images depicting the severity of an injury are submitted during the trial to purportedly help the jury assess economic (e.g., lost wages) and non-economic damages. Arguably photos, for example, of a burned hand taken immediately after an



accident may help a jury assess the pain and suffering associated with the injury. The application of this evidence is considered proper when used in this limited capacity. However, before a jury weighs damages, it must first find that the defendant was negligent and that this negligence caused injury to the plaintiff. If jurors improperly use injury photographs to determine liability, then these images may be excluded under FRE 403. According to 403, relevant evidence is inadmissible if it is found to be unfairly prejudicial.

The current study examines the proper and improper use of vivid injury photographs in a civil dispute where the evidence favors a defense verdict. The impact of injury photographs on participants' liability, causation, and non-economic damages verdicts (i.e., pain and suffering awards) was assessed. The study also answers a question of strategic value: *Can a defendant mitigate the influence that injury images have on liability verdicts and damage awards by providing counter photographs depicting improvement in the plaintiff's condition?*

Methods

The research combined three conditions which included identical trial stories embedded with neutral photographs. The final version of the trial story was by design slightly skewed in favor of the defendant. The fact pattern was developed from a lawsuit that was resolved during trial. The original litigation stemmed from an injury to an 11-month-old infant who received severe, instant third-degree burns to his hands after he put them in the path of steam emitted from an operating vaporizer. The plaintiff (the infant) sued the manufacturer of the vaporizer claiming that: 1) the product was defective and 2) the warning labels were insufficient. The defense addressed both of the plaintiff's claims and asserted a comparative negligence argument against the parents.

Injury photographs—two submitted by the plaintiff and two by the defense—were chosen from the original nine images provided by counsel. The plaintiff photographs depicted the burns to the infant's hands taken at the hospital within hours of the accident. In contrast, the defense pictures were taken over a year after the incident, following several successful skin grafts. These photographs illustrated marked improvement from the initial injury.

All three versions of the trial story were identical in content and contained the same photographs of the parties, the vaporizer, and other relevant visual aids. The control condition detailed the injuries from both the plaintiff's and defendant's perspective, but did not offer any images of the injury. The second condition incorporated the

two photos taken immediately after the accident into the plaintiff's case-in-chief. Finally, the third condition included the plaintiff photos but also incorporated the post-

recovery images in the defendant's damages argument. After reading the online trial story, participants were provided with the relevant jury instructions and then answered the verdict questions.

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Participants were randomly selected by a web-based survey company. The sample was drawn from a list of volunteers who opted in to complete web surveys for compensation in the form of points. The final sample comprised jury eligible participants from California, New York, Illinois, Texas, and Florida.

Results

As predicted, the photographs had a significant effect on final verdicts. The majority (58%) of participants in the first condition, who did not view any of the graphic photographs, found in favor of the defense. However, participants who saw the plaintiff's injury photographs were significantly more likely to render plaintiff verdicts than participants who did not view the photographs, $\rho = .03$. Fifty-one percent (51%) of participants in this condition resulted in plaintiff verdicts. Yet, the defense was able to counter the illegitimate impact that the plaintiff's photographs had on liability verdicts. Sixty-percent (60%) of participants who saw both the plaintiff and defense photos found for the defense.

The plaintiff's photographs also had an impact on damage awards. The median non-economic damages award for participants who viewed the plaintiff photographs was significantly higher than that of those in the no-photographs condition, $\rho = .02$. The defense photographs did not attenuate the impact that the plaintiff photos had on non-economic damage awards.

Discussion

The results from the present study indicate that injury photographs can and do have an improper effect on liability verdicts. Further, these photographs, which are ostensibly provided to assist in the assessment of damages, appear to actually strengthen a somewhat weak plaintiff case. From a practical perspective, these findings have important implications. While injury photographs may be relevant for assessing damages, they also appear to spill over and contaminate questions on liability.

The photos proffered by the defense were also improperly used by participants to determine liability. This finding suggests that the defendant may be able to mitigate the effects of graphic injury photos by offering photographs of its own. However, the improper use of counter photos does not justify or downplay the dangers posed by jurors using damages evidence to evaluate liability. Further, the post-surgery images submitted by the defense in this study illustrated a dramatic improvement in the plaintiff's condition. Such strong visual evidence is not always readily available to the defendant. Therefore, the defense may not be able to overcome the prejudicial impact that vivid injury photographs have on liability.

The results also suggest that plaintiff injury photographs have a significant, albeit proper, effect on non-economic damage awards. In contrast, defense photographs do not have an attenuating effect. This finding puts plaintiff counsel at a distinct advantage during the damages phase.



Legal Remedies

There are several approaches that could be employed by the Court to limit the prejudicial or improper use of graphic photographs. Under the most aggressive scenario, the Court could exclude all graphic injury images on the basis of FRE 403. In light of the current trend toward admissibility, this approach is not likely to be employed any time soon.

Under a second scenario, the Court could provide a clear limiting instruction before photographs are submitted to the jury and an additional

instruction before deliberations begin. Although this is the more widely accepted remedy, limiting instructions do not appear to be very effective. There is a significant body of research within the cognitive and social psychological literature showing that participants have a difficult time suppressing thoughts when told to do so.

The third approach calls for the bifurcation of the liability and damages phases, where the jury would only hear damage arguments after making a finding of liability against the defendant. Upon the jury returning a plaintiff verdict, both parties would then submit evidence in support of their competing damages claims. Although defense counsel may continue to have difficulty overcoming the impact that graphic injury photographs have on jurors' damage awards, the improper use of such evidence to determine liability would be eliminated.

The defense was able to counter the illegitimate impact that the plaintiff's photographs had on liability verdicts.



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With over 25 years of experience, JRI has developed a national reputation for the quality of its work. JRI is committed to providing personalized services tailored to the needs of your case.

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