

It's All Fun 'Til Someone Loses an Eye

The Case: A lawsuit alleging assault and use of excessive force was filed by a 19-year-old student for injuries suffered during an impromptu street party. The student, Larry, was visiting one of the Atlantic resort communities during spring break. Various levels of intoxication and rowdiness are an almost-expected part of the weekly activities. One evening, things became out of hand and the police declared an unlawful assembly. They issued orders for the streets to be cleared. A dispersal proclamation was read and when the crowd continued to ignore orders to disperse, tactical teams began to clear the streets. One of the non-lethal weapons used by the department was a beanbag gun. Larry was shot in the eye by a police officer and his injuries were so severe that he lost his left eye.

Larry was a 19-year-old college student on vacation at the time of the incident. He was joined on spring break by many friends and was there primarily to party. On the night in question, Larry was with several friends watching the antics of some of the more animated people in attendance. Although there was a general high level of intoxication, Larry was not intoxicated; in fact, he had only consumed two cans of beer over the entire evening. Larry was under the legal drinking age of 21.

Larry was described as being merely an onlooker and there was never any allegation that he was part of any criminal act, or that he behaved in a riotous way. There was no reason to believe he heard the police reading the dispersal order. He was simply a curious youth; young people are drawn to excitement like moths to a flame.

Larry and his friends were standing in a vacant lot. There were hundreds of other students watching a tactical team clear the street. Tear gas was fired in advance of the tactical team and people began running to clear away from the area. What had been mere entertainment was now a serious incident. Larry and his friends began to flee across the lot when Larry was suddenly felled by a strike from a beanbag to his face. Larry was immediately rendered unconscious and was dragged by his friends from the area to a first aid station that had been set up approximately a block away. Larry was transported by ambulance to a local hospital, but nothing could be done to save his eye.

Prior to the incident, Larry had a 3.5 GPA at the university and had completed the first half of his freshman year. He had graduated from high school as an honors student and planned to study engineering. It was a full year before Larry could return to college and even then, he had to struggle to maintain a C average. Larry has had several reconstructive surgeries; an implantation initially failed, but was successful on the second attempt. Larry still has constant headaches, he has an inability to concentrate and he suffers from many of the symptoms of post-traumatic stress disorder. His damages are past and future medical expenses, loss of earning potential, and the pain, suffering and humiliation caused by his disfigurement and loss of vision.

There were 40 police officers armed with beanbag guns on the night in question. Of those 40, only seven were ever in a position to have fired the shot that struck Larry. Those seven officers had been interviewed and they all denied firing the shot and they all submitted to polygraph examinations, which they all passed. Although no single officer could be connected to the beanbag, the beanbag was removed from the eye socket and it was, without doubt, fired by a police officer. The review of thousands of photographs and dozens of hours of videotape failed to show any wrongdoing on the part of Larry. It also failed to disclose which officer had fired the shot.

Research design: This research was designed to identify areas that needed to be addressed; once they were identified, theories for litigation were tested. The presentation to the jurors was made by live attorney presentations with videotapes of training and tactical team officers. The design required presentation of facts to two panels with immediate deliberations (Phase I), followed by a day of adjusting materials by the attorneys. The design was completed by a presentation to two new panels on the third day (Phase II). The goal of the

project was based strictly upon liability and the reduction of damages.

Findings: Based upon the questionnaires and deliberations of the Phase I jurors, it was determined the jurors believed the police department knew who fired the shot and they were simply covering up. On the defense side, jurors tended to follow the old adage: you are judged by the company you keep; if you chooses to place yourself in jeopardy, you can't cry about the results. They thought this student intentionally went to a location that had a reputation of wild partying during spring break. When a street disturbance began, the student should have avoided the situation entirely and returned to a place that was not involved in disorderly activities. While not actively engaged in criminal conduct, he encouraged it by remaining as an observer. As a result, jurors found the police department liable, but they found more than 70% of the comparative fault on the student.

Lawyers who were playing the role of plaintiff attorneys used this information to change the plaintiff tactic. They pointed out to the Phase II jurors that it is "incredible" that with all the pictures taken and all the video recorded, there is no indication of wrongdoing on the part of the student, and the police officer doing the shooting could not be identified. They pointed out wholesale and indiscriminant shooting under very poor supervision on the part of the department. They disclosed there were more than 600 beanbag rounds fired that evening. Lastly, they made an adjustment accounting for the student's poor decision making.

Attorneys pointed out that the street disturbance was allowed to go unchecked for almost three hours. Officers did not decide to read the proclamation and clear the streets until after storefront windows had been broken and rocks and bottles were thrown at police barricades. When these events happened, police acted swiftly and began to clear the streets. A very thorough presentation was given on the experience and education of the on-scene commander. It was pointed out that it took almost three hours for this highly-experienced and trained officer to determine that the situation was dangerous. Graphic comparisons were made between the age, education and experience of the police commander and the student. They made a very clear picture disclosing that if one could not expect a competent police commander to predict a violent encounter, one could hardly expect an untrained 19-year-old to know he was in danger. They indicated that the student was simply interested in experiencing what was occurring and was unable to perceive the danger. Further, they pointed out the only obvious danger could have come from other party attendees. In fact, the student was only endangered by the outrageous conduct of police officers run amok. The Phase II jury returned substantial damages that were slightly reduced by Larry's comparative fault of 10%.

Conclusions:

1. From a plaintiff's standpoint, this pretrial research would disclose strengths and weaknesses to change comparative fault from a large fault on the plaintiff to an insignificant fault on the plaintiff.
2. Methods were found that could determine how to invoke juror outrage directed at the police. Descriptive language was carefully designed and tested; these word choices successfully incited the jurors.

Comments: Based upon this research, conducted by the defense, the administration became aware that they were very vulnerable to a skilled plaintiff presentation. They determined the plaintiff would be a sympathetic witness and his damages would be substantial. Lastly, and many would say most importantly, the city reflected upon its own responsibility in errors and omissions to determine the ethical course of conduct. The case was settled prior to trial.

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