

July 2014 Jury Tip: "Your juror's definitions of negligence, part two"

Why are juries so unpredictable? This is the trillion-dollar question we began tackling in the most recent jury tip and will continue to explain this month, so if you missed it, make sure to read it and email me if you can't get your hands on a copy.

In short, the answer was that many jurors have a wildly different definition of "negligence" than you do, sometimes unintentionally (because they misunderstand the jury instructions) and sometimes on purpose (because they disregard the jury instructions). The last jury tip addressed the ways in which jurors' decisions about negligence are influenced by their feelings about the intent of the defendants. But another way in which jurors subvert the legal definition involves the jurors' philosophical attitudes about the obligations and minimum responsibilities of defendants... put another way, the difference between what people and companies are "required" to do versus what they should (but don't have to) do.

Many if not most jurors have funny attitudes about rules, policies, standards, and requirements. When some jurors have to decide whether a defendant was negligent, their instinct is to decide negligence solely and stubbornly by searching for "the rules"-- perhaps a written policy or a minimum industry standard-- without caring if following only those minimum rules was dangerous or negligent. These jurors care only about whether the defendant was in compliance, because these jurors believe that people and companies have only one obligation: to meet some posted, minimum requirement, and nothing more. These jurors cannot and will not find a defendant negligent if the defendant followed every written policy or procedure or met some minimum industry or government standard, no matter how dangerous a product or practice might be.

Smart defense counsel should look to keep these "minimum requirement" jurors and build their case around the defendant following the rules and the posted requirements. Smart plaintiff counsel need to identify and get rid of these jurors if the case involves red-herring policies and requirements. A plaintiff can argue all trial long about how unsafe, irresponsible, and even illegal a defendant's practices or policies were, but to these jurors, those things are irrelevant. Shocking but true: some jurors believe that companies are allowed to be unsafe, irresponsible, or even do things that are technically at odds with the law, as long as there are official "rules" that the defendant is following.

In mock trials, I have heard hundreds of mock jurors make arguments along the lines of "it doesn't matter if the company's policy violates the law, companies have the right to make their own policies, and they can't be liable if they followed their own policies." Similarly, I've heard scores of mock jurors argue things like "it doesn't matter if the product was defective, as long as the manufacturer met the minimum government standard, they can't be legally responsible... that's all they have to do, legally speaking." In one mock jury, I remember several of the mock jurors telling me that even though they found a defendant's policy (that a dangerous mountain roadway's railings must be

replaced within 8 days) to be incredibly dangerous and irresponsible, they believed that the defendant was not negligent because the plaintiff drove over a cliff without a railing 7 days after the railing was removed.

But there's another group of jurors who define negligence a completely different, but equally artificial way: by wanting to know what other people and companies are doing, and by comparing defendant's practices and conduct to what is "common." To these jurors, negligence is defined not as doing something objectively dangerous or unlawful or irresponsible, but as doing something MORE dangerous or unlawful or irresponsible than everyone else.

Said another way, some jurors believe that a practice is not negligent if "everyone else is doing it." If you've ever discussed the use of performance enhancing drugs with sports fans, or aggressive tax write-offs with an accountant, or aggressive business practices with a cynical business person, you've probably found that there are some people who are quick to excuse and justify rule-breaking if "everyone else is doing it." When people with these attitudes serve on juries, they will impose the same beliefs they have about Lance Armstrong, Barry Bonds, companies cooking the books, or insider trading on your defendant: to excuse it if they perceive it as "common" and to condemn it if they perceive it as "crossing the line." And to these jurors, that "line" has nothing to do with the objective law and everything to do with what they perceive others to be doing.

During jury selection, you'll want to identify who these jurors are and, more importantly, figure out where their "line" is, meaning what they perceive to be "common" and "acceptable" in the environment your trial involves. Do they believe that many or most drivers exceed the speed limit? That many or most companies spy on the competition or poach employees to get trade secrets? That many or most hospitals are too understaffed to give exceptional care to patients? The negligence of the similarly-situated shouldn't matter, but it does when certain types of jurors assess negligence of a single defendant. In a number of financial fraud mock trials, I've seen deliberating mock jurors excusing certain business practices they acknowledged were illegal because "lots of companies do that" but finding liability for other illegal practices because they "crossed the line of what most companies do." I remember one mock juror excusing under-the-table payments and spending company money on personal purchases as "widespread" but condemning equally illegal practices simply because "I haven't seen an executive do that before."

So you need to understand that some jurors-- cynical, jaded ones-- will draw the line between negligence and acceptable in a different spot than the law draws it. Knowing this, it is critical not only that you identify which jurors are cynical, but that you incorporate their expectations into how you present your case. Plaintiff lawyers need to show cynical jurors that this particular defendant's conduct isn't just unlawful, but also beyond what "most" companies or "responsible people" do. Defense lawyers would benefit from picking jurors who have seen the same kind of practices in the community or business world, or to find ways (through witnesses or experts) to demonstrate that it's widespread and not uncommon.

As always, a smart trial lawyer needs to tailor their case to what matters to the jury, not simply what matters to the letter of the law. And to many jurors, the "rules" and the "norm" matter much more than an objective analysis of negligence.

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