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May 2014 Jury Tip: "Your juror's definitions of negligence"

Why do juries so often give frustrating, confusing verdicts that you didn't expect and struggle to make sense of? I hear some variation of this question from lawyers all the time. Or sometimes not in the form of a question, but a statement like "jury selection is a crapshoot, jurors are crazy and unpredictable."

To help answer this question-- why do jurors make such seemingly unpredictable decisions?-- I'll ask you a question: How do you define negligence?

As trained lawyers whose work revolves around the issue of negligence and liability, your answers would be absolutely correct and match the instructions given by judges to juries in courtrooms across the country. How you view negligence is the same definition of negligence your jurors are instructed to follow. But if you could put a camera in the deliberation room, or if you talk to jurors candidly after their verdict has been reached, or if you've ever watched a mock jury deliberate (even after being read the proper jury instructions), you would quickly find that many of our jurors have a starkly different definition of negligence than the proper, legal definition.

And here's the answer to the original question, which should really be "why do lawyers have a hard time predicting what jurors will do?" Your jurors have a different definition of negligence than you do. Jurors aren't answering the same questions that you, and the court, have instructed them to answer. Sometimes it's because jurors are honestly confused, believing that their definition of negligence is the proper one. And sometimes it's because your jurors are willfully substituting their own definition of right and wrong for the court's because they believe that their definition is better at enforcing their own sense of justice. So until our court system starts putting video cameras in deliberation rooms, you'll be better off adapting your case to your jurors' definition of negligence instead of ordering your jurors to follow the law.

So how do jurors define negligence? Having interviewed tens of thousands of real and mock jurors over the years, I've heard a handful of specific opinions pop up again and again, one that will thrill plaintiff lawyers and another that will thrill defense counsel.

Many jurors will tell you that negligence is intentionally doing something harmful or wrong. One mock juror in a medical malpractice case told me "doctors make dumb mistakes and commit malpractice all the time, but that doesn't mean they're negligent, as long as they were trying to help the patient." To many jurors, an honest mistake without intent is NOT negligence. This attitude puts a seemingly difficult burden on plaintiffs... seemingly.

When I was interviewing actual jurors after a plaintiff's verdict in a product liability trial, I found that many of the jurors hadn't thought about causation, but based their decision on the feeling that "the company doesn't CARE about the safety of its customers," and this is a point-of-view I hear all the time. Many jurors believe that negligence means not doing your best, not "caring" enough about customers or patients or employees or business partners, as if defendants owe a fiduciary duty to plaintiffs in every kind of civil trial. This attitude puts a seemingly unfair burden on defendants... seemingly.

But think about these two attitudes together for a moment. Both are essentially different ways of looking at the same philosophy: that the intent of the defendant matters. To jurors, intent matters enormously and bleeds past punitive damages into how jurors view liability, compensatory damages, and the entire trial. Jurors want to blame defendants that don't seem to care, but they don't want to blame defendants who didn't mean to harm the plaintiff. It's the same way of thinking, but can benefit either side depending on how the issue is framed for jurors by the lawyers.

On the plaintiff side, you have the additional burden but also the tremendous opportunity to convince jurors that your defendant "chose" to do something careless, that carelessness is a choice, not an honest mistake. On the defense side, you'll be in trouble unless you can show your jurors that your defendant cared about doing the right thing. Show the jury all of the efforts and precautions your defendant took to do the right thing, so that your jurors believe that the defendant at least cared, and at worst harmed the plaintiff by an honest mistake.

And even though it may not be legally relevant to liability, your jurors are absolutely persuaded by whether or not the defendant seems to care now, after the plaintiff's injury. Jurors award far less in damages when they believe that a defendant is sorry, has learned its lesson, and has made efforts to fix the problem. Defendants often worry, for example, that recalling a product or making a change will be interpreted as a sign of liability-- "if the product was safe, why did they change it right after the injury?"-- but in my experience, making fixes and changes reduces juror anger and damages. Yet few things get jurors angrier and awarding higher damages (compensatory too, not just punitives) than when plaintiff's counsel can show the jury that the defendant still doesn't care, hasn't learned its lesson, is still doing the same thing, hasn't changed, and is defiant.

That's it for this month, but in the next tip, we'll continue on this subject and talk about two more juror definitions of negligence, again mirror images of one another: negligence defined by the minimum standards and requirements, and negligence defined by comparing conduct to what is "common" or "uncommon."

Harry Plotkin is a jury consultant in Los Angeles but practices nationwide. Mr. Plotkin specializes in jury research, assisting trial attorneys in jury selection, and developing persuasive trial themes and opening statements.