

**August 2011 Jury Tip: “Why some jurors are trusting, and others are skeptical”**

“Will your jurors give you the benefit of the doubt, or just the doubt?”

Have you ever noticed that some people you know are naturally trusting? Some might call them gullible or naïve, but trusting people always seem to give you the benefit of the doubt. They immediately believe you, and you don’t have to waste time proving yourself to them. When they buy cars, these are the people happily paying full sticker price.

On the other hand, do you know some people who are naturally skeptical? Some might call them stubborn or cynical, but skeptical people never seem to believe anything at first. They won’t believe you until you’ve proven yourself, and they still might not even after you have. These are the people who think that no one tells the full truth, that “statistics lie,” and who call the trusting people “gullible” and “naïve.” When they buy cars, these are the people who believe the numbers on the dealer’s invoice are exaggerated.

A recurring message of mine is the lesson that your jurors’ beliefs will always triumph over the evidence. Jurors are just as likely to misinterpret evidence to suit what they already believe, or to manufacture their own “evidence” based on pure speculation, as they are to accept evidence at face value. And when evidence is presented to a jury, each jurors’ unique, personal level of trust or skepticism often explains why some jurors naturally accept speculative evidence, and why others instinctively reject well-supported claims and damages. Nothing a jury does is ever unpredictable or random, because there is always underlying psychology explaining the judgments and decisions that jurors make.

Because I watch so many mock deliberations and talk to so many real and mock jurors after trial, I observe and study illogical trust and illogical doubt all the time. In every trial, I expect and anticipate illogical trust and doubt and plan for it when I develop trial themes and ways to corral juror decision-making. It’s one of the reasons I often call myself an “expert in jury misconduct,” because a good jury consultant knows the real ways that jurors are going to think about and decide cases, which always departs from the evidence and the jury instructions. So that you can better understand the “illogical trust” and “illogical doubt” that you’ll have to deal with in every trial, think about two actual examples from recent mock trials of mine.

In a personal injury mock trial recently, one of the mock jurors insisted that the future medical expenses the plaintiff’s lawyer had asked for should be doubled. Her reasoning? “Those medical expenses will probably end up being much higher than they think now. Who knows what other injuries or complications [plaintiff] might have that we don’t know about?” The trusting juror convinced the rest of her panel to award MORE in future damages than the plaintiff’s own lawyer had asked for. This juror not only trusted the plaintiff’s evidence, she thought that a plaintiff in a lawsuit was being conservative

and modest when it came to money. When I talked to her after the deliberation, she had a number of reasons why she felt that way. She was thinking about the “percentage” that the plaintiff would have to pay his lawyer. She was thinking about the rising cost of health care over time. She was even assuming that—“like when you get a bid for your home from a contractor”—the estimated cost of future medical care was underestimated. And most telling, she believed that the plaintiff’s lawyer could probably only ask for future expenses he could prove, but not future medical expenses he couldn’t prove for sure were necessary. Having talked to thousands of real and mock jurors over the past decade, I can guarantee you that she’s not alone in thinking that way.

A week later, in a business mock trial, one of the mock jurors refused to award more than half of the lost profits the plaintiff was seeking. She didn’t have any evidentiary basis for wanting to cut their damages in half; the defense counsel had asked for much less, but never built an argument for half. In fact, the mock juror readily admitted that she agreed with the plaintiff on liability. So what was her reasoning? “Future damages are just speculative, ‘best-case scenario’ numbers. The [company]’s real damages are probably like half of that.” The skeptical jurors managed to force the other jurors to compromise and reduce their verdict to a number that didn’t align with the evidence in any way, simply because she felt that the future damage calculations were “speculative.”

Of course, she was right in a way—all future damages are speculative, by definition. But her assumption that an expert’s educated estimate “must be” exaggerated was an instinctive, unshakeable belief of hers that had nothing to do with how she felt about the evidence or the claims. When I talked to her after the deliberation, she insisted that she would “always” assume that damages are being inflated, in any lawsuit or dispute. Having talked to thousands of real and mock jurors over the past decade, I can guarantee you that she’s not alone in thinking that way.

So here is yet another dimension to add to your assessment of jurors, and your criteria when selecting a jury. How cynical and skeptical are your jurors, in general and in ways that relate to your damages? The level of instinctual trust or skepticism in each juror will go a long way in shaping and magnifying how much (or how little) money your jury will ultimately award in damages—no matter how they feel about liability.

Identifying these jurors isn’t particularly difficult, unless your judge restricts your time or the topics you can discuss in voir dire. Pick any topic—disability claims, worker’s compensation claims, and insurance claims are three that relate very well to lawsuit damages—and ask neutral, non-leading questions designed to get your jurors talking about what they instinctively ASSUME in unclear situations. I’ve seen many jurors tell my clients in voir dire that they think most people who claim to be disabled and unable to work are lying and could work if they really wanted to. Some jurors have even insisted that disabled people intentionally injure themselves to file claims and get paid for nothing. But I’ve also seen many jurors insist that anyone with a disability must be disabled, because they couldn’t imagine a person not wanting to work.

If you can talk about it, how your jurors feel about insurance claims is a window into how they view damages. Many jurors believe that most people who file insurance claims are “exaggerating to get more money than they deserve,” and they tend to feel the same way about plaintiffs. These are your textbook skeptical jurors, and they’ll automatically slice a plaintiff’s damages to account for “exaggeration,” no matter what the evidence says. But many jurors believe that most insurance companies will “do anything to get out of paying legitimate insurance claims,” and they tend to feel the same way about defendants.

Don’t confuse these attitudes with juror attitudes about the burden of proof—innate trust and innate doubt have nothing to do with weighing the evidence and needing to feel that something has been “proven.” Trusting jurors don’t give litigants and evidence the benefit of the doubt because it has overcome some sense of preponderance. Trusting jurors simply trust what people have to say, even in lawsuits. Skeptical jurors don’t draw the conclusion that a plaintiff’s damages are exaggerated after careful thought about how much has been proven. Skeptical jurors have the unshakable feeling that everyone exaggerates when they have an opportunity, and that the truth is usually a fraction of what someone says it is.

And because these traits are instinctual attitudes instead of conscious, rational processes, dealing with trusting and skeptical jurors is almost entirely a jury selection issue. You cannot convince a hyper-skeptical juror that your damages aren’t inflated, just like you cannot convince a hyper-trusting juror that they can only award damages in evidence. Before your next jury, make sure to think about any issues where you might benefit from your jurors giving you the benefit of the doubt—or from jurors refusing to accept your opposing counsel’s evidence at face value.

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