

**November 2008 Jury Tip: “Why anxiety can overwhelm your jurors”**

Last month I discussed the technique of normalization during voir dire. Convincing your jurors that they make the same mistakes they are tempted to criticize your client for is often the only way to prevent your jurors from unreasonably blaming your litigant. Unfortunately, not every juror is ready and willing to admit to making dangerous mistakes. In certain types of troubling cases, attempts to normalize jurors will often meet with resistance from jurors who may not want to admit that they make mistakes, can be careless, put themselves in vulnerable positions, and might have been an injured plaintiff or a guilty defendant but for the grace of good luck.

This month, let’s discuss the psychological forces that pressure jurors into convincing themselves that they would never have made the same decisions your client did.

Most of us have little problem imagining ourselves in relatively harmless situations, even situations that bring some people to court. Imagining the possibility of getting into a minor car accident, suffering property damage, having a contract broken (perhaps by a construction contractor or a business partner), or having to battle with an insurance company over a claim or a medical bill is aggravating, but not emotionally traumatic to most of us. Yet when we hear about especially dangerous situations in the news—a natural disaster that takes lives and destroys homes, a botched and fatal mistake in surgery, a financial scam that leaves its victims bankrupt and without recourse, or a violent crime—many of us distance ourselves from imagining that the same could happen to us. It’s difficult to imagine personal tragedy, so many of us think of reasons why the same could NEVER happen to us. Realistic or not, it helps us sleep at night.

As jurors, we are no different. When jurors hear about litigants in troubling situations—a catastrophically-injured car crash victim, a bankrupt victim of financial fraud, a victim of a violent crime, or even an unfairly-persecuted company who fired a litigious employee—many of the jurors don’t want to internalize that trauma. Some jurors may be brave enough to empathize by imagining themselves in a similar situation, but many jurors struggle with the feelings of fear and discomfort.

For the most sensitive jurors on your panel, their natural reaction is to insulate themselves against fear that the same could happen to them. Searching for reasons (or nit-picking for excuses) why the same tragedies could never happen to them is the safest way to deal with anxiety. Never assume that your jurors will feel for a plaintiff simply because he or she has been a victim. Some jurors are so sensitive that they may be unable to empathize and will instead resort to alienating themselves from your client and your case to feel safe and secure. Jurors who fool themselves are insulators—not empathizers—who insulate themselves from anxiety by unreasonably denying their own vulnerability and finding ways to distance themselves from tragic plaintiffs, or even victimized defendants.

An example that's often used to describe juror insulation is the myth that all (or even most) female jurors are supportive of female plaintiffs in sexual harassment trials. In reality, many jurors are so troubled by sexual harassment that they convince themselves that they would have been able to prevent or deter the harassment that a plaintiff faced. A large share of mock jurors—and actual jurors—I have spoken with after deliberations have told me that plaintiffs/victims of harassment should themselves be blamed because of their dress or workplace demeanor, because they failed to immediately stand up for themselves, because they stood up for themselves too aggressively, because they didn't go to human resources or a supervisor, or because they 'tattled' to HR or a supervisor too quickly instead of dealing with it face-to-face. For troubled jurors seeking to insulate themselves from anxiety, all roads lead to criticism. The jurors aren't necessarily dealing with the issues and the evidence because they aren't necessarily being honest with themselves, but it's important to recognize that empathy isn't always the response that wins out.

The next time your jury trial involves issues that jurors might find troubling, traumatic, or downright frightening, convince yourself that your jurors may NOT automatically empathize with the victim of harm. No matter what the evidence suggests, don't underestimate the psychological power of fear and the insulation instinct. Just because the evidence shows that your client was reasonable and shouldn't be blamed (or assessed comparative negligence) for their own harms doesn't mean your jurors won't feel compelled to search for (and manufacture) their own reasons. Even in the absence of defense evidence, I have seen jurors convince themselves that the plaintiff must have done SOMETHING wrong to have been involved in catastrophic auto accidents, even if the plaintiff has presented persuasive evidence of dangerous road conditions, the fault of other drivers, or otherwise.

Many jurors can't face the possibility that, even if one is careful and makes all the right decisions, no one is perfectly safe from injury, death, or catastrophe. If you aren't convinced, ask your jurors in your next voir dire whether anyone believes that being careful and defensive can guarantee that any driver avoid and prevent ANY car accident, no matter how dangerous another driver may be or what the road conditions are. A handful of jurors will agree. They will insist, if you are careful enough, you can maneuver around any driver. They will argue that, even if there's a sheet of slippery ice on the road, you should be able to select a speed slow enough to maintain traction; if you slip at any speed, you were going too fast and were driving recklessly.

If this is what you hear in voir dire—and I do on a weekly basis—your best method of dealing with insulators is to identify the worst of the bunch in jury selection. Ask your jurors questions about the issues at stake—whether it's driving, navigating the employment world, handling finances, avoiding crime, etc.—and ask them what precautions they take. Ask them if they feel able to avoid harm, and how secure they feel. Ask them if they believe that victims are careless, and ask them questions designed to elicit criticism about how some people may handle the situation the wrong way. You'll obviously hear some fair criticism from reasonable jurors, but try searching for unfair, unwarranted, unreasonable criticism that belies too much anxiety from that juror.

Insulators are those jurors who tell you that they have read the instruction manual of every product they've ever used, that they give their brakes and engine a thorough inspection every time they drive (even rental cars), and that won't hire a doctor/painter/plumber/lawyer/babysitter without taking great pains to ensure their integrity.

Unfortunately, the worst way to identify insulators in voir dire is to ask jurors if they might be troubled or emotionally upset by a case and would have difficulty hearing troubling evidence as a juror. If a juror is willing to admit being troubled, they are more likely in fact to be honest with themselves about their fears and an empathetic juror.

Once your jury has been selected, you should assume that even your most receptive jurors may struggle with the instinct to insulate themselves. Your best way of easing juror anxiety and making your jurors comfortable facing troubling issues is to convince them that they have a powerful opportunity to make their own environment (and by extension, themselves) safer with the verdict you are requesting.

Make sure that your theme of making the world a safer place doesn't fall on deaf ears, though. During voir dire, make sure to ask your jurors if they believe that verdicts make a difference, because cynical jurors won't be receptive to this theme. Jurors who believe that plaintiff verdicts force corporations to treat employees more fairly or make products safer for consumers are much more likely to set aside their fears when they feel empowered to make the world a safer, fairer place. Cynical jurors who tell you that corporations respond to lawsuits and damages by raising prices or slashing employee wages and benefits are much more likely to insulate themselves during trial.

Rehabilitating insulators is nearly impossible; believe me, I've seen the best attorneys in the country try with the best evidence, and I've tried myself in post-deliberation discussions. No matter what evidence you use to refute their manufactured criticisms, they will replace them with an endless supply of reasons why the victim was at fault. Rather than waging an unwinnable war, remove the worst insulators on your panel, and focus on winning over the empathetic jurors. Although they may be fearful and have an urge to insulate themselves, be upfront and address the blame-game issues early in your opening statement. Showing your jurors that you too first considered whether your client was at fault, demonstrate why their actions were reasonable, and make it clear that your client only pointed the finger when it became clear that NOTHING could have prevented the defendant from harming your plaintiff... or that nothing your defendant did could have stopped your plaintiff from filing a lawsuit.

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