

5055 Oakwood Avenue
La Canada, CA 91011
Los Angeles and Nationwide

HARRY PLOTKIN

JURY CONSULTANT

(626) 975-4457
YourNextJury.com
harry@yournextjury.com

January 2017 Jury Tip: “Why every verdict includes punitive damages”

Have you ever seen a civil jury award cents on the dollar to a plaintiff with large, easily-calculable economic damages... despite finding liability? Or seen a civil jury award a huge, non-economic verdict to a plaintiff that dwarfs their economic losses? When you watch (mock) jurors deliberate as often as I do—or discuss reasons for verdicts with real jurors after trial and with mock jurors during focus groups—you become aware that assessing a plaintiff’s proven harms and losses is often the least important part of a jury’s process for deciding the size of a verdict. There are a lot of factors that matter much more to jurors, none of which are in the jury instructions or supported by the law.

So what really drives civil verdicts up or down? When they’re awarding compensation, jurors make two different decisions. Yes, they do figure out how much a plaintiff has lost. But that’s not the end of their process. Just because they determine that a plaintiff has lost \$1 million doesn’t mean the jurors will award it. Next, the jurors (sometimes consciously, but sometimes subconsciously) decide how much a defendant should deserve to pay for whatever they did. And here’s where they factor in a lot of considerations the law doesn’t allow. The defendant’s intent matters; was this just an honest mistake, or callous disregard? The defendant’s remorse matters; does the defendant genuinely feel bad? Have they tried to fix the problem? Are they trying to be reasonable, or are they stubbornly defending their mistakes in trial? The defendant’s character matters. The defendant’s welfare matters; will a verdict have a negative impact on something the jurors find important, like a children’s school or a church’s mission? Will innocent employees or important programs or the community be negatively affected? If the defendant is a public entity, are tax dollars at stake? I can’t count how many times I’ve seen jurors raise these concerns in voir dire and in mock deliberations. Even the attitude of the defendant’s lawyer matters, and it matters a heck of a lot to jurors, believe me. Is their lawyer expressing sympathy, being appropriately contrite, and being reasonable... or are they trying to excuse bad behavior?

So when jurors decide how much of the bill they feel the defendant deserves to pay, the verdict gets adjusted. When jurors don’t think the defendant deserves to have to pay a lot, the plaintiff gets a fraction of their real compensation. When jurors think the defendant fairly deserves to pay, the plaintiff gets all of their losses. And sometimes, when jurors are truly appalled by a defendant, the compensatory verdict includes an element of punitive damages... and the jurors award a verdict that’s much higher than their assessment of the plaintiff’s real losses. Don’t think it’s true? I have seen multiple juries tell the trial judge that “we’ve already factored in punitive damages” when they were told a punitive phase was coming next. Imagine how many juries keep quiet about including punitive damages... or avoid the issue by including punitives without formally finding malice in their verdict. The reality is that punitive damages are an element of most civil verdicts, even when they are “negative” punitives in which the defendant gets a discount on damages.

So let's wrap up by discussing those things that really matter to jurors when they calculate damages, because a savvy lawyer needs to do more than just prove or disprove liability and damages. A savvy plaintiff lawyer needs to show that the defendant simply doesn't care about safety or fairness or the rules. A savvy defense lawyer needs to show jurors that the defendant does care, wants to do the right thing, and at worst made an honest mistake.

Intentions matter. Jurors award far less money when they feel that the defendant made an "honest mistake" and "didn't mean to" be negligent, or breach a contract, or cut the wrong artery or copy a competitor's product or patent.

Responsibility and conscience matters. Jurors award far less money when they feel that the defendant truly cares (about their customers, or safety, or treating employees fairly, or following standards, or whatever). Jurors award huge amounts of money when they believe that defendants (corporations especially) don't care at all about others.

Apologies and contrition matter. No matter what a defendant has done to harm a plaintiff, jurors award far less money when the defendant, even though it's after the fact, expresses sympathy and remorse and finds a genuine way to apologize. Jurors award even less when they feel that the defendant has done something to "fix" the problem. Jurors award so much more in their compensatory verdicts when they feel that the defendant is being defiant. How else can you explain the very real phenomena that civil verdict awards (only when liability is found, obviously) tend to be much lower when liability is admitted and exponentially higher when liability is disputed in trial? Part of the reason is that admitting liability seems so responsible to jurors. But the bigger reason is that when jurors don't hear WHAT a defendant did wrong, they don't get upset.

Sympathy for the defendant's welfare matters. Jurors do think about the impact of a large verdict. They worry about putting a company out of business, whenever the defendant isn't a huge corporation they've heard of before. They worry about its employees. They worry about the impact on important programs, especially if the defendant is an organization that does good things, like schools or churches or non-profits. They worry about their own pocketbooks: will a verdict raise insurance rates or prices or taxes somehow?

History matters. I constantly hear mock jurors ask if this defendant has done this before. "Has this driver gotten a DUI/been in a crash before? Has this company fired other women? Has anyone else slipped and fallen on their stairs?" Jurors award far less money when this was the first time a defendant did something, no matter how awful... but will be harsh if they hear it's a second or third strike.

No matter how strongly a trial judge demands that jurors follow the jury instructions and the law—or how conscientious a juror tries to be—the reality is that every juror is influenced by their own sense of justice and fairness. In the real world, jurors care most about what people or companies "deserve," so make sure that you put on your cases accordingly.