

THE NEW ABC'S OF PRODUCT DEFENSE: A LARGE-SCALE ONLINE MOCK TRIAL EXPERIMENT SHEDS LIGHT ON THE PRACTICAL NEEDS OF MANUFACTURERS IN LITIGATION

BY KEN BRODA-BAHM

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The public's attitudes toward products liability is one critical juncture where the world of litigation intersects with the public's daily relationship to products. For many reasons, it is a good time to take a look at the persuasive demands of product liability litigation. Public attitudes toward companies and lawsuits continue to evolve. High profile cases involving Toyota, Chinese dry wall, tobacco, pharmaceuticals and a host of others continue to move forward. More importantly, the Consumer Products Safety Commission has recently unveiled SaferProducts.gov, a new publicly searchable database that is widely expected to increase companies' exposure to products liability lawsuits. In that context, conducted research focusing not only on what people say about products issues (a survey) but, also on what they do in response to a realistic products defense case (an experiment).

As part of a program of annual national research projects extending over the past eight years, Persuasion Strategies has relied on data collected from a national random sample of 4,291 juror-eligible Americans, as well as the results of an online experiment involving 1,375 mock jurors. In late 2010 and early 2011, jury-qualified and demographically diverse participants completed a short attitudinal questionnaire, then viewed forty minutes of video-recorded summary arguments from a plaintiff and a defendant in a products liability suit, and finally rendered a decision. We were able to capture their demographics, experiences and attitudes going in, as well as their verdicts and comments coming out.

The case involved a fictionalized but realistic case of a 16-year-old boy who was brain injured after a baseball that he pitched was hit back toward him by an aluminum alloy bat at an unexpectedly high rate of speed. The plaintiffs' claim that the bat was unreasonably dangerous because its design

and manufacture made it possible for the bat to meet testing standards while still hitting the ball at greater speeds than those associated with wood bats or other aluminum bats. This danger, the plaintiffs claimed, caused batted ball speeds that exceeded a player's ability to either catch or get out of the way of the batted ball. In its defense, the manufacturer claims that scientific testing shows the bat to be comparable to other wood and metal bats, and contends that the same injury could have been produced by a ball coming off any bat. The company also claims that there were other causal factors (including a vulnerable pitching position, and a banner behind home plate that reduced the visibility of the ball), as well as exaggerated damages. After hearing from the attorneys, the mock jurors split 55 percent in favor of the plaintiffs and 45 percent in favor of the defendant.

While every case has its own nuances, there are several elements to the plaintiffs' claims that tend to cut across product cases: a tragic injury, preventability in hindsight, attempts to work around regulations, dishonest communication, self-serving product testing, and multiple causation. What we learned from this study, as well as from our other research and experience, tells us a great deal about the juror characteristics, evidence traits, and argument strategies that determine success or failure in products litigation.

Taken together, the survey and experimental data helps to shed some new light on some common concerns. Here is my own alphabetic take on the product liability lessons that stand out the most:

- Anticipate the Limits of Personal Responsibility
- Bolster Your Credibility with Open and Transparent Product Testing
- Create and Highlight Product Warnings and Other Claims That Inform
- Defend Your Honesty As Much As Your Product
- Evaluate Potential Jurors to Discover Unalterable Bias

"A" is for "Anticipate the Limits of Personal Responsibility"



To take one example, the phenomena of 'unintended vehicle acceleration' was for many years treated as a simple problem of driver error. Step on the gas instead of the brake, and you have no one to blame but yourself. But that view changed with the number of lawsuits filed against Toyota and other auto manufacturers. While it remains to be seen whether that view will shift back based on the results of a Department of Transportation study finding no electronics-based cause for the accidents, the discussion does show how swiftly a frame of individual responsibility can be replaced by a narrative of corporate irresponsibility when personal choices come to matter less than company decisions.

In many cases, however, jurors have stuck with a personal responsibility focus, and have viewed the case through the coffee-stained lens of the *Liebeck v. McDonald's Restaurants* spill case. Over the years, juries have sent the message that it is the individual's responsibility to protect themselves from possible poisoning from Botox injections, collapsing stepladders, and tire tread detachment. There are

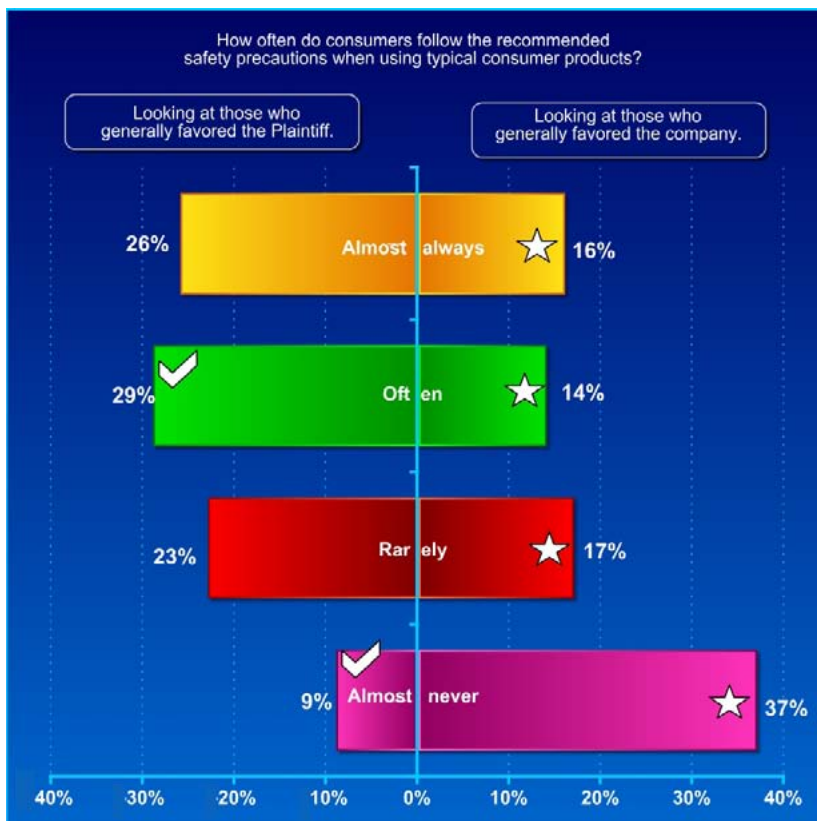
strong reasons to believe that this is a self-protective tendency: Jurors can avoid the discomfort of feeling personally at risk by believing that the injured party brought it on themselves somehow.

Our own survey supports this tendency to gravitate toward personal responsibility. When asked to assign responsibility in a

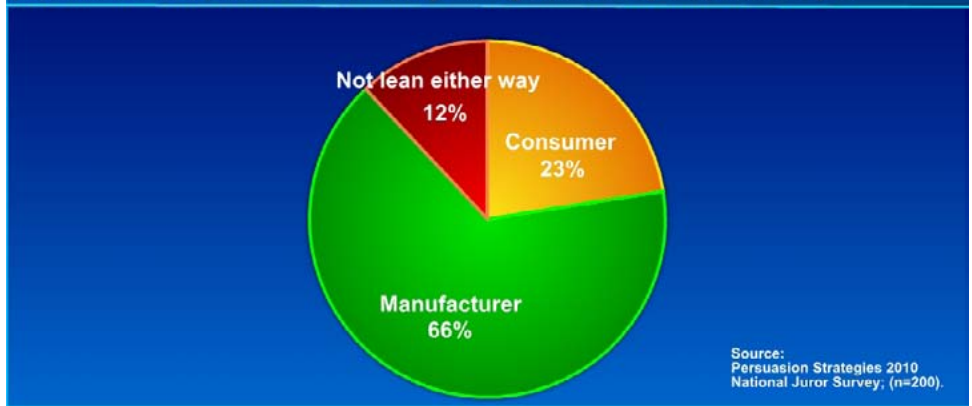
situation where a product user followed some but not all of the listed safety precautions, two-thirds of respondents would favor the manufacturer.

When responding to a particular case, jurors' expectations about personal responsibility will also play a very strong role. It helps to ask in voir dire, for example, for potential jurors' opinions on whether consumers "often" or "rarely" tend to follow recommended safety precautions. In our research project, the answers were statistically significant predictors of which side they would favor.

As the chart indicates, those who believe consumers "often" follow recommended safety precautions are more likely to generally favor the plaintiff than those who think consumers "almost never" follow recommended safety precautions. This is in spite of the fact that in our batted ball case, there was no issue of a failure to follow a warning. Instead, it is a simpler dynamic. Those who focus strongly on the burden to exercise personal responsibility, and feel that the burden is often unmet, are



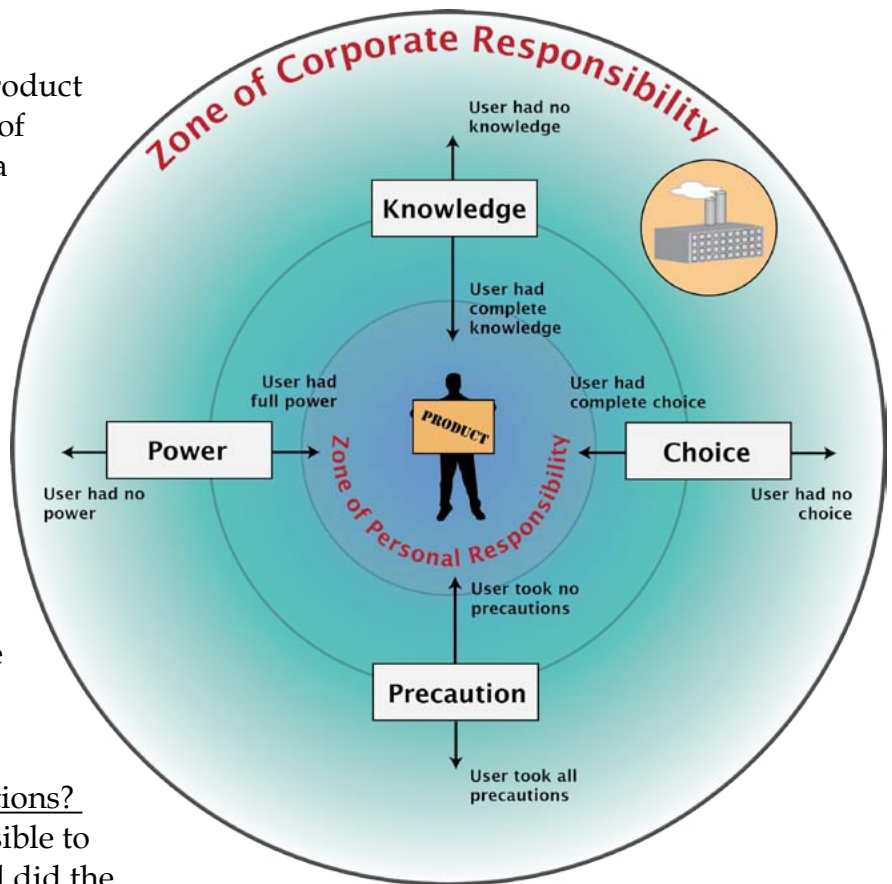
A consumer bought a product from a company and experienced a severe injury when using the product, and is now suing the company. The consumer followed some but not all of the safety precautions on the product label. Knowing nothing else, would you be more likely to:



also likely to start with the presumption that consumers are responsible for their own misfortunes.

Still, it is worth noting that many – including a majority in our experiment – will ultimately favor the consumer. In the earlier chart, one in five would still favor the consumer even where the consumer failed to take all precautions. That is because precaution is not the only factor at play. While the pull of personal responsibility is strong, it isn't automatic, and defense attorneys should not exaggerate the power of jurors' tendency to emphasize personal responsibility at an individual level. Our research has shown that there are four factors that tend to determine whether it is the responsibility of the individual or the corporation that will hold greater salience.

1. Who has the most power? Is the product user able to control the conditions of use, or are these conditions set by a manufacturer?
2. Who has the greater knowledge? Is the product user fully informed, or is some information known only by the manufacturer?
3. Who exercises the most choice? When looking at the sum total of choices leading up to the adverse event, were those choices made by the ultimate user, or were those choices made earlier by a manufacturer?
4. Who takes the appropriate precautions? Did consumers do everything possible to protect themselves from harm, and did the manufacturer do everything possible to protect themselves from lawsuits?



Naturally, this is a general list and it will apply differently in every products liability case scenario. What remains constant is plaintiffs will use these four levers to push responsibility toward the outside of the circle, toward greater corporate responsibility, while defendants will want to make use of the same basic tools to try to draw the responsibility in toward the center, into the zone of personal responsibility.

“B” is for “Bolster Your Credibility with Open and Transparent Product Testing”

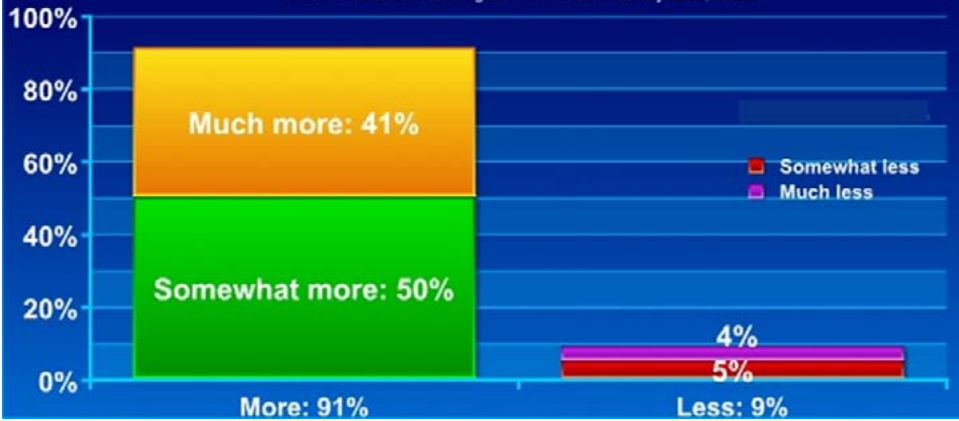


From exploding automobile gas tanks to faulty cribs, the history of jury verdicts is littered with cautionary tales of what can happen when a company fails the perceptual test of protecting its customers, investigating dangers known and unknown, and ultimately standing behind its product. The company that manufactures or sells a product is either a good steward or a poor steward of the goods it brings to market, and jurors’ assessment of that will determine the company’s credibility and fault.

At a default level, the public supports rigorous testing. When asked in our most recent national survey, nine in ten supported “more” testing than is

How much testing should large corporations do before placing their products on the market?

Source: Persuasion Strategies National Juror Survey 2010; n=200



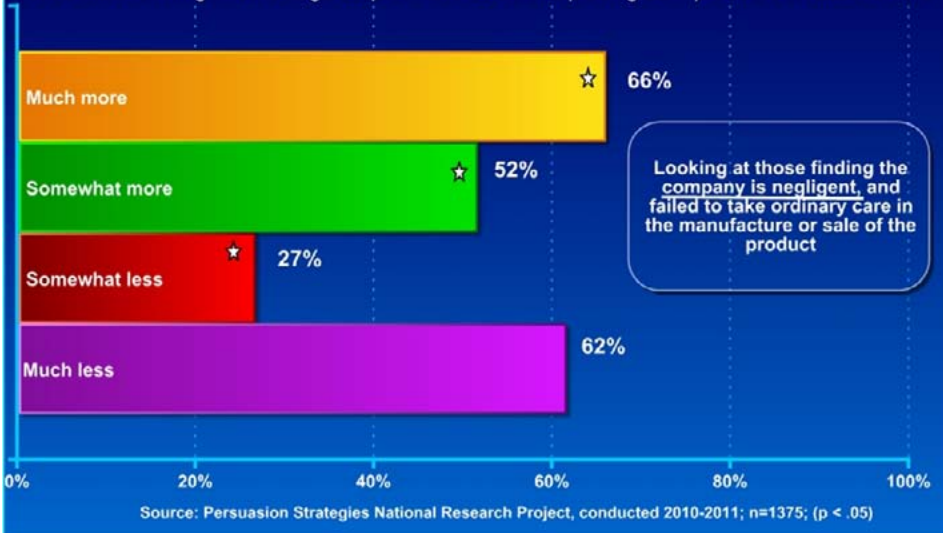
currently done, with four in ten calling for “much more.”

That attitude is easy to understand. If testing can discover and correct product dangers, then why not test? The more, the better! Despite the widespread nature of this belief, however, it remains a good idea to pay attention to those who are on the extremes of this call for greater testing. One thing we know about those who are

most likely to support more testing is that they are also more likely to support the Plaintiff. In our study, we found that those who indicated at the start of the project a support for “much more” or even “somewhat more” product testing, were significantly more likely to find negligence on the part of our company after hearing the attorneys’ presentations.

Those who think corporations should test their products much more are more likely to find the company negligent.

How much testing should large corporations do before placing their products on the market?



In our experimental research project involving the boy injured by the batted ball, testing played a particular role. Because the company was accused of running product tests, not to improve product safety, but to design around the applicable regulations, the issue of honesty played an important role, and was the biggest driver of comments by pro-plaintiff jurors (see “D” below). The important takeaway from this research is that *motive matters as much as method*. In other words, expect jurors to ask *why* you tested, and to look for signs

in the documents and the study protocols that give clues to that motive. If the test appears to be an open and transparent attempt to discover and address product dangers before the fact, then jurors may be more apt to forgive the one weakness that manages to slip through. However, if the reason for testing boils down to “CYA” or worse, then expect jurors to blame the company even for inevitable dangers that could not have been solved through greater testing.

Beyond the experiment, I recently interviewed some actual jurors who had completed their trial service, and they reminded me of four rules or themes that companies should use in order to, ideally, avoid litigation, but also to defend themselves should they find themselves the target of a lawsuit. The rules may boil down to common sense, but after all, that is exactly what makes them appealing to a jury. These are the four takeaways that stood out the most, along with some quotations from my notes:

1. *Know Your Product*

The company should have researched all possible dangers posed by a product. Armed with hindsight, jurors can be harsh: *"I think they were lazy... they did not do the research they should have done... they didn't steward their product."*

2. *Communicate Clearly*

Both internally, and externally, the company should clearly share what they know about the product. When they don't, the responsibility is lifted from the users' shoulders: *"They didn't talk to customers... nobody knew anything."*

3. *Take Proactive Measures*

The company should do more than simply react when it hears of problems. Instead, the company should take proactive steps to avoid dangers. In one case, jurors faulted a company for not specifically investigating use conditions after a large volume sale: *"I didn't see any desire to do follow-up."*

4. *The Measures You Take Should be Proportionate to the Danger Posed*

In the same case, jurors clearly appreciated the product: *"I think it is an amazing product,"* one said, and another called it a *"brilliant product."* But they also felt the product carried some obvious dangers when used incorrectly. As a result, *"their stewardship has to be stepped up a bit when you are dealing with something that is potentially dangerous."*

Jurors voicing these themes or similar could be found in virtually any case that involves an attack against a product or a service, and a successful litigant will take them to heart.

"C" is for "Create and Highlight Product Warnings and Other Claims That Inform"

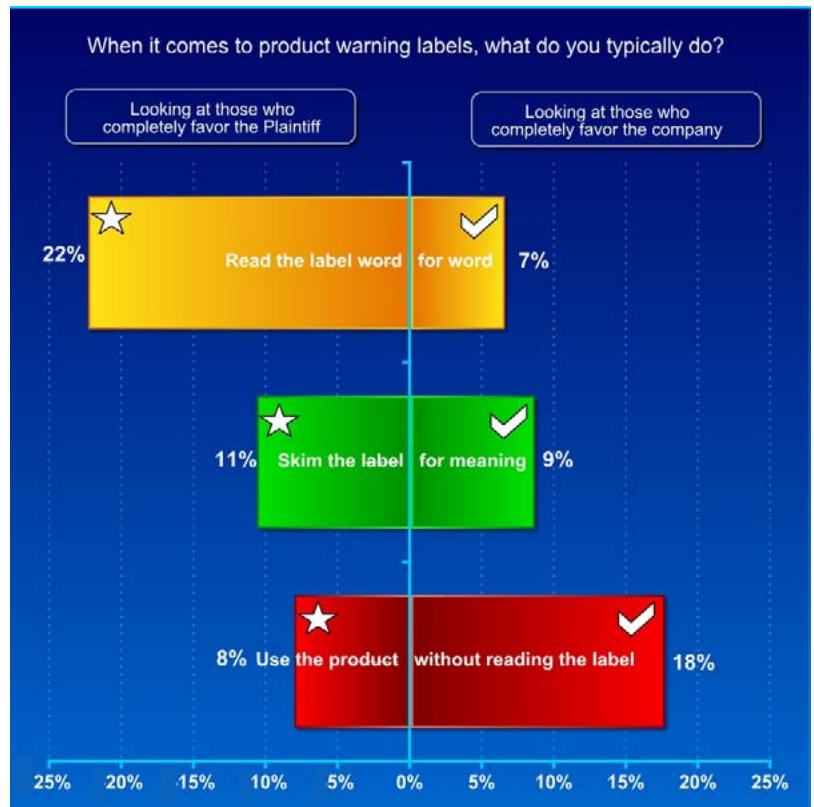


A warning that calls attention to a product's potential danger is obviously an important part of a company's litigation prevention and defense. But according to one recent statistic, a substantial portion of the public, and potential jury pool, may be a bit cynical on the question of whether warnings are designed to educate or just provide cover. In a 2010 Decision Analysis survey¹ on attitudes toward products liability litigation, fully 70 percent shared the belief that product warnings exist to protect companies in the event of lawsuits rather than to protect the public from product risks. On the bright side, that means that if "CYA" truly is your motivation for consumer warnings, you won't be violating jurors' already low expectations by admitting it. On the even brighter side, it means that if you can convincingly reframe your own company's warning in the broader terms of public education, you may end up surprising jurors and gaining an important measure of credibility in the process.

While jurors outside the context of a particular case tend to scoff at coffee cup warnings, once they become more knowledgeable about the dangers of a specific product, they are more apt to appreciate a need to warn clearly. As one juror in a recent post-trial interview said to me, you *"need to make it idiot proof,"* and as another said, *"there should be no question"* of how a product can be appropriately used.

In our mock trial experiment involving the batted ball, warning labels did not play a role (after all, it is hard to put a warning label on a baseball bat that is big enough for a pitcher to see it). However, attitudes toward product labels still played an important role.

As the chart indicates, even in response to a fact pattern that doesn't explicitly include label issues, those who say that they read product warnings word for word are more likely to favor the plaintiff, while those who merely skim the label for meaning or use the product without reading the label, are more likely to favor the company defendant. Why would we see that result? Again, it is probably due to the role of expectations surrounding consumer responsibility. Those who have idealized views of their own behavior, are likely to extend that view to other consumers, and to believe that consumers tend to take responsibility.



Thus, when a tragedy occurs, it is easier to blame the company. Those who, more realistically, acknowledge that they and other consumers often skip labels, are more likely to see a clear way that the consumer could have avoided the tragedy. They could have reviewed the labels.

But when it comes to product labels and related messages, they're not all created equally. The best consumer warnings should be oriented toward "FYI" -- information, and not just defense. So how do you develop and communicate a product warning that does that? A few ways:

1. Include warnings within the broader picture of necessary information. Try to steer your warning strategy away from the frightening list of dire consequences that seem to come during the next-to-last moments of televised drug commercials. Instead, provide a full spectrum of information, including product uses and answers to broader questions of how and when consumers should use the product. A warning in that context is more likely to be seen as effort toward education rather than making excuses.

2. Don't leave the printed warning as the lone voice. If a single printed product warning is the only time that you are talking about risks, then jurors can feel like you are just checking a box instead of trying to make sure that users genuinely understand potential problems. In a recent products mock trial, for example, we found that the number of defense-oriented jurors who said, "they warned - case closed," was exceeded by the number who said, "due to the danger involved, the company needed to take special efforts to make sure that the warning is read." In that case, it meant an expectation that the company would actually hold classes to make sure those who installed the products were aware of the revised precautions. In other words, when the risks are serious, jurors can expect a broad-spectrum effort, and not just a single warning.

3. Ensure that everyone, including your marketing and sales force, is consistent with the warning. Nothing can undermine the effectiveness of a clear no-nonsense warning as well as testimony showing that the sales force didn't know, didn't care, or consciously counseled buyers to ignore the warning. In the eyes of many jurors, even a single rogue salesperson can end up defeating the best product warning plans.

4. Make an educated public not only possible, but likely. When the end user has to work in order to locate and carefully unfold a list of product dangers, and then find a magnifying glass to access the unbroken field of 3-point font, it is easier for jurors to believe that the company didn't really expect that every user would inform them. Instead, ask yourself, "what if our mission wasn't just to sell the product, but to also try at the level of a true public information campaign, to make sure that the product was only used by the right people and in the right ways?" Some industries like tobacco and alcohol, have learned the hard way and embraced public information campaigns only after damage has been done. You will certainly have a better story to tell jurors if you can show that emphasis right out of the gate.

"D" is for "Defend Your Honesty As Much As Your Product"



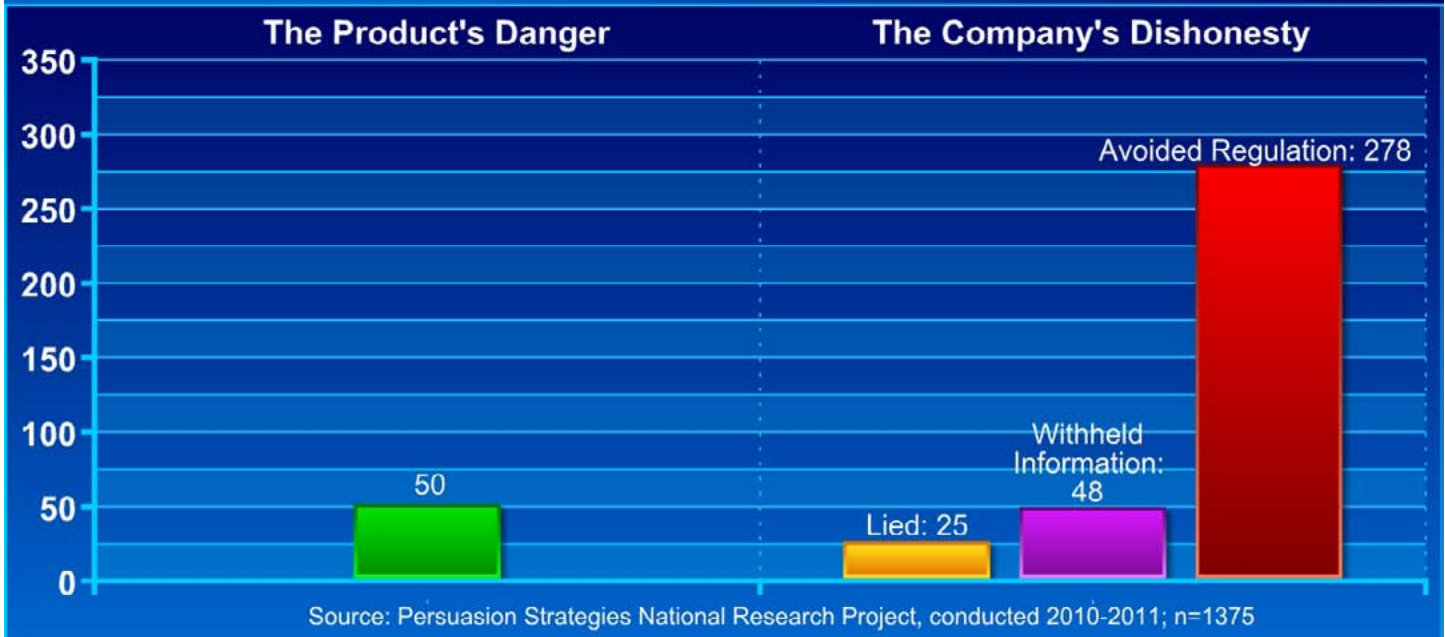
One stereotype of the litigious American society suggests that jurors are willing to hold manufacturers and sellers responsible for even the most obvious product dangers: a ladder that allows its user to fall, or a cup of coffee that turns out to be hot. While anecdotes abound -- some true, and some false -- our experience is that product danger alone rarely drives a verdict. Instead, jurors need to see something else in order to generate sufficient anger to deliver any sizeable verdict against the company. That 'something else' can be boiled down to one word: dishonesty. Jurors know that products are dangerous. They have no trouble placing personal responsibility on adults who knowingly use dangerous products. What they are less able to abide is incomplete information. Whether the company is failing to investigate, providing inadequate or false warnings, working around regulations, or simply withholding information, the jury is less willing to say "buyer and user beware" and more willing to put responsibility on manufacturers and sellers.

With ten of the top fifty verdicts² of last year coming from defective product suits, we do know that jurors are willing to hold manufacturers responsible. At the same time, the important ingredients that drive those damages are often found in the company's behavior rather than in the product itself. A good example can be found in attitudes and behaviors surrounding tobacco use. Based on the results of a pair of studies, the public is more likely to reject a 'deceptive' product than it is to reject a merely 'dangerous' product.

The first study, (Mazanov & Byrne, 2007),³ looking at the knowledge and beliefs of young Australians, found that smokers were actually significantly *more* aware of the risks of smoking than non-smokers. In that study, a greater awareness of danger didn't result in less use of the product. The second study, (Klesjes et al., 2009),⁴ found that what did in fact differentiate smokers from non-smokers was a belief that the company was misleading consumers. If study participants felt that tobacco companies had lied about the risks, that was a strong predictor that the individual was a non-smoker. In other words, while smokers may feel that they have an honest appreciation of the dangers of smoking, non-smokers believe that manufacturers are distorting or concealing information about those risks.

There is a parallel in tobacco litigation as well. The product has been known to be deadly for decades, yet tobacco litigation only became viable in the courtroom when attorneys were able to show that the companies had lied about the dangers and manipulated the addictiveness of the products.

Reasons for Pro-Plaintiff Products Liability Verdict



We have also found in our own experimental mock trial focusing on the batted ball case that deception matters more than danger. Among other things, we asked our mock jurors for a verdict as well as an open-ended reason for their decision. After analyzing the content of the responses, we found that comments relating to the danger of the product itself were not nearly as prevalent as comments relating to various forms of the company's deception.

In this particular fact pattern, the company was accused of knowingly making a sports product more dangerous, but what resonated with the mock jurors was the "knowingly" part. A smoking gun memorandum appeared to show the company's intent to design in a way that would enhance performance (and hence, possible risk) while still skirting the regulation. Jurors were also disturbed at the stated intent in this memorandum to keep the company's testing data to itself and not share it with the regulatory body. As noted in this chart of the reasons given by those favoring the Plaintiff, product dishonesty was mentioned seven times more often than product danger.

There is a clear takeaway for those who defend their products in litigation. Your goal is to fully steward your product, and that means not only making it as safe as possible, but also making sure that your communication about the product -- with sellers, with consumers, and with the government -- is as direct, complete, and honest as possible.

"E" is for "Evaluate Potential Jurors to Discover Unalterable Bias"

You can't reach everyone. Even if a company is dutifully following "A" through "D" above through appeals to its responsibility, thorough testing, clear warnings, and complete candor, there will still be jurors who are prone to find against a company. For that reason, an important part of your strategy at trial will still involve evaluating your venire in order to discover the attitudes and experiences that predict a more anti-company juror.



There are a number of factors that I've already discussed that would indicate a higher risk for company defendants in products liability suits:

- Those who believe that customers “often” follow product safety precautions;
- Those who believe that products should undergo “much more” testing;
- Those who say they read product warnings word for word.

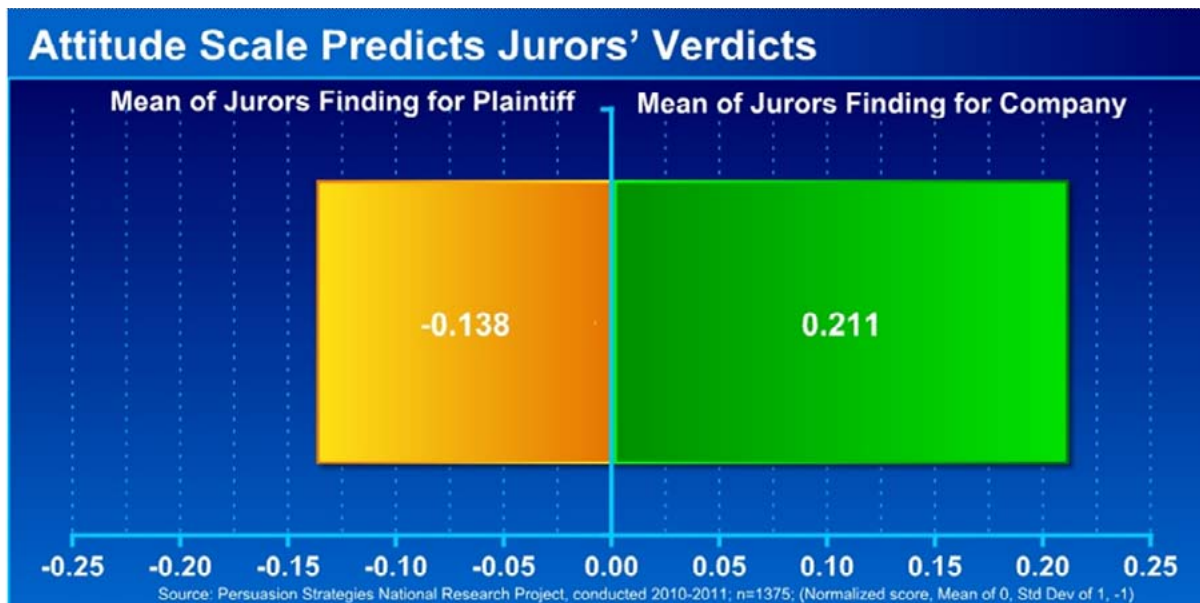
In addition, we found in our online experiment that some additional attitudinal factors were significant in predicting which mock jurors would decide in favor of the plaintiff at the end of the case. Individuals with the following attitudes would also be higher risk for product defendants:

- Those who would “definitely” pursue a lawsuit if they were injured by a product; and
- Those who believe that when an individual is injured while using a product, it is “generally,” or “almost always” the product’s fault.

Many of these attitudes stand to reason, of course, yet it can be surprising how often questions like these are not asked of potential jurors. Instead of relying on gut feelings or juror demographics, it helps to go straight to the source in asking potential jurors how they feel about the general issues that may bear on your case. While no judge will allow you to ask for potential jurors to prejudge the case, judges *should* allow questions that bear upon the consumer, product, or litigation attitudes which are likely to cut across all manufacturer liability cases.

Through our online experiment, we also discovered that one other factor was critical in identifying the most dangerous jurors for the product defendant: anti-corporate bias. While we gathered information on demographics and occupation and related facts about jurors, none of that was significant in predicting who would favor the plaintiff at the end of the case. Instead, the best predictor turned out to be anti-corporate bias, as measured by a custom scale that we’ve recently developed.

Relying on eight years of data collected from a national random sample of 4,291 juror-eligible Americans, as well as the results of our online experiment involving an additional 1,375 mock jurors, we have developed a scale consisting of a specific weighted combination of seven attitudes concerning corporations, government regulation, ethics, and lawsuits. When juror responses to this series of questions are collected, via a supplemental juror questionnaire or oral voir dire, and combined into



a single score, that score serves as a statistically significant and reliable predictor of juror leanings and verdicts on a wide variety of cases that pit an individual against a corporation, in the context of products liability cases, as well as in employment, intellectual property, contract, investor claims, and other 'individual versus company' litigation.

For example, in our mock trial experiment, we found that those with scores on the more anti-corporate end of the scale were significantly more likely to favor the plaintiff, find that party credible, and reach a plaintiffs' verdict on both liability and cause in the specific case.

In high stakes litigation in today's economic climate, those who defend product manufacturers need every tool to assess and persuade potential fact-finders. It makes sense to discover how your potential jurors stack up on both products related questions as well as this dimension of anti-corporate bias. These attitudes should form an important part of the overall picture you use to assess your venue and inform your strikes.

Closing Thoughts

In addition to the lessons for litigators mentioned above, the other takeaway we gained from this research project is a reminder of the benefits of testing a specific case with a larger sample size than you can typically get in mock trial research. Working with twenty-five to thirty jurors, you can definitely see some important factors that bear on your case preparation, but it is the exception rather than the rule that you actually see statistically significant findings on the specific factors that separate those who buy your arguments from those who don't. Working with a large data set, however, provides many more opportunities for analysis, and we are continuing to mine the results of our online mock trial experiment, along with our national survey data.

In the end, products liability cases are complicated because they implicate not only jurors' attitudes about companies and litigation, but also their more personal experiences with the products in their lives, along with their basic outlook toward personal responsibility. In that context, those who are working to defend product manufacturers and sellers in litigation need to make sure that they are relying not only on the strategies I've included in this article, but also on the full alphabet of legal persuasion.

Portions of this article have appeared in the author's blog, [Litigation Postscript](#).

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A Note From the Editor

Race, gender, tears, rage, damages, communication, economy and emotion!

You cannot run the gamut of topics anymore than that! And that's what we have for you in the May 2011 issue of The Jury Expert! As trial consultants, we see the good, the bad, and the ugly. We are privy to the secrets, the dysfunction, the illicit wishes and wants of the parties and the anger and frustration of both litigants and lawyers. And that results in work that is sometimes exhausting but always invigorating and interesting.

You may have expected a piece in this issue about the way our heroes fall and how jurors [and the general public] respond. We think that topic is way too predictable for The Jury Expert. So instead, what you will see is emerging work on how the race and gender of the trial lawyer is related to the ultimate verdict for criminal defendants. (It isn't pretty.) And then you'll find lots more including some original research on damages and entitlement, product liability, juror emotions, and finally, narrative persuasion.

We are, naturally, attuned to the economy and your desires to save some money. So we have two pieces on how to save money on pre-trial research and on witness preparation. Why? Why, because we care about you and want to help.

You could help us too! Our authors work hard on their articles for The Jury Expert! You like reading them. So read. Enjoy. Gather nuggets. AND then become real—by writing a comment on our website or on your own blog so our authors know you are out there appreciating their hard work.

Next time you see us it will be in the dog days of summer. So enjoy this breath of spring and know that, before too long at all, "we'll be back".

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A M E R I C A N S O C I E T Y O F T R I A L C O N S U L T A N T S



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