Alternative Cause Strategies in Product Liability Litigation: The Need for Affirmative Defenses

By Sean Overland

In the July issue of *The Jury Expert*, Tenney, Cleary and Spellman presented the findings of their research on the power of alternative explanations in criminal defense strategies. They found that "TODDI" ("This Other Dude Did It") strategies significantly reduced mock jurors' perceptions of the likelihood of a defendant's guilt. A similar strategy may be used in civil litigation, when a defendant may portray a plaintiff's loss or injury as the result of the actions of a third party or even the plaintiff herself.

However, this defense strategy is not without pitfalls in product liability litigation, because jurors often see an alternative cause explanation for an accident and injuries as insufficient without affirmative defenses of the company's products and actions. By breaking a corporate defendant's case down into its component parts, including an explanation of any alternative cause(s), we will see how jurors view these component parts and why each is needed for a complete and persuasive defense strategy.

Breaking Down the Case

First, let us consider a hypothetical lawsuit against a large "widget" manufacturer. Let's assume that the owner of a widget has filed the suit, claiming that a design defect in the widget caused an accident in which the owner was severely injured. The plaintiff has also alleged that the company knew about the potential dangers of its defective widgets, yet refused to fix the problems or to adequately warn its customers. The plaintiff is therefore seeking compensatory and punitive damages from the manufacturer. In its defense, the widget manufacturer will not only attempt to refute the plaintiff's claims, but will also present evidence that, at the time of the accident, the plaintiff was not using the widget according to the manufacturer's instructions, and that the plaintiff's actions therefore caused the accident and the resulting injuries.

In this example lawsuit, the defendant's case can be broken down into three main parts. These three parts are:

1. "Alternate Cause" - this part explains why the plaintiff's actions, rather than any alleged defects in the widget, caused the accident and injuries.

2. "Product Defense" - this part defends the widget's safety. It explains the widget's design and its safety features, favorably compares the widget's safety record to similar widgets made by other companies, and describes the widget's compliance with company, industry and government standards and regulations.

3."Company Defense" - this part explains and defends the company's actions. It outlines the motivation for developing and marketing the widget, describes the widget's design process, discusses the safety testing the company conducted on the widget, shows the instructions and warnings the company provided with the widget, and describes the steps the company took to investigate and address any customer complaints about the widget.

To tell a complete and persuasive story about why the defendant deserves to win this case, the defense must present all three parts, because the presentation of each will affect how jurors perceive the others.

The Pitfalls of the "Alternate Cause" Case

A major part of the defense strategy will be the presentation of the alternate cause case. The defense will argue that the plaintiff was misusing the widget at the time of the accident and that the plaintiff's own actions therefore caused -- or at the very least contributed to -- the resulting injuries. A common reaction to this kind of evidence is to see it as dispositive. That is, if the plaintiff caused the accident, shouldn't that be enough to win a defense verdict? Why even bother presenting anything else?

The answer is that the alternate cause case is a necessary, but not sufficient, part of a winning defense strategy. Mock trial research and post-trial juror interviews consistently show that a defense strategy that relies solely on an alternative cause explanation often leads to a plaintiff verdict in these types of product liability lawsuits, even when jurors are convinced that the plaintiff contributed to the accident and resulting injuries. The problem with relying exclusively on an alternate cause approach is that it fails to address the allegations made by the plaintiff. In our hypothetical case, the plaintiff's main allegation is that the widget is defective. A defense case based solely on the plaintiff's responsibility for the accident fails to rebut that central claim. As a result, jurors are often left with the impression that the defendant has no answer for the defect allegations. In the absence of any affirmative defense of the product's design, jurors can easily conclude that the plaintiff's defect allegations are probably true.

Once jurors believe that the plaintiff's defect allegations have merit, the defendant's alternative cause case can backfire. Instead of a powerful part of the defense case, arguing that the plaintiff is responsible for the accident and injuries begins to look less like a plausible explanation of what happened, and more like a weak excuse or an attempt to shift the blame away from the company and onto the victim. Jurors are then prone to perceive the defendant as careless and desperate to avoid responsibility for the horrendous injuries caused by its defective product. Even if jurors are convinced that the plaintiff contributed in some way to the accident, jurors may still hold the defendant liable for the lion's share of the responsibility for the plaintiff's injuries. As a result, the defendant's once-promising alternative cause case collapses and the defendant is exposed to a large damages award.

The Need to Defend the Product and the Company's Actions

To employ an alternate cause case most effectively, a defendant must also defend the safety of the product and the actions of the company. An affirmative product defense can include, for example, evidence on the many safety features of the product, its excellent safety record, and any positive evaluations of the product's quality and performance from independent reviewers or government agencies. A defense of the company's actions could center on discussions of the company's extensive product testing protocols, the clear and thorough warnings included on the product, and the company's history of addressing customer concerns about its products.

But there's a catch to presenting these affirmative defenses: even with strong product safety evidence, the defense probably won't "win" these arguments. That is, the defense is unlikely to convince a majority of jurors that the product is as safe as it should be. Plaintiffs are often able to show that different, newer, or more comprehensive features could have been included in any product at a minimal cost that would have made the product even safer. As a result, jurors in mock trial and real courtroom settings often report wanting to see more safety features and stronger, more robust product designs.

This suggests also that jurors hold large companies to a very high (and probably unrealistic) standard of conduct. Jury research consistently shows that jurors expect much more caution and foresight from a large

company than they ever would from an individual. As a result, no matter how much testing a company performs on its products, jurors often believe that there were other tests that should have been done. Similarly, no matter how many warnings the company included with its products, jurors often want to see more.

The Benefits of a "Losing" Affirmative Defense

Given the uphill battle to convince jurors about the safety of their products and the responsibility of their actions, it is understandable that corporate defendants are reluctant to dedicate much time and effort to these aspects of the case. *However, these affirmative defenses are critical, because they enable the alternative cause case to be most effective.* Even though jurors often believe that products could have been safer and companies should have done more, presenting affirmative defenses is often enough to raise questions in jurors' minds about whether or not any perceived shortcomings of the product are bad enough to constitute a defect. Moreover, the affirmative defenses often convince a majority of jurors that the defendant company itself believed its products were safe. Jurors are then less likely to see the company's actions as negligent, and more likely to believe that the company tried hard to "do the right thing."

Only after jurors have heard these affirmative defenses are they ready to receive the alternate cause evidence without rejecting it as the excuses of a greedy or desperate company. With the more complete context provided by the affirmative defenses, jurors no longer see the alternative cause evidence as an underhanded attempt to shift the blame or avoid responsibility. Instead, the alternative cause case explains to jurors the defendant's legitimate beliefs about why the accident and injuries occurred. Rather than the result of some far-fetched defect claims, the accident is more likely to be seen by jurors as a freak accident caused by the plaintiff's momentary inattention or misuse of the product. In short, only by presenting strong affirmative defenses of the product and the company itself can the decisive alternate cause evidence be most effective.

The difficult strategic gambit to identify is that "losing" the affirmative defense does not necessarily lead to a verdict against the defendant. Even if a majority of jurors are persuaded that the product is not as safe as it should have been, or that the company did not do as much as it should have done, this "loss" of the affirmative defense, combined with a winning alternate cause case, can be enough to achieve a favorable defense verdict. In these scenarios, jurors often conclude that although the defendant company probably could have done more to make its product safer, the plaintiff was primarily to blame for the accident and injuries and that the plaintiff is therefore undeserving of any monetary award.

Conclusion

Like all human beings, litigators instinctively try to simplify and condense complex information to make it more understandable. However, this natural tendency to simplify can easily lead attorneys preparing for trial to become too focused on what appear to be the one or two "key" aspects of a case. While certain evidence is certainly vital, the other aspects of the case often give that key evidence its context and power. In the discussion of the example lawsuit above, we saw that a persuasive defense strategy requires not only the key alternate cause evidence, but also the context provided by the affirmative product and company defenses.

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On civility, racial slurs, graphic pictures & anthropomorphism

Recent days have been filled with news about (very public) rude and/or disrespectful behavior from athletes, celebrities, and politicians. Pundits and pollsters are telling us what it means about our society and about the deepening political divisions in our country. Media outlets are covering the frenzy intently and 'civility' is being talked about as a behavior sorely lacking in our society today. It does make us stop and think about how each of us is responsible for our own behavior and for treating each other with respect.

Our goal with *The Jury Expert* is not only to help you increase your trial skills but also to offer information that helps you pause and ponder from time to time. This issue features diverse and provocative pieces that we hope will make you stop and think about hate crimes, racial slurs, graphic injury photographs, and assault weapons as self-defense tools.

In addition, we have terrific pieces on the contribution of the mediator to the negotiation process; how to identify leaders in the jury pool; the benefits of humanizing complex evidence through anthropomorphism in technical presentations; considering the need for alternative cause strategies in product liability litigation; and a primer of sorts, disguised as our September 2009 Favorite Thing.

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--- *Rita R. Handrich, Ph.D.*

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