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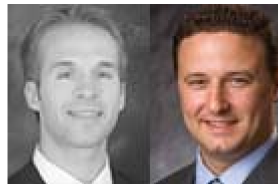
Jury Attitudes And Advocacy Techniques In Sports-Product Litigation

by Kevin R. Boully and William A. Staar



Jurors like sporting goods companies. Yet, companies in the sporting-goods business are not immune to large plaintiffs' verdicts. In 2010 and early 2011, American juries returned fifteen product-liability verdicts of $25 million or more, which is more than twice the number of similar verdicts issued in 2009. In many disputes involving sporting goods and/or recreational-vehicles, including the cases described below, the plaintiffs are engaged in activities having an obvious risk of injury, and, in some cases, the plaintiffs exhibited clear negligence. Regardless, juries were willing to award substantial damages against manufacturers for injuries received in the regular course of participating in these activities. Years of experience and recent nationwide research by litigation-consulting firm Persuasion Strategies have revealed common factors (1) that favor sporting-goods manufacturers in the courtroom and (2) that can turn a jury against such manufacturers. This article highlights those topics and provides strategy recommendations and juror-selection criteria that may aid defense counsel in sporting-goods cases.

I. Notable 2010-11 Decisions

•In December 2010, a New York jury awarded $66 million to an assistant physical therapist who was paralyzed after a leg-extension machine made by Cybex International Inc. fell on her, broke her vertebrae, and rendered her a quadriplegic. The plaintiff allegedly placed her hand over the machine as she stretched her shoulder; Cybex maintains that she pulled the machine over onto herself. "Even Ms. Barnhard admitted misusing the equipment," Cybex President Arthur W. Hicks reportedly told The Buffalo News. "This is a product that's been in use since 1983 and continues to be used today." Cybex is pursuing an appeal. (*Barnhard v. Cybex International, Inc.*, Index No. 2368/2005 (N.Y. 8th Judicial Dist. Dec. 10, 2010)

•In April 2011, a Missouri jury awarded $48 million to relatives of five people killed in a skydiving incident. The right engine of a DeHavillandDHC-6 Twin Otter plane exploded shortly after takeoff on July 29, 2006, at the Sullivan Airport, about 60 miles southwest of St. Louis. Trial testimony indicated that Doncasters, Inc.,

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the London-based defendant maker of replacement airplane parts used in the subject engine, used a metal alloy material in its replacement compressor turbine blade different than that called for by the engine manufacturer, Pratt & Whitney Canada. Plaintiffs submitted evidence that the replacement part was half the cost of the original, had caused other engine failures, and that the defendant had hidden documents from the FAA showing that the part had failed numerous internal tests. (*Delacroix v. Doncasters, Inc*., Case No. 06AB-CC00233 (Mo. Cir. 20th Judicial Dist. April 28, 2011.)

•In June 2011, a California jury awarded plaintiffs $30 million after finding boat manufacturer, Mastercraft, eighty percent to blame for injuries two women sustained in a boating accident. Plaintiffs' counsel argued that a design flaw caused the bow of the boat to dip into the water and launch his clients over the bow of the boat during the course of a turn. The two women were swept under the boat and into the path of the boat's propeller. The boat was overloaded with nineteen passengers, and twelve of them were seated on the bow at the time of the incident. Additionally, the driver of the boat was intoxicated. (*Bell v. MasterCraft Boat Company, et al*; No. 140630, Superior Court of California, County of Butte.)

II. Persuading Sports-Product Jurors

A. Jurors Like Sporting-Goods Companies

Jurors like companies in the sporting-goods industry, and sporting-goods manufacturers walk into a courtroom with a distinct advantage even before any evidence is submitted at trial. Juror opinions of the sports-equipment industry contrast positively with other major corporate industries. The noted polling found that mock jurors had the following general attitudes towards various industries:

•Small Business: 94% favorable

•Sports Equipment: 87% favorable

•Pharmaceutical: 49% favorable

•Insurance: 43% favorable

•Oil & Gas: 32% favorable

The reasons for this advantage are not entirely clear, but the fact that sporting-goods companies rarely receive bad press and because these companies generally are viewed as helping improve the health of the general population are likely contributing factors. Additionally, research found that a subset of jurors in a sporting-goods case will be predisposed to believing the following: (1) sports have inherent risks of injury, (2) other things besides equipment can cause injury, and (3) "accidents happen."

Data also reveal that jurors believe sporting-goods companies to be more responsible and honest than the average company. As further discussed below, however, that perception can be a double-edged sword. Such high expectations, if undermined by plaintiffs' evidence, can result in a juror response harmful to the defendant corporation. Further, regardless of the nature of a company's business, jurors will tend to punish it harshly for (1) avoiding

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regulations, (2) internally discussing a known problem (evidenced by e-mails or other evidence) and doing little or nothing about it, (3) lying or purposely withholding information, and/or (4) exhibiting clear "corporate greed" over the welfare of consumers.

B. Address Personal Responsibility: Key Decision-Making Factor

In addition to the factors described above, personal responsibility is a key factor to jurors' evaluation of sports-product cases. If able to do so, jurors rely on their own experiences with the product at issue to evaluate the parties' conduct. If unfamiliar with the product, or even the sport, at issue, jurors rely on someone who has that experience, e.g., other jurors, expert witnesses.

More likely than not, sports-product jurors will be familiar with the product or the activity for which it is used, and many will consider themselves "experts" with meaningful and polarizing opinions of how a consumer should safely and reasonably use the product. Sports-product jurors tend to voice two critical questions relating to party responsibility after learning the basic outlines of a typical sports-product defect case:

(a) What did this consumer do, or fail to do, that put him/her at increased risk?

(b) What did this manufacturer do to ensure that consumers would safely use the product?

1. Map Out "The Road Less Traveled"

In sports-product cases, jurors frequently see individuals as having substantial control over the decision to risk injury by participating in sport to begin with and as having the ability to prevent injury while using sports products. That perceived power – and associated responsibility – results in a presumption that fault for an injury rests with the individual rather than the product. Defense counsel may effectively demonstrate how the plaintiff increased his or her risk by outlining for a jury "the road less traveled." By explaining the reasonable and common decision paths the plaintiff chose not to take, defense counsel can encourage jurors to see the plaintiff's conduct as the road less traveled, i.e., the road more likely to result in risk and injury, for which the product manufacturer cannot be blamed.

2. Avoid Aggressively Blaming the Victim

Jurors' tendency to leverage personal-responsibility bias against sports-products plaintiffs has its limits. Defense counsel often face the difficult challenge of introducing evidence of plaintiff's negligent product use without risking juror resentment for "blaming the victim." It is critical to find a way to encourage jurors to consider the alternatives that a plaintiff ignored or actively chose not to follow, but defense counsel should do no more than provide jurors the information they need to scrutinize the plaintiff on their own. Any attempt to overtly blame the victim in oral argument risks juror backlash. Further, to the extent possible, defense counsel should try to avoid focusing on the plaintiff's negligence until after establishing that the manufacturer behaved responsibly.

C. Develop an Exhaustive Product-Testing Story

Product-related research, development, and testing for even the most basic sporting good can be expensive and time consuming. Unfortunately for manufacturers, jurors do not care. Jurors expect substantial and relevant product testing before *any* sports product finds its way into the hands of a consumer. Persuasion Strategies' polling found that ninety-one percent of mock jurors expected manufacturers to perform more testing before placing a sporting-goods product on the market. As national media continue to report problems regarding various types of products, e.g., poorly designed baby carriages, Asian products containing lead, sulfurous gasses in Chinese drywall, expect these numbers to creep closer toward 100%.

Further, not just any testing will do. The manufacturer must provide jurors significant detail regarding what it tested, why it performed the testing, and when it performed the testing. Polling found that a manufacturer's motive for testing (or not testing) a product had significant sway. Mock jurors wanted to understand why the manufacturer tested the product, and they wanted contemporaneous evidence (documents, e-mails, conversations) that corroborated the manufacturer's claims.

Like jurors in any personal-injury case, many jurors in a sports-product liability case are, unfortunately, predisposed to decide cases with feelings and emotions instead of in strict accordance with the law. Objective evaluation of whether a particular product is defective to the point of being unreasonably dangerous often takes a distant back seat to sympathy for the plaintiff or other factors. For such jurors, the examination of evidence tends to be viewed through a lens of confirming a decision already made. Any small omission or mistake on the part of a manufacturer, even if arguably irrelevant to the facts of the case, can, in the mind of such jurors, be magnified many times over. For such individuals, any evidence that the defendant ignored or excluded even one or two testing regimens or alternatives will quickly outweigh the persuasive force of evidence that the defendant conducted numerous other product tests that were far more relevant and important.

It is critical for manufacturers to develop a clear "safety story" that includes employees at all levels of the product-development chain who can testify to their involvement in ensuring that the subject product was tested and that it met or exceeded every applicable company (internal) and regulatory (external) standard. The safety story accomplishes the following for the manufacturer: First, it humanizes the company by bringing individual employees' personal testimony to bear. This diffuses any argument from the plaintiff that the monolithic manufacturer sidestepped its testing responsibility. Second, it provides a substantial road-block for pro-plaintiff jurors who are more likely to focus on sympathy or other reasons to favor a plaintiff. The simple fact of an articulated story of the product's development and testing history speaks directly to the reasonable and safe manufacture of that product.

An effective approach to establishing a "safety story" is to provide testimony supporting the following three objectives:

(a) Offer a Thorough History of the Product's Evolution

Start with the problem the product was designed to solve. Then, trace the product through research, development, and testing

all the way to the market and through post-market improvements.

(b) Address the Entire Spectrum of Anticipated Uses

Present the manufacturer's contemplation of anticipated uses, both safe and unsafe, and how the manufacturer addressed those contingencies during product development. While plaintiffs may argue that manufacturers must anticipate *all* potential uses, defense counsel must clearly distinguish between reasonable and unreasonable uses and explain why a particular plaintiff's unsafe use either was addressed or unforeseen.

(c) Present Responsible, Personable Witnesses

Credible witnesses are key to any defense, but personalizing the manufacturer through its full range of relevant employees is central to the defense in a sports- product case. Jurors distrust polished corporate executives' stories of a safe product, especially when those executives were not directly involved with the product's development. Lower-level employees with direct, hands-on experience developing and testing the product are key to gaining juror trust.

D. Meeting Regulatory Standards Is Not Enough

Juror polling indicates that jurors harbor substantial distrust of government and regulatory agencies, including those involving product standards. While jurors are highly critical of these gatekeeping agencies, they still expect products to be extraordinarily safe, leaving a significant burden on the manufacturer. Many jurors assume that today's technology and the ability to develop products faster and cheaper than before means that products should be cutting edge, extensively tested, and, perhaps most importantly, bomb-proof safe. The realization that personal responsibility and "good old common sense" are still the best tools for safe recreation is an assault on the most pro-plaintiff jurors' sensibilities about what should be a safe recreational environment.

Most mock jurors in Persuasion Strategies' research reported that corporations should test their products "much more" than corporations currently do before placing products n the market. Of those, sixty-six percent stated that, if such steps were not taken, they were more likely to find in favor of an injured plaintiff than not. In the words of one juror, "Meeting [government or industry test standards] is not as strong because it is uncaring. It sounds like, as long as they pass the test, they don't care if [the product] hurts people."

Thus, defendant manufacturers must embrace a higher standard for testing and developing sports products and consider ways to demonstrate how their own internal standards help them exceed the regulatory and industry minimums. In the courtroom, this message is effectively communicated as follows:

(a) List the ways in which the manufacturer took additional steps to ensure the product's quality,

safety, and effectiveness. Even a handful of small steps can add up in jurors' minds.

(b) Identify and present to the jury company standards or other documents that show higher burdens than the relevant regulatory agency requires. Show these to the jury repeatedly to give life to the mantra that, "This company exceeds the standard."

(c) Put profit motive on the side of safety.Jurors understand that the public will not buy unsafe products, particularly in today's age of social media. When the plaintiff suggests that profit motivation negatively affected the product's safety or performance, address directly the fact that companies are profit motivated to sell *safe* products and that manufacturers of unsafe products do not last long in today's sophisticated consumer market.

III. Strategic Juror Selection

Voir dire varies significantly among trial judges. To the extent that a trial judge permits parties to submit their own questions to jurors, the following inquiries should be helpful to attorneys defending product manufacturers.

A. Weed Out Jurors Likely to Sue

During the course of the noted study, six percent of mock jurors said that that they would definitely pursue a lawsuit after suffering an injury using a sports or recreational product. Of those, 40% completely favored the plaintiff in the sports-product-liability fact pattern. This is a far greater proportion than those mock jurors who were less certain or probably would not pursue a lawsuit under such circumstances.

The fact that a relatively small proportion of potential jurors said that they would definitely pursue a lawsuit against a sports manufacturer is good news for defendant companies. If the trial judge allows it, the following question is ideal for identifying these few high-risk jurors:

"How many of you feel that you definitely would consider filing a lawsuit if you suffered a serious bodily injury while using a sports or recreational product?"

B. Identify Jurors Believing Products to be the Likely Cause of Consumer Injuries

In the study described above, two percent of mock jurors stated that a consumer injury occurring while using a product is almost always the product's fault. Of those, seventy-two percent returned a verdict finding the defendant manufacturer at fault.

The fact that a minority of potential jurors said that they believe it is almost always the product's fault makes this another area ripe for effective *voir dire* to gain advantage in jury selection. The following question is designed to identify these individuals:

"How many of you believe that when an individual is seriously injured using a product, it is almost always the product's fault?"

C. Inquire as to Potential Jurors' Beliefs about Following Warnings and Instructions

Study data indicates that a defendant gains no advantage by selecting a juror believing that consumers (1) almost always follow a product's recommended safety precautions or (2) rarely follow precautions. Mock jurors stating, however, that consumers *almost never* follow a product's safety precautions were significantly more likely to favor the defendant-manufacturer.

When possible, and particularly when written warning labels and consumer compliance are key issues in a case, defense counsel should attempt to obtain a supplemental juror questionnaire inquiring into jurors' attitudes about safety-related writing warnings and instructions.

IV. Conclusion

Sporting-goods manufacturers enjoy at trial a distinct advantage over the manufacturers of other products and most other types of corporate defendants. That advantage is not absolute, however. A sporting-goods manufacturer that fails to explain effectively where the injured plaintiff went wrong or that fails to provide significant evidence of its enhanced product development and testing, risks losing that advantage. Further, such manufacturers finding themselves in a courtroom with liberal *voir dire* rules can, with distinct questions, help forge a jury more likely to render a defense verdict.

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