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JURY ANALYSIS

Jury Selection and the Injured Plaintiff: How Do Jurors Relate?

Are Jurors Who Are Similar to an Injured Plaintiff More Likely to Find Liability?

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Special to the Legal

It all seems to make perfect sense. In a case with an injured plaintiff, the best jurors for the plaintiff would be folks who could relate to her, and who could picture themselves in her shoes, right? That is the common thought among both plaintiff and defense counsel in most cases. As a result, the defense will tend to use a jury selection practice to determine which jurors will identify most with the plaintiff and strike them, while plaintiff counsel will focus on striking folks unlike their clients. The question is: Are both sides striking the wrong people?

First, let's look at the psychological theory behind the premise of identification with another person. Taking a step back, Henri Tajfel and John Turner explain the basic process of group identification in their social identity theory. First, they say, in order to psychologically simplify our world, we naturally categorize people into groups. The most basic of these groups is based on easily identifiable traits such as race and gender. That said, categorizations may be based on any trait that is salient at the time, such as



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socio-economic status, career, interests and skills. After we have made our categorizations, we identify or associate ourselves with certain groups and consider these our in-groups. Finally, we compare and contrast our in-groups with other groups.

Of course, the reason why most plaintiffs attorneys seek to seat jurors who appear to be similar to their clients is because they believe that there is a natural tendency to ascribe positive characteristics to the in-group, and therefore, jurors will have a natural empathy toward a plaintiff with whom folks identify. Tajfel and Turner called this phenomenon in-group bias. Norbert Kerr called it similarity-leniency.

Kerr's similarity-leniency hypothesis is based on the belief that we provide more lenient treatment to those similar to ourselves. A deeper look into the psychology of social identity, though, reveals that leniency or in-group bias toward others with whom we identify is not always the case. The difference comes when a person who would typically be considered a member of the in-group is perceived to have unfavorable traits. In these instances, what can happen is called a "black sheep effect." The black sheep effect is a phenomenon in which harsher treatment is given to a person within the in-group if that person is perceived as having a characteristic that reflects poorly on the in-group. In other words, the same people who identify with an individual plaintiff may want to disassociate themselves from that person, and actually be the most unfavorable jurors to that plaintiff.

Jury research conducted on two cases involving fatal or catastrophic injuries illustrates how the black sheep effect may manifest itself in cases with injured plaintiffs. In the first case, a warehouse worker was rendered a quadriplegic after an accident in which he ran a forklift into a pole. He sued the

forklift manufacturer and the company that designed the racking system layout in the warehouse. Focus group research data revealed that the jurors who were the plaintiff's worst critics were those who resembled him prior to his accident. Specifically, the salient in-group for this plaintiff was composed of blue-collar workers, particularly those who operated heavy machinery. These jurors rejected the plaintiff as a member of the in-group. Instead, they decided that the accident was his fault. Their mantra was "I would not have hit the pole."

The second case involved a tragic accident in which a young child was fatally injured during an accident with a piece of landscaping equipment his father was using. The family sued the manufacturer for faulty design. While the accident happened at the home, the father worked with heavy machinery for a living. In this case, a profile telephone survey revealed similar findings to the first example. Specifically, the father's worst skeptics were those who resembled him before the accident happened: Males who were familiar with technical matters and heavy equipment.

In both of these cases, these disparaging jurors did put themselves in the plaintiff's shoes. Instead of finding the empathy that the similarity-leniency effect would have predicted, though, the plaintiff found harsher criticism. These jurors decided, "if I were in this plaintiff's position I would have been able to avoid the accident." They were unforgiving of the plaintiffs' failings and they neither understood nor sympathized with the plaintiffs'

unwillingness to take responsibility for their own actions.

That is not to say that the similarity-leniency theory does not apply in many, or even most, cases. It is often true that a juror who identifies personally with an injured plaintiff will have a higher level of sympathy than someone who does not.

In fact, in these very same cases, there was another way in which jurors identified with the plaintiffs in a manner that was more in line with traditional, intuitive thinking. Specifically, while jurors who were critical of the plaintiff identified with the plaintiff before the accident, the most favorable jurors were

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those who identified with the plaintiff after the accident. These jurors related to the plaintiffs' hardships. They had their own financial hardships and were caretakers of those unable to care for themselves. In other words, these jurors identified with the plaintiffs' injuries and victimization, not their actions.

Formal research on similarity-leniency and the black sheep effect in civil cases is anemic. Most of the focus has been on external variables such as race and has primarily addressed impact

on perceptions of criminal defendants. As a result, there is little empirical evidence in an academic context to support either the similarity-leniency or the black sheep effect phenomena in a civil courtroom. Therefore, more research toward this aspect of juror psychology is certainly warranted to understand how people psychologically perceive themselves and plaintiff in the social context of the courtroom and how that may affect their judgments.

Regardless of the academic research, it is critical to evaluate each case and its idiosyncrasies that may cause a particular set of jurors to respond to case facts in a counterintuitive manner. Needless to say, there are multiple variables at play that we have to consider when determining the best jury selection strategy. For the cases cited above, these variables included, inter alia: whether the culture of the venue valued personal responsibility over corporate responsibility, and if the trial involved a situation in which the plaintiff did have a role in the incident that caused the injury.

Focus groups, telephone surveys or, at least, a very critical look at the issues to evaluate the juror profile in a case are critical. In essence, taking a hard, strategic look at a case as opposed to going with traditional thought can make the difference between striking the worst jurors and inadvertently getting rid of the best. •