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Bad Product or Bad Parent?

Exposing Parental Negligence in Product Liability Cases



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IN OUR SOCIETY TODAY, WE FACE A bombardment of information, images, and stories about child safety. There are hundreds of websites and even more news stories devoted to safety and injury prevention related to products used by children and their parents. In their most recent safety report, Kids in Danger (2012) indicated that in 2010, more than 44 million units of child products were recalled; 430,000 child injuries were treated in hospital emergency rooms; and there were 118 deaths of children under the age of 15.¹ Although the total number of recalled child products may have decreased (i.e., there were 11.6 million products recalled in 2011), widely-available reports such as these, along with websites and databases for concerned parents – combined with a tarnished image of corporations and high profile cases throughout the United States – have heightened the public’s awareness and increased companies’ exposure to product liability lawsuits.

Negative publicity also surrounds consumers of these products. Everyone can think of recent examples of undisciplined, irresponsible, and even reckless parents in our society today. A Google search of “bad parents,” reveals a number of websites devoted to satirically spotlighting photos and videos of parents putting their children in harm’s way.

Notwithstanding public sentiments about isolated, highly publicized cases, attitudes toward personal and corporate accountability can be quite polarizing in the midst of a legal matter. The attributions people make about responsibility and blame are emotionally-charged and carry over into the courtroom. Besides their thoughts about other

parents and corporations, jurors – many of them parents themselves – filter evidence through their own life experiences, basic attitudes toward the world and corporations, beliefs about personal responsibility, and their general personality makeup.

Results from pre- and post-trial research have taught us a great deal about factors that determine litigation outcomes when jurors render judgments about the cause and cost of a child injury or death. Creating positive juror reaction in cases involving parental negligence is viable if pursued with a carefully-formulated strategy, anchored in compelling messages about the conduct and responsibilities of both parents and corporate defendants.



How Do Jurors Decide Who’s Blameworthy?

While philosophers and other experts on ethics and morality may have similar, rational characterizations of blame, there are many ways jurors decide who is blameworthy. Numerous psychological theories on blame, corroborated by the perplexing outcomes of civil trials, demonstrate that laypersons are guided by many, often irrational, extra-legal factors.

Social Psychologist Mark Alicke’s Culpable Control Model (2000)² is useful for understanding jurors’ decision making process. “Culpable control” refers to the fact that when evaluating a negative outcome, people are inherently driven to 1) blame (versus seek mitigating information); and 2) hold someone culpable based on the degree to which that person exerted control over the situation. In deciding legal

matters, this automatic, spontaneous process skews jurors' perceptions of evidence, to the extent they become very irrational, in a way that justifies blame. In many cases, rather than relying on a systematic analysis of facts and evidence, jurors use these moral judgments in making determinations of fault.

Being sensitive and empathic with plaintiff parents of an injured or deceased child is paramount

In product liability cases, indications of culpable control first emerge as plaintiff's account of a "tragic injury that could have been prevented" triggers an innate human process within jurors. A range of negative feelings (e.g., sadness, anger) are evoked within jurors in response to learning of a bad outcome. Jurors then seek evidence that supports their inclination to blame who they believe to be the cause of those negative emotional reactions. This desired "evidence" often takes the form of another key element to plaintiff's story: the portrayal of a company who chooses profits over safety; fails to take responsibility; and communicates dishonestly with its consumers and the general public.

As it goes with human nature, jurors selectively pay attention to evidence that corresponds with their attributions of blame while minimizing or even dismissing contradictory evidence. Applicable to all industries and causes of action, the concept of culpable control is helpful for conceptualizing what happens inside the minds of jurors as they listen to and evaluate the evidence.



Other Cognitive Biases Affecting Blame

As exemplified by culpable control, cognitive biases are involuntary, unconscious beliefs or attitudes – that although simply part of human nature, skew reality. Biases affect each of us as we approach new situations, and these innate biases greatly impact jurors' important decision making process. A few cognitive biases have particular relevance to product cases involving parental negligence.

Hindsight Bias: People overestimate the foreseeability of an event because they know how that event turned out. These are the "shoulda, woulda, coulda" interpretations jurors make about the conduct of both companies and individuals. In product liability cases, jurors listen for information in the form of if-only reasoning, particularly in relation to proximate cause evidence, to support their use of hindsight bias. Commonly observed during mock deliberations, jurors decide liability through discussions about actions the company or parent "should have" taken, assuming that party could have predicted, and thus prevented, the injury.

Attribution Error: When attempting to explain others' behavior, all individuals have a tendency to cite personality- or trait-based causes for that behavior and to minimize or disregard situational explanations. In evaluating a parent's conduct relevant to a child's injury, jurors may refer to a parent as an irresponsible or careless person (focusing on personality factors) rather than blaming something situational that may have occurred on a

one-time basis, such as “he was running late that day.” However, jurors may also consider the conduct of a corporation as resulting from it being greedy, dishonest, or profit-driven, versus being unable to foresee a particular use of a product, for example.

Base-Rate Fallacy: People are influenced more by salient, individual cases than by base rates drawn from the greater population. Remember the Kids in Danger report? There were 118 child product-related deaths in 2010. That number represents .00003% of children under the age of 15 in the United States and .0005% of children under the age of five, although jurors do not think in terms of these overall incident rates. In fact, some jurors report a firmly-held belief that “one incident is too many.”

Certainly, social norms and context-specific biases also may play a role in juror decision making. For example, some products are generally believed to have more inherent risk than others (e.g., ATVs, BB guns), and a parent may be presumed to be more liable in cases involving these products. Whether a parent’s level of experience makes them more or less culpable varies, as jurors have commented “she should have been more cautious” – in relation to both a first-time mother and a mother with more than one child. Jurors also consider situation-specific contexts (e.g., what the parent was doing that day) and the age of the child, as well as rely on widely-held expectations of what parents should and should not do, all of which can be quite powerful in determining the outcome of a case that involves parental negligence.



Corporations - More Blameworthy Than Individuals?

In a society with a seemingly constant barrage of negative messages about corporations, individuals do have higher expectations about the conduct of corporations compared to the conduct of individuals. While the actions of individuals and corporations are evaluated using much the same criteria, more is expected of a reasonable corporation – in the way of responsible decisions, causation, and foresight – than a reasonable person. The higher standard for corporations results from perceptions of their having a higher duty than individuals, as well as a professional responsibility to be knowledgeable about potential risks and to guard against those risks being imparted to consumers. The threshold for “punishable” conduct is much lower for corporations than for individuals.

As evidenced by the outcomes of several recent trials (e.g., children’s pharmaceutical warnings cases, child seat design defect cases), plaintiffs successfully capitalize on the presence of irrational, morally-driven, emotional triers of fact with strong views about corporations. The ensuing consequences for defendants may be unexpected, and devastating. However, reducing blame on the reasonable company, and shifting blame toward a careless or even reckless parent, is attainable. Pre-trial research and tactical voir dire both facilitate the identification of jurors predisposed to blaming defendants; however, witnesses are the primary means through which the jury evaluates each party

in an effort to make ultimate conduct determinations and to attribute blame.

The Critical Importance of Corporate Witnesses.

Juror responses in post-trial interviews and focus groups consistently reveal the critical importance of witness performance. In weighing the evidence and arguments, jurors look to defense witnesses to provide information that either supports or conflicts with plaintiff's story. Bad witness testimony lowers the threshold for findings of unreasonable or reckless behavior on the part of the defense – increasing the likelihood of a plaintiff verdict and higher damage awards. Conversely, when jurors perceive a witness to be credible, trustworthy, and in conflict with the negative portrayal by plaintiff's counsel, the conduct scale tips in favor of the defense.

Jurors want to hear each and every painstaking step the company took to execute its power in the best interest of consumers

Jurors seek information, largely from witnesses' nonverbal communication, that either supports or dispels the opposition's characterization of them and the side for which they are testifying. Prior to appreciating testimony content, jurors evaluate a witness's persona, tone, and communication style in determining whether that witness is truthful and likeable. In fact, impressions of character among witnesses can outweigh even the best causation arguments and amplify the impact of sufficient ones. Truly, a case can be won or lost, regardless of the causation evidence, depending on positive or

negative assessments made by the jury regarding character and conduct of not only the participants in the story itself, but also the conduct and character of the witnesses and attorneys on display in the field of battle – the courtroom.

In hearing corporate witness testimony, jurors are especially interested in the extent to which individuals accept responsibility for their own actions; appear open and not evasive, arrogant, "shifty," or self-serving; respond on target during direct and cross-examination; and demonstrate the company's efforts to be transparent in their motives, goals, and internal and external communications. Importantly, jurors cite company conduct in the form of dishonest communication more often than perceived product danger as a reason for favoring the plaintiff in these cases.

Shifting Blame. Even in cases involving child injury or death, defendants may be able to shift the conduct scale in a favorable direction and overcome even the direst of circumstances. In the simplest of terms, success with a jury comes down to knowing the audience; delivering a persuasive and relevant message; and using optimal communication strategies. The particular approach employed will be case-specific and depends on nuances of the fact pattern, as well as a variety of other variables (e.g., venue, nature of the injury).

Knowing the Audience. In order to gauge the extent to which jurors may be influenced by anti-corporate bias, irrational thinking, cognitive biases, or biases specific to your case – research is key. Pre-trial research provides an exploration of juror reactions to specific case issues, witnesses, and

evidence, as well as a greater understanding of jurors' attributions of blame. A supplemental juror questionnaire allows for the ability to dig deeper into each juror's life experiences, attitudes, and belief systems that will affect their ultimate decision making. Strategic voir dire elicits valuable information about risky jurors, while protecting good ones. Establishing rapport with the jury pool by asking non-threatening open-ended questions (e.g., "How do most companies feel about their products' safety?") then hitting them with critical bias inquiries (e.g., "I am interested to know to what extent you believe corporations choose profits over safety. How many of you suspect this is the case?" "How many of you are fairly certain this is the case?" and "Who believes lawsuits are an effective way to hold companies responsible for their actions?"), is essential.

Crafting the Reasonable Company Story. When themes or simple concepts resonate with members of the jury, they enter the deliberation room with conviction in their beliefs and are armed with persuasive explanations to counter their opponents. Given the negative attitudes toward corporations and the higher standard to which they are held, some jurors are unlikely to ever believe that a product is as safe as it should be. However, telling the company story to demonstrate how the company fulfilled its duty is often enough to raise questions in jurors' minds about liability.

One effective approach includes: 1) describing the history of the product's conception, research, development, testing, and market launch; 2) presenting the company's efforts to identify and address various consumer uses of the product; and 3)

explaining the company's response to any reported problems in the form of product improvements – at each step emphasizing all that the company did within its control. Jurors want to hear each and every painstaking step the company took to execute its power in the best interest of consumers, particularly when a child is involved. Jurors expect to hear and see information supporting that a company: 1) made a safe product; 2) complied with and even exceeded government standards; 3) extensively and intentionally tested the product; 4) educated consumers through warnings and instructions; 5) communicated honestly; and 6) responded to needs for improvement.

Crafting the Negligent Parent Story. There has certainly been an increase, in theory, regarding the importance of personal duty or responsibility, that individuals must do what they can to protect themselves from possible harm. In reality, however, it seems society's adherence to this value is tenuous, as people have come to expect corporations and governmental agencies to protect us from ourselves. Nonetheless, a strong theme of personal responsibility is often effective in providing 1) a foundation for the development of the reasonable company story; 2) a framework for characterizing the conduct of the plaintiff; and 3) a means of keeping the potential for juror anger and excessive damages from escalating out of control.

Jurors who otherwise would be predisposed to favor the plaintiff may begin searching for evidence to support that the injured party was in fact responsible, due to cognitive dissonance. Cognitive dissonance occurs when individuals attempt to simultaneously hold thoughts that conflict with each

other (i.e., “dissonant” beliefs or ideas), resulting in the experience of discomfort. To resolve the distress of accepting, for example, that the bad outcome “could happen to anyone” while also believing “this won’t happen to me,” jurors often shift their focus toward analyzing plaintiff’s choices in light of decisions made leading up to the incident. Blaming the plaintiff for causing the harm resolves jurors’ uneasiness and reinforces the idea that “this won’t happen to me, because I would not make the same choices plaintiff made.”

Beliefs about the duties and responsibilities of parents may vary to some degree, but most people agree that a parent’s duty in using a product includes: 1) informing oneself about a product; 2) providing a safe environment for the child; 3) assessing the risk of danger to the child in using the product; and 4) attentively monitoring the child and the contiguous environment.

Hindsight bias may cause jurors to blame parents for a failure to fulfill these duties, because if they had, the injury would not have happened. In addition, jurors compare a parent’s degree of knowledge to their own experience and talk about products they themselves have used, warnings they have read, and their awareness of available information resources. Certain types of jurors will place an extremely high personal responsibility burden on plaintiffs (e.g., believing that life events, whether good or bad, are caused by controllable factors such as one’s attitude, preparation, and effort), while others will always shift the blame to the corporation (e.g., persons who report a string of experiences wherein their complaints and grievances have fallen on deaf ears). Additionally, some jurors will find fault with a

warning, regardless of how explicit it is. Although parents’ knowledge is not informed by science or product testing per se, it is a reasonable argument to make that a responsible person with information available at every turn has ample opportunity to be armed with sufficient knowledge.

The parent’s power comes down to weighing options and making choices. Just as a company’s decision making process is described step-by-step, the parent’s decisions about purchasing the product, then using it and under what conditions, must be illuminated. For the jurors to ultimately determine an injury was caused by circumstances well within the power of the parent, one message is indispensable: regardless of our familiarity with products and the environment in which we use them, never should any of us fully surrender responsibility for our own safety or the safety of our children.

Eliciting the “If Only” Plaintiff’s Story.

Counterfactual thinking occurs when a person considers alternative realities, in which past events could have been undone. During trial, jurors engage in counterfactual thinking by imagining “if only...” or “what could have happened....” As jurors generate a list of counterfactuals, blame shifts toward the party they believe could have changed the outcome of the event by selecting an alternate course of action. Hindsight bias and cognitive dissonance combine synergistically to reinforce jurors’ counterfactual thinking.

The stage can be set for identifying understandable or reasonable conduct through evidence and testimony (particularly that provided by experts). Jurors will begin to ascertain what would have

been reasonable choices for the plaintiff, given the same circumstances. Through plaintiff's testimony itself, jurors will engage in counterfactual thinking to assess whether plaintiff made those choices or less safe, even risky, choices. They compare the parent's actions (i.e., "risky decisions") one-by-one before, during, and after the incident that ultimately produced the bad outcome with those that would have been reasonable and safe, leading to a positive or neutral outcome. For example, "If the plaintiff followed the instructions for assembly, the product would have worked the way in which it was intended." The messages derived from counterfactual thinking can be quite powerful, particularly when complemented by expert testimony on the design, safety, and use of the product.

To demonstrate the important transfer of power from the company (as the product maker) to the parent (as the product user and supervisor of the minor child), it is beneficial to contrast all the various actions plaintiff could have taken to prevent the incident with what plaintiff contends the company should have done. Also advantageous would be presenting evidence demonstrating that the less-than-reasonable decisions plaintiff made would have neutralized any benefit of anything the company could have conceivably done in the situation to reduce the risk of injury. Through this approach, jurors' assessments of the plaintiff's conduct begin shifting from reasonable and ordinary toward careless or reckless. Spotlighting plaintiff's decision to either not read or read but ignore warnings is not sufficient for establishing unreasonable conduct; however, it may bolster jurors' other counterfactual reasoning.



Optimal Communication Strategies

Just as important and if not more so than the message itself, is the means by which it is communicated. In general, jurors are quite tolerant of lawyers who aggressively advocate for their client, but in a child product liability case in particular, jurors become sensitive to any indication that the "victim" parent is being bullied.

Actions Speak Louder Than Words. More than 90% of our communication, and thus the actual message we convey, is nonverbal. As aforementioned, jurors evaluate witnesses, including those testifying for the defense, based on a multitude of factors unrelated to testimony content. Just as with other witnesses, jurors scrutinize the plaintiff in search for information about her conduct and character. Even in deposition testimony, plaintiff's body language, response style, and expression of emotions provide clues to her vulnerabilities. Jurors carefully observe a grieving parent in court as a source of comparison to themselves (and to answer the critical question "could this happen to me?") and to evaluate the parent's decision making prior to, during, and after the incident.

In spite of legitimate sympathy for plaintiff's loss jurors may experience, they are intuitive in spotting indications of undesirable motives on the part of the plaintiff – customarily, greed and vengeance. As previously described, attribution error often compels individuals to find evidence of character flaws in explaining bad outcomes. Jurors who label parents

as “losers” or “selfish” will look to their demeanor for validation of these characterizations and not to defense counsel’s own descriptions of them. Jurors criticize a parent who does not answer a question on target; is perceived as “overly emotional” or not sufficiently emotional; appears angry, greedy, or vindictive; sounds argumentative; or seems evasive.

During cross-examination, jurors are perceptive when it comes to things such as defense counsel’s body language and proximity to the witness. Paralinguistics are also a key component of nonverbal communication. The pitch, tone, rate, intonation, and volume of speech used when arguing or examining witnesses (especially cross-examination of the plaintiff) convey respect, aggression, sensitivity, contempt, and authenticity in the eyes of the jury. To an extent greater than in other types of cases, jurors will react negatively to defense counsel’s doing or saying anything that could be perceived as demeaning or humiliating to a witness or disrespectful to the court proceedings.

During cross-examination of a grieving parent in particular, jurors are sensitive to word choice; voice tone and volume; the witness’s personal space; the sincerity of sympathy expressed by counsel; and the extent to which counsel pursues his own agenda at the expense of the witness’s emotional well-being. Generating a parent’s account of the timeline of events in her own words, in minute-by-minute segments, can be beneficial; however, in some cases, it may be prudent to limit cross-examination to a few basic inquiries (particularly when the plaintiff is likeable, credible, and sympathetic). Highlighting what the jury perceives to be “minor” testimony inconsistencies may be interpreted as bullying the

witness. Rather, giving the parent an opportunity to “correct the record so the truth can be known” is likely to be better received. Finally, jurors have criticized corporate defense counsel for avoiding responsibility and even “mudslinging” in response to arguments or testimony about aspects of plaintiffs’ lives that may seem unrelated to the incident (e.g., criminal history, employment status). Any negative information about the parent, particularly that which places blame on her for causing the injury, should be elicited matter-of-fact and in a manner as non-threatening as possible. While testimony about plaintiff’s character may be vitally important for the jury’s attribution of blame, it should manifest itself as a result of a fact-finding approach that is presented in an informative, “reporting the news” fashion.

Jurors certainly have more commonalities with parents and children than they have with corporations. Therefore, being sensitive and empathic with plaintiff parents of an injured or deceased child is paramount. Jurors will often find a way to excuse a neglectful parent if they perceive the defense is insensitive to that parent’s loss. This response may be further magnified when the defendant has chosen to file a formal pleading against the grieving parents, such as one alleging negligent supervision. It is painful psychologically for a juror to sit in judgment of another parent. Many, if not all, jurors in a particular case may contemplate their own conduct regarding product usage, warning labels, and product safety to forgive certain conduct of a parent because it reflects what normally happens in “real life.”

“Prove It” with Hard Evidence. To overcome preexisting biases, jurors often look to evidence

such as the product itself, safety policies and reports, consumer inquiries and complaints data, police reports, phone records, purchase receipts, corporate communications (e.g., emails) about product safety or testing, and any documentation that supports a timeline or sequence of events leading up to the incident. Jurors may be critical of arguments and cross-examinations that seem to be designed only to support defendant's agenda (of winning at all costs) and are not explicitly supported by such evidence. Thus, testimony and demonstrative evidence that is intended to be indicative of parental negligence should be presented in a manner that appears to be fact-finding, objective, and a reflection of defendant's "search for the truth."

You Can Lead a Horse to Water... Considering all of the possible juror obstacles to overcome, it is vitally important (especially with today's younger, more skeptical, better-informed jurors) to present plaintiff's choices in contrast to reasonable and common decisions people in similar situations usually make, but to draw no adamant conclusions. In fact, encourage jurors to consider even more alternatives the plaintiff ignored or actively chose not to consider. And then, finally – and perhaps most importantly, empower the jury to draw their own conclusions and make their own determinations about how to rate the conduct of both parties. Younger jurors in our society want to act independently with respect to "figuring it out." These Generation X and Y jurors are very discerning of any attempt to manipulate or encroach on their self-reliance. For them, it is all about understanding the duties and responsibilities of plaintiff and defendant and then, they will decide who failed or did not fail in fulfilling those duties and responsibilities.

In studies of attitude change and persuasion, psychological research is clear that people are more strongly convinced of an assertion with a minimum of external inducement. In other words, facts – such as the conditions under which a product was used and a parent's actions just prior to the incident – will produce more beneficial results for the defense if simply delivered to the jury in the course of providing complete information about the event, as opposed to sounding more like argument.



Conclusion

There are many barriers to defending products cases involving children, but particularly if parental negligence is to be addressed. In our society, anti-corporate bias is widespread, as are stories and images of products endangering the lives of children. It is critical to understand the role of relevant preexisting attitudes and beliefs, life experiences, and general attributions of blame in juror decision making – whether or not a matter ever reaches trial. These issues are particularly important to consider when audiences have extensive experience in the content domain at issue. As parents, jurors will form opinions quickly and in an intractable manner.

In their efforts to blame someone, jurors instinctively apply a variety of cognitive strategies to reach an ultimate decision as they make critical determinations about the cause and cost of a child's injury or death. If first the jury hears a reasonable company story through trustworthy and likable witnesses, parental negligence can be pursued as a defense. To shift blame toward a parent, jurors must: 1) trust

corporate witnesses; 2) believe the company fulfilled its duty, informed by knowledge, and executed its power in the best interest of consumers; and 3) focus on plaintiff's choices in contrast to available and safer options. Success depends on the ability to emphasize the parent's personal responsibility and choices, using a sensitive, fact-finding, hard evidence-based approach that empowers jurors as ultimate decision makers.

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About the Author



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