# EXPECT THE EXPECTED:
## Managing the Jury's Expectations in Product Liability Cases

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A journeyman electrician's helper with five years experience sticks a screwdriver into an energized circuit breaker panel and, not surprisingly, the panel explodes in a ball of fire. Plaintiff alleges that if the wire had been insulated, the accident would not have happened and the plaintiff would not have been horribly burned; if one extra switch was used, or an additional guard, or a stronger metal, or a different bolt, the plaintiff would not have been severely deformed.

To a jury, it may seem patently obvious, in the face of horrible injuries, that a product is more dangerous than an ordinary consumer would expect, and thus defectively designed. But is it fair for the jurors to determine whether an industrial-level product—heavy or technical equipment about which consumers have little knowledge or contact—has a design defect merely based upon the jurors' safety expectations as ordinary, unsophisticated consumers? How does a jury made up of ordinary consumers determine what to expect of the technical design characteristics of a product? Leaving the fate of a product that was never intended for use by ordinary consumers to the subjective determinations of a jury seems brutally unfair to product manufacturers, which is why the "risk-utility" test contained in the *Restatement (Third) of Torts: Product Liability* §2 appeared to be the answer.



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The Third Restatement on its face appears to take away the subjective component of the Second Restatement's "consumer expectation" test, and insert the objective "risk-utility" balancing test as the standard for determining if a product is defective in design. However, in reality, that is not the case. The consumer's expectation of safety, and, therefore, the jury's expectation of safety, is either the primary factor or a substantially influential force in all cases where a jury is asked to determine whether a product has a design defect. Hence, even in states that have adopted the Third Restatement, it is essential that defense counsel present the case in a manner that addresses the subjective safety expectations of a juror.

**Restatement Synopses: The Test for Design Defect**

In the *Restatement (Second) of Torts,* Section 402A, comment g states that a product is defective only when, at the time it leaves the seller's hands, it is in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to the consumer. "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Comment I to Section 402A. In other words, in States following the Second Restatement, the jury is asked to step into the shoes of a reasonable consumer of that particular product, and then asked how the reasonable consumer would assess the risks associated with using that product. Therefore, it is what the reasonable consumer would have expected, as interpreted by the jury, infusing a subjective interpretation into the test.

Section 2(b) of the Third Restatement "adopts a reasonableness ('risk-utility' balancing) test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the

foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe." *Restatement (Third) of Torts: Product Liability* §2, comment d. This objective balancing test abandons the consumer expectation test of Section 402A.

While the risk-utility balancing test of the Third Restatement seeks to be objective by abandoning the subjective factors of the consumer expectation test, the risk-utility balancing test actually incorporates consumer expectations as a factor to consider when applying the Third Restatement's test of product defect. "A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include . . . the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, *and the nature and strength of consumer expectations* regarding the product, including expectations arising from product portrayal and marketing." *Restatement (Third) of Torts: Product Liability* §2, comment f (emphasis added).

"Some courts, for example, use the term "reasonable consumer expectations" as an equivalent of 'proof of a reasonable, safer design alternative,' since reasonable consumers have a right to expect product designs that conform to the reasonableness standard in Subsection (b). Comment g to Section 2. "[A]lthough consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe." *Id.* Therefore, even in those States that have declared the Third Restatement controlling and apply the risk-utility balancing test, a jury will have the opportunity to insert the subjective aspects of the consumer

expectation test. It is critical to know which States apply the risk-utility balancing test, which states use both tests, and which States rely exclusively upon the consumer expectations test, to know what to focus upon when presenting the case to the jury.

Contrary to what one would expect after reading the Third Restatement, most States still apply the consumer expectations test of the Second Restatement. Twenty-seven States apply a version of the consumer expectation test of the Second Restatement—Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming. Nine States have incorporated a combination of the risk-utility balancing test and the consumer expectations test—Alaska, California, Connecticut, Hawaii, Illinois, Maryland, Ohio, South Carolina, and Washington. Twelve States have adopted some form of the risk-utility balancing test of the Third Restatement—Georgia, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Texas, and West Virginia. Only Delaware, Michigan, and Virginia have declined to adopt either the Second or Third Restatement tests, but these States have not adopted strict liability as a theory of product liability.

Thirty-six States apply some form of the Second Restatement's consumer expectations test, and the twelve States that apply the risk-utility balancing test incorporate aspects of the consumer expectations test. Therefore, to present an effective defense to a product design case, it is critical to take into account the jurors' safety expectations regarding the product, their comprehension abilities (especially in product cases), and the method by which to best educate the jury about the design of the product.

**What to Expect from the Jury**

- **Dealing with complex concepts**

It is commonly held wisdom, by both plaintiff and defense trial attorneys, that jurors are incapable of grasping and grappling with the complexities of the scientific concepts often attendant to product liability litigation. By and large, this understanding is the product of anecdotal tales flowing from cases that resulted in "runaway" verdicts. It is certainly true that jurors are often asked to perform the incredible task of learning enough physics and engineering (through the presentation of evidence compressed into a relatively brief measure of time) to resolve a complex dispute, while being told that the evidence can be indicative of two diametrically opposed outcomes. While it is easy to assume that the average juror cannot or will not understand these complicated matters, a significant amount of jury research argues to the contrary. Studies have shown that jurors can comprehend complex cases, such as product liability cases, and that they do apply the law as presented to them by the judge. However, it is the presentation of that case by the lawyers that is essential to the education of the jury and the successful defense of a product design case.

"In studying data from hundreds of jury trials and jury simulations, Professors Valerie P. Hans and Neil Vidmar found that juror incompetence is a rare phenomenon. This is because the deliberative process allows jurors to pool their collective memories, allowing them to recall and analyze the evidence and the law. One study examining jurors' memories for facts and law found that a jury's collective memory was large, recalling 90 percent of the evidence and 80 percent of the instructions. Difficulties in understanding the judge's instructions were often cleared up during deliberation. Hans and Vidmar also found 'much evidence that most people, once actually serving in a trial, become highly serious and responsible toward their task and

toward the joint effort to deliberate through to a verdict.'" *Facts About Civil Juries in the United States* (Citizens for Corporate Accountability & Individual Rights 2000), citing Hans & Vidmar, *Judging the Jury* (1986).

In his review of jury studies dating from the 1950s, John Guinther opined that "jury discussions are highly serious, highly relevant, and highly concerned with the facts of the case." Guinther, *The Jury in America* (1988). Similarly, University of Chicago professors Harry Kalven and Hans Zeisel found that, because juries operate by collective recall, they remember far more than most of its members could as individuals. Also, "most people, once actually serving in a trial, become highly serious and responsible towards their task." *Facts About Civil Juries in the United States*, citing Zeisel, *The American Jury* (1971).

Similarly, a recent three-year survey of judges and lawyers conducted by the Georgia Civil Justice Foundation found that judges and juries frequently agree on which party should win a case. It noted that citizens perform jury service in an undistracted and highly conscientious fashion, the jury largely comprehends even complicated negligence cases, and the jury generally follows the judge's instructions on the law of the case. *In Defense of the Georgia Negligence Jury,* based upon Sentell, *The Georgia Negligence Jury* (1995).

- **The Roles of Jury and Counsel**

From the jurors' perspective, their job is to learn highly complex, novel information and solve a difficult problem in an environment that seemingly works against these goals. Their first concern is to determine what they are expected to do. "[Their] second concern is a desire to do their job well. In post-trial interviews conducted by psychologists, jurors regularly express a strong desire to be good jurors. They feel they are in a responsible position, and they take their

job seriously. A recent poll by the National Center for State Courts found that 80% of jurors enjoyed their jury service and would serve again. They believe they learned a great deal and that they did something important for society." Leggett, *Educating Your Jury: The Key to Success* (Jury Research Institute). "Jurors consistently describe their jury service as 'like being in school again.' … In school, students must learn what is presented and be able to use what they have learned to answer correctly on a final exam. To many jurors, their ultimate job is not only fact-finding, but also solving the problem presented in the case with the 'right' answer—the verdict." *Id.*

The work of jury researchers suggests that jurors want to learn, and that they can do so if the case is taught well. One of the most consistent complaints is that "things were not explained well" in trial. "Jurors are willing to accept the court's tradition restricting communication with each other and family members during trial. In return, they hold high standards for those who are communicating with them in the courtroom." *Id.* Sound psychological research attests to the need for clear communication of the case to the jury. A jury will most likely act upon its predisposing beliefs and attitudes when the case is incomprehensible. "A juror who has found the case to be too dense for comprehension will rely on peripheral rather than central information. Personal experiences and pre-existing beliefs are more available and accessible as problem-solving tools, and the facts of the case diminish in ultimate importance."

Simply put, the defense has the best chance of winning if jurors have both heard and understood the defense side of the story. *Id.* Therefore, "a tremendous burden exists for litigators who must translate their expertise into a communication strategy that will enable the jurors to learn their side of the case and become experts by the end of the trial." *Id.* Nowhere is this more true than in complex product liability cases, where the litigator must not only educate the

jury about the product, its function, and its history, but also teach the jury the law and how it should be applied to that product. The manner in which this information is conveyed to the jury is critical.

If jurors do not receive a simple, clear story as to what the case is about, they experience confusion about the nature of the dispute, about who is suing whom, and about what decisions they will be asked to make. The longer jurors remain confused, the more frustrated they become, and the less willing they are to closely attend to the details of the case. Jurors will look for pieces of evidence that support their private story of the case, rather than the "story" of the case being presented by the attorneys. Laguzza, *Stage Management: Understanding and Reacting to Changes in Juror's Attitudes and Perception* (About Juries Online, DecisionQuest, January 2001). Even when dealing only with the issue of damages, "[j]urors will simply stop paying attention if the theory is too complicated or contrived. Most jurors are unlikely to have much experience in mathematics or statistical formulation and, consequently, will avoid dealing with intricate damage theories. The simpler the theory, the more likely the jurors will feel comfortable using it in deliberations to determine an amount." David S. Davis, Ph.D., Helen Ditges, *On Damages, a Jury is Difficult to Figure* (About Juries Online, DecisionQuest, January 2001). It is essential that the attorney presents the case, and the law, in a clear, understandable manner that will allow the jury to understand the "story" of the case, thereby promoting and enhancing the juror's comprehension and effectively educating them about the product and the law.

- **Judging the Conduct of Others**

Long before jury consultants existed, scholars recognized the importance of understanding how people judge the conduct of others. Thinkers from Confucius to Adam Smith recognized that a person is only capable of judging another person's actions by placing himself or herself into the shoes of the person whose actions are being judged. When asked to pass upon the righteousness of an activity, people naturally ask, introspectively: "How would I feel if that happened to me under the same circumstances?" "Would I accept or reject that behavior?" "If I could justify it as my own act, then it must have been okay for him to do it." "If I find it too inappropriate either to do myself or to have it happen to me, I will reject the activity as improper for anyone to do or to be burdened by."

As trial lawyers defending product liability or any other kinds of personal injury suits, we have been schooled to demand relief *in limine*, to object during cross-examination, and to jump up and down whenever a plaintiff's attorney breathes anything that even remotely sounds like a "Golden Rule" argument (which asks the witness or a juror to place him or herself into the shoes of the plaintiff). Plaintiffs' attorneys make similar protestations when defense lawyers attempt to have the jurors place themselves in the position of the defendant in an effort to bolster the reasonableness of the defendant's actions. It is important to keep in mind this body of thought that teaches that even if jurors are not asked or told to decide an issue or an entire case based upon the "Golden Rule," they may have no other possible way to decide the matter. If one accepts this teaching, does that necessarily lead to the conclusion that defendants in the venue of strict product liability (where the focus is on the product's integrity, not on the integrity of the

process by which it was created) are hopelessly doomed? No. The task is simply to refocus on how to use this fundamental knowledge to the advantage of the defendant.

If jurors are naturally, perhaps even subconsciously, going to place themselves into the shoes of the various parties, the defendant must offer them a better brand of shoes in which to walk. Achieving this task requires an orchestration of several well-planned defense strategies: humanizing the defendant; giving spirit to the product's design; elevating the importance of the product's role in the marketplace by identifying the product's beneficial impact on the lives of industrial users; and making the jury feel good about supporting the product's design through its verdict.

**Meeting the Jury's Expectations**

A jury wants to, and can, comprehend facts in a non-consumer (i.e., industrial-level) product case. The burden is on defense counsel to meet and exceed the jury's expectations in the communication of the case information. Properly presented, a defendant can expect the jury to follow the law and correctly apply the facts to reach a true verdict, even in a case involving products outside the jury's realm of experience.

It is relatively fundamental to the process of sharpening one's effectiveness in "getting through to" jurors the complex issues involved in a design defect case that trial counsel must become a teacher (although not a preacher). Further, what is taught must be both understood and in a retrievable form of memory (because deliberations, which are, in essence, the final examination, often come a week or two after the crucial concepts are introduced). To achieve the goal of effective teaching, several approaches can prove fruitful. By mixing and matching elements from some or all of the following methods, counsel can increase the likelihood that the

jury will understand and retrieve the message that the defendant's product is reasonably safe for its intended purposes and users.

- **Use repetition to reinforce the message.**

"If a stimulus is forced upon [one's] consciousness often enough, the exposure can substitute enough for interest and for meaning for [one] to notice and remember it." London, *Beginning Psychology*, at 261 (Dorsey Press 1975). This is nothing new to seasoned trial counsel who have been taught by litigation masters that repetition is crucial to jury understanding. The mantra is that "if it's worth saying once, it's worth saying three times." As a practical matter, no verbal learning device is more effective than redundancy. Experience shows that it may be necessary to repeat key concepts several times for the jurors to go through the steps of hearing, listening, and processing foreign ideas.

- **Use graphics and other visual stimuli.**

As in any classroom, the jury must pay attention to learn; that is fundamentally necessary for any lasting memory to occur. While we may fight against the adage, "a picture *is* worth a thousand words," jurors remember what they see *and* hear in much greater measure than that which they only see. Visual presentations help to keep the jury awake and, if properly used, can serve to stimulate the jury's receptive capabilities. The dynamics of the visual aids must, however, be well thought out to gain maximum effectiveness as a teaching tool. Size is important. "Large enough to see and to carry" should be the guiding rule. Clarity and brevity of presentation is crucial. Too much

visual stimulation can be exhausting, and jurors can "zone out." Visuals must be well placed, taking into account all of the proxemics of the courtroom. Consider placing them in an area of the courtroom where all jurors can study them for an extended time. Creative uses of advances in courtroom technology can provide innumerable presentation opportunities and angles, each of which can be pre-trial-tested for effectiveness as a teaching tool.

Counsel should be certain, in the absence of formalized input by jury consultants or focus groups, to seek input from non-legal individuals to more closely track the likely jury profile. Practice in the use of these tools is vital to their effectiveness. A clumsy presentation threatens to distract the jury from the substantive messages being advanced.

- **Educate on the difference between expert and consumer users.**

It is important to begin the education process early by questioning prospective jurors during *voir dire* about their individual experiences with consumer products (like toasters, televisions, microwave ovens, vacuums, clothes dryers, or hair dryers). Focus on how the jurors use them without paying specific attention to potential dangers; e.g., they let their children touch them and use them. Then set up the distinction between that experience and the use of industrial-level products (*e.g.*, car engines, circuit breaker panels in houses, or overhead power lines). Most jurors will acknowledge knowing their own limits. Just because they feel a measure of confidence using various related products at home, most would not feel that same level of surety, without substantial training, tackling an electrical panel at the courthouse, maintaining a punch press, or running an industrial cleaning machine.

Use creative examples from common experience, such as watching their children at the pool versus relying on a lifeguard with special training. Inquire about their individual job focuses, how they expect more care from the trained person, and how they, like any untrained person, would be foolish to try to do the specialty job without the proper training. In other words, raise juror expectations as to the level of education, training, personal responsibility, awareness, and common sense required to encounter, work with, and use industrial-level products.

- **Tell the company's story.**

The opening statement presents a prime opportunity to further the jury's education about the product designer. In an effort to humanize the defendant, to make the jury's new shoes more comfortable, counsel needs to tell the company's story. Historical data on various benevolent activities undertaken by the company, products produced by the defendant that are widely known and appreciated, and nationalistic ventures by the defendant are all matters that can raise the jury's initial perception of the defendant. Often these materials are readily available on company web sites.

- **Tell the bigger story of the product's value.**

Counsel should be careful not to become too parochial in describing the merits of the involved product. Many times, the product has a "trickle-down" beneficial effect that is not apparent to the jurors. Consider, for example, the case of the exploding electrical switchgear. This device perhaps supplies power to a hospital or to a residential facility for the elderly. In that capacity, it performs a valued public service that, if taken away by

a user's inappropriate actions, can adversely impact many who can least afford the insult. If it supplies a laundry with the power needed to run the washing machines, an officious interruption may adversely impact the schools and hospitals that rely on the laundry's services. Almost every industrial product is an important cog in its industry. Its greater value will not be lost on the jury.

- **Don't corrupt an accurate picture of the industrial environment.**

Consider having witnesses testify in uniform. Trial counsel rarely hesitate to have police officers wear uniforms and badges in an effort to convey a predetermined message to the jury. Why shouldn't the electrician wear his tool belt and hard hat, bring safety glasses, wear the safety clothes, etc.? The trappings of one's work environment create a better feel for what life is like in the field.

- **Emphasize the education and training required for someone to be qualified to work on/in/with the product.**

As an adjunct to those efforts made during jury selection to awaken the jury's understanding of the differences between using consumer products and industrial/commercial products, it is important to reinforce with witnesses the various experiential and educational factors necessary for appropriate product operation. This will help to strengthen the jurors' respect for the importance of proper operation. Jurors tend to respect medical doctors because they are keenly aware of the long and arduous training doctors go through before they are allowed to practice. The goal of defense counsel is to engender a similar level of appreciation for the product operator.

- **Communicate the complexity of the design process.**

The product's design must be re-created for the jury, from conception to fault tree analysis to drafting to test run to production. This becomes a concert of carefully chosen witnesses whose ultimate goals will be both to describe the process and to embody the process. Jurors must be able to place a friendly, wise, and caring face to the design process. The goal is to show the product as a living work that could only have come to being through the sweat equity of many intelligent and thoughtful people.

This requires telling the story of why the defendant chose to make the product in the first place. Offer both a practical and a technical reason for the design to exist in its current form. Often, product lines came about due to overwhelming and repeated requests by people, not unlike the jurors, for a more efficient way to do something that once was considered drudgery or maddeningly inefficient. The product must ultimately be shown to have a value that is not dependent on profit potential to the company. If the product was a truly useful innovation, witnesses need to let the jury know what the industrial world was like before the product was designed. If practical realities of function come into play, the jury must know what can and cannot be physically done. The story should then progress through the product's infancy and the various generations and iterations of the product as technology advanced. Revel in the challenges of the task that faced the product's creators. Have witnesses available who participated in the many tasks involved in the creation of this new product life.

Use visuals or courtroom re-creations to show the testing lab where the witness designed and tested the product. Use a timeline showing what occurred between product

conception, the development of engineering specifications, tooling and retooling the product, and ultimate production. Consider showing a timeline of the marketing, instructions, testing, and trade shows used to sell the product (unless your client rushed the product to market).

- **Communicate the education and training of product's designers.**

Spend some time on the background of defendant's testifying design engineers, draftspeople, and safety specialists to give the jury a complete picture of how many classes each witness took in his or her particular discipline, the types of degrees that each holds, licensures, and the number of years spent in school, as well as other pursuits of knowledge, such as in-house training and apprenticeships. Jurors need to know that the product is imbued with the hard-earned knowledge and background of these witnesses.

- **Illustrate the environment in which the product is used.**

Paint a complete and realistic picture of the industrial setting where the subject event took place. Have witnesses describe the measures that have been taken to illustrate the serious nature of the product's usage, including locked access, keyed on/off switches on machines, demarcated walkways, danger signs, and circulating supervisors.

- **Educate beyond first blush.**

Don't become wedded to obvious labels for the product. Often, it is helpful to step back and look away from the obvious. Just because a certain element of a product has a traditional name, connoting a traditional function, does not mean that helpful

ancillary uses for that facet of the product don't exist. Search for ways to give the jury a picture of the product that doesn't strike the onlooker at first glance, but directly addresses the plaintiff's claims of defect.

For example: Assume that the plaintiff is claiming that the electric miter saw that injured the plaintiff is defectively designed because it lacks a guard that completely encompasses the blade. Rather than simply arguing that it is acceptable to have failed to design the recommended guard, counsel may want to teach the jury that some other aspect of the product, such as the electric brake, was designed as an invisible guard which acts like a steel wall, instantly dropping down to protect the user from injury. This places a visual memory in the jurors' minds, which will aid them in arguing the relative safety of the product for themselves.

- **Give the jury creative ways to remember multi-step processes or issues.**

Trial counsel should, as often as possible, subtly foster the notion that counsel recognizes the complexity of the issues and would like to share with the jury ways to remember multi-step concepts that were used during trial preparation. Mnemonics can be used to try to make things memorable both by conceptual and perceptual associations. They were used by ancient cultures to allow storytellers to remember important tales about the past.

Acrostics is a sub-field of mnemonics that involves an arrangement in which the first or last letters of words, when taken in order, spell out a key word. This concept can be used in various creative ways to help the jury understand design processes. An example follows:

**S**eeing a problem or need;

**A**nalyzing alternatives;

**F**ormulating a design;

**E**valuating strengths and weaknesses;

**T**esting for efficiency and operation;

**Y**es (product approval).

Anything that will catch the jury's attention but does not require exhaustive verbal discussion to make the intended point advances the jurors' learning process.

- **Don't be afraid of the product**.

Many a design case involving potentially dangerous products has been lost by the display of abject fear of the product by defense counsel. The way that counsel interacts with the product, if present in the courtroom, and the words that counsel chooses to describe the product make lasting impressions on the jury. It is important for trial counsel to draw a distinction, in both action and discussion, between a healthy respect for the potential danger of the subject product and fear of the product.

Keep in mind that the jury must ultimately believe that, if used properly and as intended, the involved product is reasonably safe. To build up this confidence, counsel must learn every aspect of the product's proper use by in-depth discussion with the product's creators and by "hands-on" product use. The jury must be taught to respect the power of the product, not to fear it. In-court demonstrations, rather than being avoided, should be carefully choreographed, and performed by experienced operators who have been advised that improvisation and cavalier operation will doom the defense.

## Conclusion

If defense counsel approaches the trial of an industrial product design defect case with the understanding that jurors are eager to understand and perform their designated roles as the triers of fact, yet carry with them innate consumer expectations that they test by stepping into the shoes of both parties, effective methods can be employed to advance the defendant's case. These methods give primary attention to shaping the jurors' expectations of the defendant's design by making the jurors active observers of the design process and educating them on the important role of the product in the workplace.

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