

Testing the Comparative Negligence Affirmative Defense

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This article is a report on an experimental test conducted by a jury behavior research firm. The question addressed by the test was the effect of including or excluding a comparative negligence instruction and question on a special verdict form, and how it affects the verdict and damage awards in a case in which comparative negligence is a viable defense.

An Overview of the Case

The president of a successful dot.com company died in early 1998 just before his company launched a very successful IPO. The company was later sold for over \$6 billion. The widow and daughter of the 38-year-old decedent sued a major institution for wrongful death and for its failure to diagnose, refer, and treat a reversible heart condition.

The defense was very concerned about damages. Because of the decedent's age and earnings history, the dot.com president's loss of earning capacity was worth \$100 million according to accepted accounting methods. During trial preparations in late 1999, dot.com valuations were rising to unprecedented levels. At one point, the plaintiffs' accounting methods used to estimate loss of earning capacity exceeded \$200 million. Moreover, the venue in which this case was filed was known to be plaintiff-oriented. What would be the mindset of the average juror in a city where two-bedroom, two-bathroom condominiums in modest areas sold for \$875,000, and single family homes in the region regularly sold for between \$300 and \$400 per square foot? How, in such an environment, could the defense ever present a case that would result in a reasonable verdict if liability were found?

Because the stakes were so high, the defendant institution asked the authors' jury behavior research firm and third party administrator to conduct focus groups to develop defense arguments, and then to test and refine these arguments in a large panel study. The latter project was also intended to assess the risk of taking this case to trial, determine the probability of a defense verdict, and develop a "high-low" estimate of the probable range of damages in the event of an adverse verdict.

Defense counsel also wanted to use a controversial tactic to enhance the probability of obtaining a defense verdict. While he agreed with the focus group results that showed that a comparative negligence affirmative defense would be persuasive, he also wanted to omit the comparative negligence instructions/question on the special verdict form. He hypothesized that the comparative negligence instructions/question would have a detrimental effect on verdict. He felt that the inclusion of the instructions/question would only invite the jury to render a plaintiff's verdict and then "split the baby." However, in the event of an adverse verdict, would plaintiff jurors take the comparative negligence evidence into account and reduce their damage awards on their own without the instructions/question?

To our knowledge, these hypotheses had never been scientifically tested. Therefore, we developed an experimental design to test the hypothesis as part of the larger study.

The primary purpose of this study was to test the arguments that had been developed in prior focus groups, and to provide the client (the institution that was the defendant in the lawsuit) with a statistical assessment of probability of a plaintiff's or a defense verdict, as well as "high-low" statistical estimates of the probable damage awards if there was a plaintiff's verdict. Such a test required a large sample size to attain statistical power and reliability. Therefore, a panel of over 100 mock jurors was recruited to hear the case in an all-day mock trial. Half of the panel got the comparative negligence instructions and question on the special verdict form. The other

half of the panel did not get the comparative negligence instructions/question on the verdict form.

Focus Group Pilot Study

A jury consultant reviewed the case in depth and presented various aspects of the case to three focus groups. Each presentation was structured to test various hypotheses formulated at the outset, and new hypotheses that developed as feedback was obtained from the first and second groups. Focus group results showed that this case had good evidence for a comparative negligence affirmative defense. Based on these and other results, a defense was prepared and tested in a larger panel study to verify and refine the defense's strategy, and to assess the value of the case.

Selecting Mock Jurors for the Large Panel Study

The primary purpose of the follow-up panel study was to scientifically predict the probable verdict and exposure in this case. This type of study requires a different approach to the typical mock trial. A larger sample size is necessary to provide a statistical measure of exposure. Therefore, 125 mock jurors were recruited with a stratified random sampling procedure throughout the venire; i.e., we sought a group that was representative of the population in the relevant jurisdiction. They were screened on the telephone as they were recruited; this preliminary step helped us to eliminate people who would have been excused for cause, hardship, or who posed potential risks that they would be targets of discovery actions by the plaintiffs' counsel.

The mock jurors that were selected were in fact a representative demographic sample of the venire in terms of age, race, gender, education, and community/neighborhood. The demographic breakdowns were based on U.S. Census data and modified by our own databases of jurors who are ultimately seated in large civil cases in this venue. Participants were paid for their time to participate, thus eliminating the self-selection bias that is inherent with volunteer samples.

111 of the 125 people recruited actually came to the mock trial/research on the appointed day. Upon arriving, jurors were screened again for discovery risks and challenges for cause. All of those who showed up for the research qualified to participate.

Procedure at the Mock Trial

Jurors heard statements from the plaintiff and defense. (Plaintiffs' counsel was role-played by another attorney in the defense firm.) Both statements recited deposition testimony, explained clearly their client's position on the case, and presented demonstrative evidence. Both sides also presented and argued their positions on damages. The plaintiffs' statement included the emotional arguments that would be expected at trial.

Next, jurors were instructed on the law. They filled out a questionnaire to capture their pre-deliberation attitudes and verdict, prior to being exposed to the opinions of fellow jurors. Half of the panel got the comparative negligence instructions and question on the special verdict form. The other half did not.

Finally, two subgroups of twelve mock jurors were retained to deliberate the case. One jury had received the comparative negligence instructions/question, and the other jury had not received the instructions/question. Moderators joined each jury to focus participants on specific issues that needed clarification. Deliberations were videotaped and used in a separate analysis.

Three hypotheses were tested:

- A defense verdict is more probable when the comparative negligence instructions/question are excluded.
- Damages awards by plaintiff-oriented jurors are higher when the comparative negligence instructions/question are excluded.
- The “exclusion effect” on damage awards is only applicable to jurors who would normally be inclined to award high damages; they would have previously been identified and eliminated by peremptory challenges.

The Test’s Results

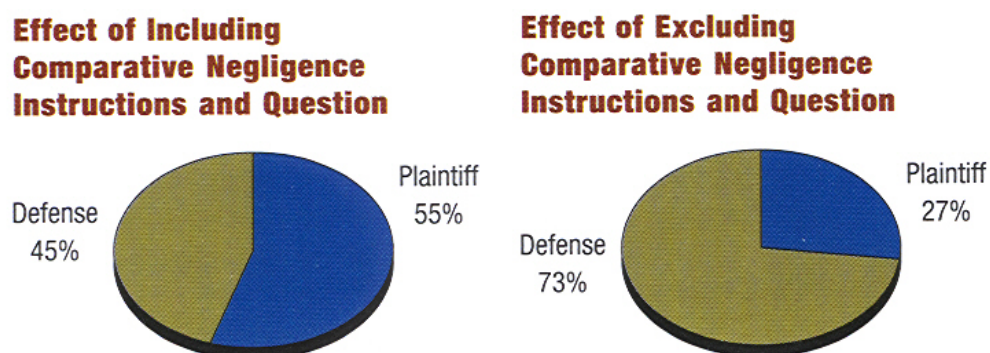
The mock jurors decided, first, the question of the institution’s liability for the wrongful death of the dot.com president, and second, the amount of damages to be awarded to the plaintiff. Here are the results of testing the three hypotheses.

Hypothesis # 1:

A defense verdict is more probable when comparative negligence instructions/questions are excluded.

The inclusion/exclusion of the instructions/question produced a statistically significant effect on the verdict. In fact, the difference was dramatic. (The figures in Graph 1 indicate the percentage of the 111 mock jurors who would find for the defense or for the plaintiff on the question of liability.) Results showed that there was a 45/55 chance of a defense verdict when the comparative negligence instructions/question were included. However, the chance of a defense verdict improved dramatically to 73/27 when the comparative negligence instructions/question were excluded:

Graph 1



Statistically, the probability that this difference was mere chance was only 0.17%, which was well beyond the traditional threshold of 5.0% for asserting that the observed difference is significant. The exclusion of the instructions/question increases the probability of a defense verdict on liability. Therefore, the defense would be better off if it excluded the comparative negligence instructions/question if it is betting on a defense verdict. Whether this can backfire in the form of higher damage awards, in the event of a plaintiff's verdict, is addressed by the next two hypotheses.

Hypothesis # 2:

Damage awards by plaintiff jurors are higher when the comparative negligence instructions/question are excluded.

Can the strategy of omitting the contributory negligence instruction/question backfire, *i.e.*, result in a higher damages award, in the event of a plaintiff's verdict? Although excluding the instructions/question enhanced the probability of a defense verdict, to what extent did its inclusion/exclusion affect damage awards by those who were plaintiff-oriented? More specifically, would the exclusion of the instructions/question lessen the impact of the defense's comparative negligence arguments on damage awards by plaintiff-oriented jurors?

The results in Graph 2 indicate that the exclusion of the instructions/question did have an impact on damage awards. Awards were significantly higher by plaintiff-partisan jurors who did not get the instruction.

Based on these results, it appears that the defense needs to make a distinct choice:

- 1) Go for broke by excluding the instruction/question to enhance the probability of a defense verdict; or
- 2) Hedge the bet by including the instruction/question to minimize damage awards, though this will also increase the likelihood of a plaintiff's verdict.

These data were based on *all* jurors who rendered a plaintiff's verdict. The next question is whether jurors who survive peremptory challenges are susceptible to the "exclusion effect."

Hypothesis # 3:

The "exclusion effect" on damages awards is only applicable to "high damages" jurors who would normally be identified and eliminated by peremptory challenges.

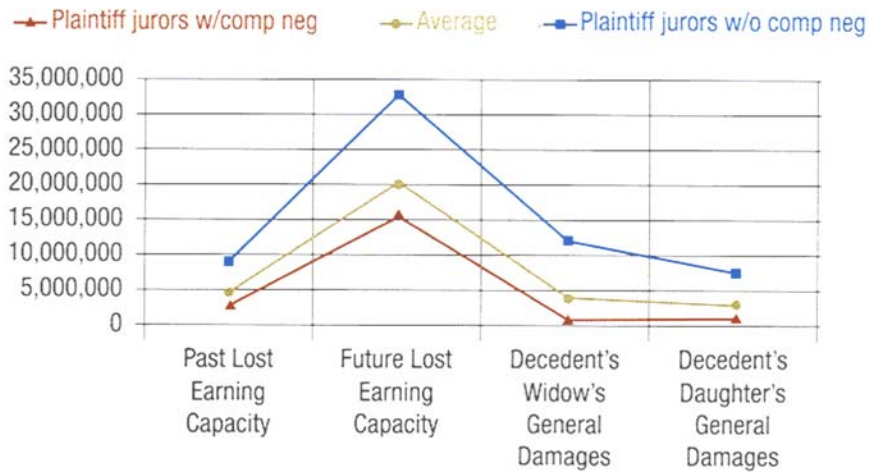
Although excluding the instructions/question increased the damage awards of jurors who were plaintiff-oriented, did this "exclusion effect" hold up for jurors who survived peremptory challenges? It may be that plaintiff-oriented jurors who survive peremptory challenges will take the comparative negligence evidence into account on their own and reduce their damage awards accordingly.

Peremptory challenges in this study were done somewhat artificially. Since it was impossible to

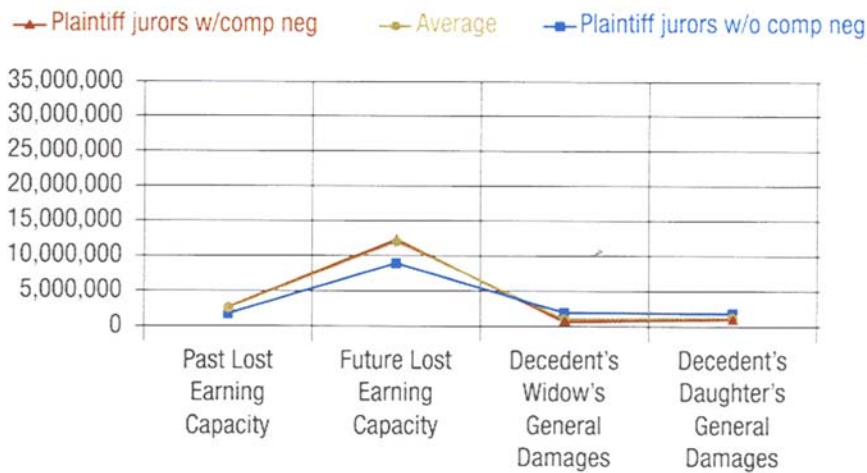
voir dire all of them. Therefore, we assumed that experienced counsel on both sides would identify biased jurors. Defense counsel would strike emotional, high-damages jurors. Plaintiffs’ counsel would strike conservative, defense-oriented jurors. High-damages jurors were defined as the six jurors who had the highest economic damage awards among the 47 plaintiff jurors in the panel.

Graphs 2 & 3

All Plaintiff Jurors: Mean Awards for Elements of Damages



Qualified Plaintiff Jurors: Mean Awards for Elements of Damages



The results in Graph 3 show that the “exclusion effect” disappeared after peremptory challenges were exercised. Apparently, this effect applies only to high-damages jurors. Once they had been eliminated by peremptory challenges, the damages awarded by plaintiff jurors in either condition were statistically identical.

Conclusions and Recommendations

The results noted above were startling. Yet, the entire exercise was founded on solid research. The research design was well executed, the sample was large and representative, and the presentations for both sides were exemplary. The resulting choice was clear:

Go for a defense verdict by excluding the instructions/question, or hedge the bet by including the instructions/question to control damages.

We also suspect that this strategy will probably be more effective when liability itself is close, as it was here (55%-45% when the instructions/question was included on the verdict form). The strategy may also be more suitable to a medical malpractice setting. Earlier focus group sessions noted that many mock jurors felt particularly strong about “patient responsibility” and thus to some degree that theme might have been an acceptable substitute for comparative negligence. Only additional case-specific research can determine whether these results apply in other cases.

Nevertheless, this research produced some provocative results that conflict with the common thinking of most experienced trial attorneys.

These results strongly suggest that defense counsel and the client must discuss and decide on their objective:

“Do we want to win the case and accept the risk of a higher award in the event of an adverse verdict, or do we want to control damages and increase the probability of a plaintiff’s verdict?”

Whether to include or exclude the comparative negligence instructions/question depends on the objective that counsel and the client jointly decide upon. If the objective is to win the case, then the comparative negligence instructions/question should be excluded. However, both counsel and the client should be clear that this is a “go for broke” strategy. If there is an adverse verdict and there are still some high-damages jurors on the panel, they will not automatically reduce their own awards even when there was ample evidence presented about comparative negligence.

Consequently, this strategy should only be exercised if both defense counsel and the client are committed to winning the case, and if they believe that the defense can identify high-damages jurors during *voir dire* in the event of an adverse verdict.