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The "Burden" of the Burden of Proof

Juror misconceptions about the applicable burden of proof are one of the major reasons, in my opinion, that plaintiffs lose civil trials.

It has been my overwhelming experience, both in trying cases and in conducting focus groups, that jurors:

1. do not understand the concept of "burden of proof;"
2. if they understand the concept, they don't understand the law; they drastically overestimate the degree of certainty required to meet the burden; and
3. even if they understand the concept, and understand the law (that is, they understand the degree of certainty required to meet the burden) they don't agree with and don't apply the "preponderance" standard, but rather apply a much higher standard.

In my work doing focus groups, I routinely ask people how certain they would have to be of wrongdoing before they would find someone negligent and award damages against them. As lawyers, we know the answer should be something like 50.001%. But the answer I get is routinely 70% or more; with medical negligence claims against doctors we often see 85% (and sometimes 100%).

and TV shows about criminal cases. Criminal cases are their frame of reference in the justice system. Everyone knows "beyond a reasonable doubt." We can tell jurors that's only for criminal cases because "we have to have a higher standard when a person's freedom is at stake," but the feedback I get is that this argument doesn't ring true. Civil jurors view "taking" someone's money (and nearly all jurors think of non-economic damages as a form of penalty) as every bit as serious as taking their liberty.

More often than not, jurors refer to determining negligence as finding the defendant "guilty." There is a big difference, both in the law and in perception between the words "negligent" and "guilty." "Negligence" is an amorphous term that doesn't mean much in regular parlance; and the jury instructions are little, if any, help on this point. "Guilty," on the other hand, *does* mean something in regular conversation and jurors are primed to view your case through the prism of "guilt vs. innocence." Even mock jurors who have sat on real civil jury trials often describe their experience, as follows:

"I was a juror on a medical negligence trial that lasted two weeks. At the end of it, we didn't find the doctor guilty, because we didn't think he intended to hurt the plaintiff."

What, then, is a plaintiff's lawyer to do when your jurors are already primed to find the defendant "guilty" only if you can prove that a crime was committed? You can educate jurors as to points (1) and (2) above, but you need to identify and beware of the jurors who believe that it is only fair to find the defendant "guilty" if the plaintiff meets a burden that's much higher than 50%+.

A great way to explain the burden of proof is this: **"Imagine I had two reams of photocopy paper in front of me. Each stack has 500 pages. If I slide one page over onto the other stack, that stack now has the preponderance of the paper."** (you can also do this as a visual demonstration if the judge will allow it)

Then, follow up with "How do you feel about the idea that the law only requires that the plaintiff prove its case by a preponderance – by that one piece of paper?" You will often be able to identify pro-defense jurors by

I'll write more about this in my next article.

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