

DEFENSE NEWS

Fighting for Justice and Balance in Civil Courts



The Cynical Juror The Impact on Case Perception and Damages

By George Hunter, Ph.D. and Andrea Blount, Ph.D., Dodge Blount & Hunter, LLP - Litigation Consulting

Many of us who grew up with Charles Schwartz's Peanuts may remember a classic line voiced by Linus van Pelt, "I love humanity; it's people I can't stand." While holding onto both his security blanket and his unbridled optimism, Linus captured the heart of cynics everywhere without us even knowing it. In popular conversation, the term cynicism often refers to a jaded, scornful or generally negative disposition but this is actually a misuse of the term. As psychologists and jury researchers, we have a more measured definition of cynicism.

Cynical people are not sour and hateful, nor are they unfeeling or unsympathetic. In fact, cynics are actually much the opposite. Cynics have an abiding idealism about humanity and how the world "should be," but their beliefs are offset by the thought that all human behavior is motivated out of self-interest. Life could be different and better, they believe, if not for the self-interested behavior of others. Let us leave psychological theory for classrooms, however, and talk about why jurors' cynicism is gaining increased interest. Consider recent current events:

- Left to largely regulate themselves, the entire banking industry all but collapsed in 2008 providing an excellent example of what cynics find flawed about human nature: people in powerful situations making choices which enriched themselves at the ultimate cost of the system and the public.
- Bernie Madoff, a trusted figure in financial circles and former Chairman of the NASDAQ stock exchange, exploited investors for his own exorbitant gain, leaving many of his innocent investors penniless.
- The credit card industry benefited from billions of dollars in bailouts from taxpayers and then promptly thanked their consumers by hiking interest rates, raising minimum monthly payments and cutting available limits, even on consumers who were up to date on their payments.

Additionally, we cannot forget scandalous actions of governors, senators, baseball stars, pop musicians, corporate executives and a host of other professions. Over time, exposure to the negative details of our lives can steadily develop into a cynical worldview, implicating everyone. A cynical worldview does not

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Cynical *From Page 1*

just impact our perceptions of national or world events, but also affects the way we view our friends, family, cohorts, and colleagues.

The unconventional person in today's society is no longer the jaded discontent but, instead, the unabashed believer who withstands cynical conversion. It is not surprising, then, that researchers have found roughly half of all Americans can be classified as cynics, although many may not view themselves as such. If you are personally wondering whether you are a cynic or not, you are likely a cynic if you believe:

- People pretend to care about each other more than they actually do;
- An expert witness will say anything as long as he or she is paid for it;
- Big businesses often engage in deceptive behavior to increase profits;
- Most people would lie in court if they stand to profit from it; or
- It is not unusual for people to take advantage of each other's weaknesses.

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With its attempts to resist and subvert social themes, cynicism has itself become a social theme, and has become an added twist to many of today's complex litigation.

Cynicism and the Legal System

Cynicism is an irony, and develops as a reaction to dashed hopes and the obvious imperfections of a materialistic, demanding, and manipulative society. Cynics are disillusioned idealists who wish that the world would be different, but believe that the greatest barrier to change is humanity's own nature. This worldview serves as a defense to what is seen as an increasingly and hopelessly corrupt world. Social scientists have studied many aspects of cynicism, including health, organizational and work issues. Yet, the role of cynicism in juror decision-making has yet to be extensively investigated.

No aspect of the courtroom experience, however, escapes a cynical interpretation; the behaviors of plaintiffs, defendants, attorneys, witnesses, the judge, and even fellow jurors are fair game. As part of our ongoing research into jurors' perceptions and influences, we examined the effects of cynicism on juror decision-making using mock juries in civil litigation and criminal research. Although cynicism is not related to verdicts in all cases, we discovered that, on a case-by-case basis, cynicism can be a very powerful predictor of which side jurors tend to favor. Cynical jurors are not more likely to systematically favor plaintiffs or defendants. However, case-specific facts can increase the likelihood of cynics favoring a particular side.

Due to case specifics, it is difficult to know in advance how cynicism will ultimately affect jurors' perceptions. But there are some cases we could point out where the results are a bit more concrete. Recently, there was a case where a pharmacy dispensed the wrong medicine, thereby poisoning the child. In this instance, cynics are more likely to favor the plaintiffs because the defense from the pharmacy appeared disingenuous. They admitted having made a mistake in

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the prescription, but refused to accept that this mistake caused the brain damage afflicting the child.

In a different case where a wealthy businessman was accused of bribing officials, cynics were actually more likely to favor the defense. The defendant's behavior was not all that different from what cynical jurors expected other people would do in his position. Careful pretrial research could identify the effects that cynicism would have on jurors for a given case, and provide early insight into themes that shape how the case is presented.

Cynicism and Damage Awards

Although cynicism does not cause jurors to systematically favor either the defendants or plaintiffs in litigation,

it does have some predictable effects on how jurors approach damages. Our research has shown significant effects of cynicism on both compensatory and punitive damages but, perhaps surprisingly, these effects go in opposite directions.

For compensatory damages, cynicism is positively related to award sizes – the more cynical a person is, the higher the likely compensatory award. Even though cynics believe that people pretend to care about each other more than they really do, they themselves actually care very much about other people. Cynicism is not a reflection of how cynics think about themselves; it is an attribution about how *others* feel and why *others* behave as they do. Thus, for a civil

trial involving personal injury to an innocent bystander, a cynical juror would feel compelled to right the situation by awarding high compensatory damages.

Cynics believe that, because of people's ultimately selfish natures, others are less likely to help people in need. Given the opportunity to help others, cynics are eager to help. Doing so brings to balance for cynics how the world is compared to how it "should be." Interestingly, our research has revealed that this effect is enduring. Participants in our research who have served as actual jurors are less cynical than those who have not - being a part of the system and the justice process leads to a more optimistic outlook on humanity.

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An Introduction

By Jillian Barron, WDTL President, Sebris Busto & James



Although it is now already several months since WDTL's Annual Convention, I would like to introduce myself as your "new" President and let you know about my priorities for the year. I am also asking for your help in working toward WDTL's goals.

My first priority is to increase WDTL's interaction with and recognition by the state and federal judiciary. For many years now, WDTL has held annual judicial receptions in Seattle and Tacoma. More recently we have reintroduced the reception in Spokane. These events get WDTL's name in front of our judges, and allow our members to mingle with judges in an informal setting. However, the size of the receptions can make it difficult for individual members to get some personal time with the judges and connect. So the Board is working on additional ways members will be able to meet and learn more about specific judges, and in which the judges will get to know us better. We are putting together brown bag lunches at which judges and attendees will be able to engage in conversations about issues that could help us improve our practices. We are also working on reinitiating and expanding our provision of CJE programs to state judges.

My second priority is to increase WDTL's interaction with and recognition by state legislators. As you are probably aware, WDTL has a legislative consultant, Mel Sorenson. Mel informs us of legislative proposals likely to be of interest to our members and our members' clients, and also informs legislators of WDTL's position on proposed legislation. In addition, some of our members have given generously of their time by testifying in Olympia in connection with legislation of concern to WDTL. These actions have helped achieve the desired outcome in some cases. Due to the last-minute nature of legislative committee meetings, however, and the short (if any) time allowed for our members' testimony, we are attempting to expand the avenues for getting our positions before critical decision makers. Among other things, we are working on identifying WDTL members who will introduce themselves and WDTL to legislators in their districts.

Finally, and in conjunction with the second priority, I am working with the WDTL Board to refine and streamline the process for Board decision-making and action on pro-

posed legislation. A more efficient decision-making process will also increase our ability to timely present WDTL's position on rule-making and other developments under consideration by the courts and the WSBA Board of Governors.

WDTL strives to advance the goals and concerns of its members throughout the state. In order to increase our visibility to the courts and legislators, and to be sure your interests are taken into account, we would like your input and support. If you are interested in helping us organize events for judges or would be willing to set up an informal meeting with a legislator from your district, we would like to hear from you. And if you have expertise in a practice or area of the law and would be willing to help us draft a legislative position paper or speak on WDTL's behalf in Olympia, we would welcome your involvement. Please contact our Executive Director, Kristin Lewis, any of our Board members, or me to let us know of your interest or share your ideas.

I am honored to serve as your President and look forward to meeting many of you in the coming year.



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The Results of WDTL's Annual Golden Coat Drive



This October, during our annual Golden Coat Drive, WDTL members donated over 260 coats. This generous donation was given to Bethany Presbyterian on Queen Anne for their Wednesday Night Dinner (a dinner for those in need). The firm of Wilson Smith Cochran Dickerson won the challenge with over 60 coats donated. After we delivered the coats on a cold, overcast day, we received this email back from the Director:

I need to formally thank both of you and your group for the successful coat drive!! We were able to host the coat give away for two weeks. This enable us to get more coats to more folks that really needed them. It was really wonderful to be able to offer a coat to anyone who wanted one. We had a great time giving them away. Many folks thanked us and were so very proud of their new looks.

This week while out doing a errand I stopped to talk to one of our gentleman. He thanked me for the coat and said how warm and nice it was. He look a bit brighter as he spoke to me. I realized having a descent looking coat brought him some dignity. That is a huge thing for folks that are living on the streets of Seattle.

Then there was a sweet older women who got a kind of retro coat with fur on the collar. She told me she had always wanted a coat like that but had never been able to afford one. She hugged herself as we talked. She was so very happy and thankful for the beautiful coat.

Thank you so very much.

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For punitive damages, the effect of cynicism runs opposite what is observed for compensatory damages. The more cynical a juror is, the lower the punitive damages. Because cynics believe that it is in people's nature to be dishonest and self-interested, they see little purpose in punishing selfish or dishonest behavior. Human nature will remain unchanged, and the punishment will likely have no effect on the defendant. Going back to the case involving the pharmacy and the brain-damaged child, cynics were more likely to award higher amounts for compensatory damages, but awarded less in punitive damages compared to non-cynical jurors. Although cynics had been angered by the pharmacy's deflection of responsibility, this anger did not increase the size of their punitive awards. Instead, more focus was placed on compensating for the harm done.

Neither effect of cynicism on damages is likely to occur as a conscious process for cynics. Many cynics may not even realize that they are, in fact, cynics. Cynicism is now pervasive enough in our culture that it is relatively "normal." The impact cynicism has on the way a juror perceives a case and determines the amount of damages occurs outside their immediate awareness. Because of the systematic influence of cynicism on

damage awards and the effects that vary depending on case-specifics, it is important to research how cynicism will affect jurors for each case. Identifying the role that cynicism will have in a case will have implications not only for the jury selection phase of the trial, but also in how the case is presented.

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And the Defense Wins...

A Washington District Court Finds that the “Efficient Proximate Cause” Doctrine Does Not Automatically Trump Mold Exclusions when Mold Is Not the Efficient Proximate Cause of the Loss

By Lloyd Bernstein, Gordon & Polsker, LLC

In *AXIS Surplus Insurance Company v. Intracorp Real Estate, LLC*, U.S. District Court Judge John C. Coughenour, for the Western District, recently ruled in favor of insurers on the application of mold exclusions irrespective of the fact that efficient proximate cause was potentially a covered peril. This coverage dispute arises out of a claim made by the insured under two “all-risk” Builders Risk insurance policies for alleged moisture, mold, and related damages to a mixed-use condominium project that resulted primarily from faulty and defective construction. The claimants argued that because the efficient proximate cause was a covered peril, the mold exclusions have no application under Washington’s “efficient proximate cause” doctrine. The insurers argued that the mold exclusions should apply regardless of the rule.

On competing cross-motions for summary judgment on the application of the various mold exclusions, the court expressly rejected the claimant’s argument that if the efficient proximate cause of the loss is a covered peril, then the efficient proximate cause doctrine *per se* requires coverage regardless of any other potentially applicable exclusions. The court was persuaded by the insurers argument that a properly worded mold exclusion can operate to exclude “mold damage” irrespective of the application

of the “efficient proximate cause” doctrine, even if the efficient proximate cause is a covered peril. The court adopted the holding from the California Court of Appeals decision *DeBruyn v. Super. Ct.*, 70 Cal. Rptr. 3d 652, 658-659 (2008) that when a policy “plainly and precisely communicates an excluded risk to a reasonable insured” * * * the efficient proximate cause doctrine [does] not operate to cover the loss.

* * * [I]nsurers ‘may limit coverage to some, but not all, manifestations of a given peril, as long as a reasonable insured would readily understand from the policy language which perils are covered and which are not.’” In so holding, the District Court went on to note that the “efficient proximate cause” rule “merely brings about ‘a fair result’ within the reasonable expectations of the parties.”

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Beyond Pro Bono Projects

As part of our efforts at WDTL to get involved in the greater community beyond pro bono projects, we collaborated with one of our core sponsors, Exponent, to form a cycling team with the intention of participating in the MS Society's BikeMS event in and around Skagit County, Washington September 12 & 13. The adventurous team, aptly named "Pro Bono," comprised of WDTL attorneys, Exponent employees, and respective family members, had a great time on and off "the bike"! Rider turnout was excellent, with 20 of 21 team members, in rude health, simply celebrating life while peddling along scenic (and sunny!) northwest roads. Notwithstanding the travails of the US economy, we did very well on shirt and individual sponsorship donations.

The length of the ride varied from a leisurely 20 miles to a bottom-numbing 92 miles the first day, then a 49 or 68 mile loop the second day. Feedback has been positive from Team Pro Bono participants, with some members already signed up to participate in next year's BikeMS ride. If you would like to join this fun event and entertaining team, please contact Kristin Lewis.



Team Pro Bono getting ready to ride.



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41295, 41296,
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With respect to the language at issue in this case, the District Court held, in relevant part, that the “[mold] however caused” language in one of the insurers mold exclusions is clear. “It communicates to a reasonable insured that mold damage is excluded, even if it was caused by a covered peril.” With respect to the other insurers mold exclusion, the court agreed (ostensibly based upon the “anti-current causation” language), under the same rationale, that it applied irrespective of the “efficient proximate cause” doctrine as well, but found that the exclusion’s “resulting loss” exception potentially had application, and that was “an issue not before the Court.” The court’s holding with respect to the latter exclusion is not a model of clarity.

As we all know, the “efficient proximate cause” rule is a very insured friendly doctrine. Washington courts have not been shy to apply the rule *ad nauseam* to find coverage regardless of the express policy language. Having the District Court put the brakes on its application and look to the particular language of an exclusion that has application later in the chain of causation is a step in the right direction, and an encouraging result for property insurers in Washington. That being said, it is hard to predict what Washington State courts or the Ninth Circuit might do with the decision.

To be included in the Defense Wins column, send your case summaries to Kristin Lewis at Kristin@wdtl.org.



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- 3 CLE - Ethics followed by WDTL Holiday Party
Convention Center – Seattle
- 11 CLE - Annual Tort Law Update
Convention Center – Seattle

January

- 19 South Sound Judicial Reception
Courtyard Marriot – Tacoma

February

- 19 CLE - Annual Update on Construction Law
Convention Center – Seattle

April

- 9 CLE - Insurance Law Update
Convention Center – Seattle
- 22 CLE - Judicial Reception – Spokane

July

- 22-25 Annual Convention – Suncadia