# 2014 Roundtable Series

# Product Liability

In recent years, the outcome of product liability cases that go to trial has depended heavily on the personal outlook of the jury, making the juror selection process more critical than ever before. One analysis found that in 85 percent of trials the questions at issue were not factual but philosophical. Ferreting out bias due to media coverage, life experience, and personality type can be essential to winning a case. Our panel of experts from Northern and Southern California discussed the art of jury selection, sophisticated intermediaries and duty to warn, warnings and causation, and the use of science days. The participants were Thomas Girardi of Girardi Keese; Robert Herrington of Greenberg Traurig; R. Bryan Martin of Haight Brown & Bonesteel; and Jessica L. Grant of Venable. The roundtable was moderated by *California Lawyer* and reported by Laurie Schmidt of Barkley Court Reporters.

*Participants*

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## EXECUTIVE SUMMARY

**MODERATOR: How have new issues, particularly media exposure, impacted jury selection in product liability cases?**

**THOMAS GIRARDI:** We all agree that there's been a big change in how jurors view products cases because of the publicity given to defects. Also, issues such as Proposition 46 had a very negative impact on the image of trial lawyers. I've talked to four law firms currently in trial, and on the voir dire selection, roughly nine on each jury panel discussed the problems with trial lawyers. So media exposure can be good, or not so hot. The goal of a trial lawyer is to try and defuse the negative bias. As a plaintiffs lawyer you have to try and overcome the effects of the $80 million spent against the recent Medical Malpractice Reform Act.

**JESSICA L. GRANT:** It goes to the importance of jury selection, now more than ever, given the widespread nature of social media and the multitude of ways people get their information. Publicity can cut both ways. Certain cases get highly publicized, but if you have a more straightforward case without a significant amount of alleged malfeasance, it can be more difficult for the plaintiff. If citizens are constantly exposed to these high-profile cases, they come to expect a smoking gun. In a case where that's lacking, it can subtly affect a juror's perception because it doesn't seem like the company did anything wrong when compared to high-profile cases. It can have an unintended consequence for the plaintiff's side.

**R. BRYAN MARTIN:** GM's transmission problems appearing in the news, for instance, raises the issue of timing in relation to a particular case and jury selection. It's important to be aware of events that are in the news cycle and being passed through social media. It matters whether an event occurred a few days versus several weeks before. Studies on this topic find that the more recent an event occurs, the more impact it has on jurors and trial outcomes. Yet, after three weeks or so, the sting lessens and jurors are more objective. Even tangential news can shape jurors' opinions. An oil spill or product recall in the news can shape a juror's opinion as to corporate malfeasance or indifference especially in a case where that may be at issue. The fiscal cliff negotiations dominating the headlines a year ago could have raised sentiments about government incompetence in a particular case. It's important to be prepared to deal with current news events and explore them during voir dire.

**ROBERT HERRINGTON:** Many popular television shows now include science, and they make it interesting. When talking to juries, you can often use them to connect with jurors. But they may also expect that level of proof or type of information during the trial, which may or may not be possible. That can certainly work to the defense's advantage, in terms of the burden of proof. Regarding selecting juries and ferreting out bias, much of the process is about deselecting the jury.

**GIRARDI:** Jury selection—it's the ball game. Jurors no longer decide facts. Jurors decide philosophies. When I started practicing law, the jury would decide who ran the red light, or how long the ice cream was on the

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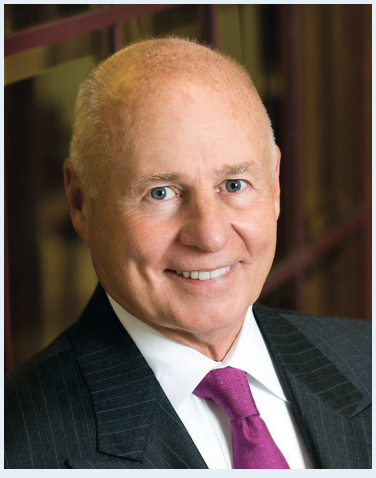
–THOMAS GIRARDI



**THOMAS GIRARDI,** founding partner of Girardi & Keese in Los Angeles, has been called the most feared plaintiff's lawyer by the Association of Southern California Defense Counsel. He was inducted into The American Trial Lawyers Hall of Fame in 2014, listed as one of the "Top 100 Most Influential Lawyers" in America in 2013 by the *National Law Journal*, and a top 100 lawyer in California by the *Daily Journal* legal newspaper.

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ground before the patron slipped in it. They made facts. Now, all the facts are admitted in these cases. The guy is on Vioxx, he has high cholesterol, he's 30 pounds overweight, he doesn't workout, and he had a heart attack. Did the Vioxx cause it? It becomes a question of the jurors' own perception. Our law clerks looked at cases tried in the Los Angeles Superior Court in 1988. It appears that in at least 80 percent of those, the jurors decided the facts. We looked at all the cases in 2013, and the jurors decided facts in probably 15 percent of them. The others depended on the philosophical bent of the jury. So a good lawyer has to ask some questions that show that person's personality. Jury selection is a crucial part of the game.

**GRANT:** At a recent dinner party people started talking about high jury verdicts and the McDonald's verdict for the woman with the hot coffee. There was complete agreement that it was a shocking, completely outrageous verdict. But no one knew the facts of the case, the severity and location of the burns, or that the damages were later reduced. All they recalled was a huge verdict for a woman who spilled coffee on her leg. Those types of perceptions are in society and can lead to bias against high jury awards. Also during jury selection trial lawyers always look for the leaders who can sway others—especially those who might be predisposed to accept my adversary's view of the case.

**MARTIN:** You raise an important point about media publicity of huge verdict numbers. A study I recently read highlighted that 40 percent of plaintiffs victories and 60 percent of punitive damage awards were published and promoted through the media, which was in sharp contrast to the lack of media coverage of defense verdicts. The study found the coverage of large, atypical verdicts oftentimes serves as an anchor for a case a potential juror may be engaged in.

**GIRARDI:** This isn't scientific, but in three trials—where I had a friendly opponent—we gave the jurors a statement that read, "I will follow the court's instruction not to make up my mind until all the evidence is in. If I had to vote right now, however, I would favor the plaintiff or the defendant." After jury selection they had to check a box for one or the other even though they hadn't heard a word of evidence. Over three trials 36 jurors took it, and the results were astounding—80 percent of those folks voted the same way at the end of the trial, and 86 percent voted the same way that they felt after opening statement. So, it is unscientific, it's only 36 people, but it was fairly dramatic. Do you use mock juries? We use quite a few and you learn a ton. You think you're the big-time lawyer, and then you talk to these people and you say, "Man, that ain't working."

**GRANT:** When you watch mock jurors deliberate much of what you thought was important has little impact on them. It's so informative. And yet they usually get to the right result. I prefer to play the opposing side in mock trials because knowing your opponent's case inside and out is critical.

**HERRINGTON:** There's a big question, though, regarding the reliability of mock trials. It depends upon how you do them. So much depends on the credibility of your client, and how they come across in person and under cross-examination, et cetera. You can only do so much of that by presenting videotape deposition testimony.

**MODERATOR: How does the sophisticated intermediary and duty to warn differ between states and what challenges does it present?**

**GRANT:** Our firm just did a case in Nevada where the trial court did not recognize the learned intermediary doctrine, and the duty to warn in a pharmaceutical case run to the physician. How do you approach a case where you can't say, "These are the warnings that we gave to the physician, and the physician did his or her job in terms of passing those warnings on to the consumer." Instead, you have to convince laypeople that the warning given was adequate. A label is obviously highly technical and scientific. Most jurors don't have the expertise that doctors and prescribers have regarding the risks and benefits that they weigh when they're deciding what medication to prescribe. So convincing jurors that the warning label is adequate requires a different approach.

**GIRARDI:** A couple of my doctor pals say that roughly 80 percent of the prescription drugs they prescribe are requested by the patient. The warnings will tell you, "your leg will fall off, and probably you'll be blind in the morning," and everybody takes the drug anyway. Then at cross-examination, "Were you told that you could go blind because of this, were you told that both legs could fall off, and yet you chose to take the drug, right?" It's pretty powerful stuff. You can see what has happened with respect to warnings, even though they're truly not effective.

**HERRINGTON:** The rationale underlining the learned intermediary doctrine, and the reason it's in most states, is that in many cases the warnings are complicated or the various considerations you have to weigh in deciding whether or not to take the drug, or use a medical device, are issues many laypeople wouldn't be equipped to evaluate on their own. The idea is to make the duty run to the person it should run to—the doctor, pharmacist, or nurse practitioner, who can help an individual make those decisions. But a debate arises once the drug company starts advertising—does it change the underlying rationale for why we had this doctrine in the first place?

**MARTIN:** The rationale for the doctrine is also based on the reality that in certain contexts the end user or recipient simply isn't capable of receiving the warning or evaluating the risk. You see this in the drug context and also with medical devices. A patient undergoing an arthroscopic shoulder procedure, for instance, won't be exposed to the product warnings for the equipment used during the procedure. That patient will never be in a position to evaluate the risks associated with it. That information is directed to the physician, and the focus is on what he or she knew about the devices and whether he or she followed the instructions and warnings.

**HERRINGTON:** West Virginia and New Mexico have also rejected the doctrine, as well as a few other states, but around 48 states have adopted at least some version of the doctrine. The choice of forum and the law that will ultimately apply to the case can be case dispositive. If the case is in California, for example, you will probably get summary judgment or maybe dismissed earlier. But in one of these states that doesn't recognize this doctrine, it's a new ball game.

**MODERATOR: What recent issues surrounding preemption, causation, and warnings do you find notable and why?**

**MARTIN:** How do you deal with a conventional products case when a plaintiff is suing on a failure-to-warn claim, yet acknowledges never having seen the information or warnings provided with the product or even looked for such information, but then attempts to testify that, had there been a better or different warning, they would have read it and followed it and thus avoided injury? Many courts outside California won't allow such testimony, from plaintiffs or experts, because it is speculative and entirely self-serving. Unfortunately, California has yet to really address this issue.

**GIRARDI:** Causation is an issue in all these cases, not just with respect to the warning. Causation is probably the key means by which the plaintiff loses or wins the case. The great thing about California law are the instructions that say, "there may be more than one cause of an injury." If two or more causes bring about the injury, each is a legal cause, irrespective of the percentage it contributes. Jurors understand that instruction and lawyers have to educate them about it from the beginning of the case. In every single lawsuit there are one or two jury instructions that decide it, and if the first time the jury hears the instruction is from a judge mumbling it, that ain't going to work. Let's suppose you have a causation issue, the lawyer has to start in voir dire telling them, "There could be more than one cause of this injury, so you will follow the law with respect to what the court says." In your opening statement you repeat that sentiment. When an expert is on the stand you reiterate those jury instructions. Then again in your final argument. You take the jury instruction that's the key your case, and you start at voir dire and educate all the way through.

**GRANT:** When there's a plaintiff with a catastrophic or serious injury, the jury naturally feels sympathetic and may even want

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–JESSICA GRANT

**JESSICA L. GRANT,** a partner in Venable's San Francisco office, focuses on products liability and commercial litigation, representing some of the world's largest pharmaceutical companies. She has been the lead trial lawyer in three jury trials in excess of $100M in damages. Recently, Jessica was the lead attorney in a three-month trial in which the jury unanimously awarded $816 million after 90 minutes of deliberation. The verdict was the fourth largest award in the U.S. in 2013.

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"The judge was incredibly engaged during our science day. You could see the lightbulb go on. Things went better for us after that."

—ROBERT HERRINGTON

**ROBERT HERRINGTON** is the national co-chair of Greenberg Traurig's products liability and mass torts practice. A complex commercial litigator focused on class action defense, he wrote the best-selling book titled *Verdict for the Defense*, which provides a blueprint for business leaders to defend their companies against the growing risk of mass action and class action liability. He also was the only attorney in the country named to two different sections (Class Action and Products Liability) of *Law360*'s "Top Attorneys Under 40" in 2013.

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to help that person or her family. The key is to educate the jury that it's not enough that the person is injured. The plaintiff also has to show that the alleged inadequacy of the warning caused the injury. On the defense, keep causation front and center throughout the entire trial. In most cases it's the plaintiff's Achilles heel.

**MARTIN:** We attempt to challenge the jury to do the right thing. Even though they may want to award a large sum of money to the plaintiff based on sympathy, they just can't do it because it's not the right thing to do under the facts. You have to challenge them at a personal level to make commitments that they'll put aside sympathy and look at the facts and law objectively, and remind them of those commitments in closing.

**GIRARDI:** But it is the right thing to do. I would argue, "Can you imagine? Look at what happened to him. Can you imagine a company putting out this drug in which this could happen? They've admitted that. They've admitted that it caused this terrible injury, and they put it out. Here's what you have to do. You're the conscience of this community. You have to do the right thing."

**GRANT:** What Tom's [Girardi] doing, of course, is completely glossing over the actual issues at trial, which is to show that the warning is inadequate. But how does the defense counter someone like Tom who very effectively argues from an emotional perspective. On the defense side, it's incumbent on us to also give jurors an emotional hook, to make them feel as if they're doing the right thing, in the context of this lawsuit, by finding for the defense. Notwithstanding that somebody might be in a wheelchair or severely injured.

**MARTIN:** If in deposition a plaintiff admits he or she did not read or see any of the product warnings, whether on the product or in the product manuals, you have a strong basis to argue that it is self-serving and speculative for that plaintiff to testify he or she would have read and followed an alternative or better warning. There is ample case law outside California that says such testimony is inadmissible. As I said earlier, however, this issue has not been addressed by California courts. But under Evidence Code 800 a witness's testimony is limited to that which is rationally based on their perception. It is not based on their perception for a plaintiff to testify that he or she would have followed a different warning, especially when the plaintiff did not read or see the existing warning information.

The heeding presumption recognizes the difficulty for plaintiffs to prove causation on a warnings claim. Many states have adopted this presumption, which instructs the jury to presume that, had an adequate warning been given, the plaintiff would have "heeded" or followed it to avoid injury. It establishes causation by a presumption that the plaintiff would have changed their actions. The burden then shifts to the defendant to show that an adequate warning would not have altered the plaintiff's conduct. If a defendant fails to make that showing, the plaintiff's burden of proof is satisfied. The presumption is a burden-shifting device to make it easier for plaintiffs to prove causation. The good news is that California has not adopted this presumption.

**HERRINGTON:** This whole interplay emphasizes the importance for the defendant to try to get out earlier, rather than later. Because if the case is in front of the jury, and Tom's [Girardi] able to talk to them, you're already at a major disadvantage. It's a question of when causation is really decided or where does the defendant have the opportunity to test and attack the issue of causation. In federal court and in many states there's the Lone Pine Order, where in complex cases courts will demand the plaintiff come forward and show his or her cards in an early stage of the case. If you can't make a prima facie case of causation in an early stage, you're done. In California that kind of process is a lot harder given our rules and procedures and the standards applied in the summary judgment stage. It's a lot harder to get to that point, which is why, oftentimes, if you can, you want to get into the federal court very quickly on these kinds of cases.

**MODERATOR: As the use of science days in complex litigation has increased, what problems have arisen and how might they be addressed?**

"It's a burden-shifting device to make it easier for plaintiffs to prove causation. The good news is that California hasn't adopted it."

–BRYAN MARTIN

**R. BRYAN MARTIN** is a partner in Haight Brown & Bonesteel's Los Angeles and Orange County offices, and is the head of the firm's Product Liability and Tort Practice Group. His experience covers a wide range of civil matters with a focus on representing Fortune 500 clients in high-exposure actions involving product liability, business, and insurance matters. Mr. Martin is a frequent lecturer across the country on product liability issues.

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**GRANT:** Science days in complex litigation is something at our firm we try and raise with the judge as early as possible. For instance, if you have a pharmaceutical case, both sides would present their respective scientific evidence to educate the judge about the particular drug, medical condition at issue, and how the drug treats that condition. Both sides would be given about three hours. It ties into dispositive motions, motions in limine, and voir dire. The better the judge understands the science, the better the judge will be able to evaluate the procedural motions, and understand what's really at issue at trial.

**HERRINGTON:** The concept of the science day doesn't apply only to medical devices or pharmaceutical products. You see it a lot in large-scale patent litigation. In a products case the technology behind the product maybe the subject of the litigation. The ABA has a set of civil trial practice standards that describe and lay out the possibilities for a science day. Will you do it in person or record it for the judge? Will you take down testimony and have an adversarial process, cross-examinationt? Will it be admissible? How will you select the experts? Will it be joint, if that's possible? Or maybe there won't be an expert at all and counsel will try to educate the judge. I've only been involved in one of these where we finished the process and were able hold the science day. It wasn't recorded or taken down as testimony. The judge was incredibly engaged in the process and interested in hearing from the experts, and was actively asking questions. From that point forward—maybe he just liked our expert—you could see a lightbulb go on regarding some of the complexities. Things went better for us after that.

**GIRARDI:** The only success I've had in doing that is very limited—a 15-minute presentation you can convince any judge to do. A couple of judges, when I suggested more, they said, "I think I can understand the testimony, counsel."

**GRANT:** My firm's been involved in a lot of multi-jurisdictional cases where there will be bellwether trials. The judges are engaged and want to get it right. There's a lot of significance beyond just the three or four cases that will be tried. We always give the judge a glossary of scientific, medical, and technical terms that will come up just to make his or her job easier. They are so appreciative that we want to take the time to sit with the judge.

**MARTIN:** How does it play out as far as having no notice of what the other side may be presenting and how you can challenge the information if it's not accurate?

**HERRINGTON:** Technically—at least the way that I've seen it done, and the way that the ADA talks about it—most of the time it's not evidence. It's not admissible for any purpose. Oftentimes it's not even transcribed, the hearings are closed door, and no media. There won't be anybody there.

**GIRARDI:** It tells you where they're going.

**MARTIN:** Exactly. That's my concern. Even though the information is not admissible and is supposed to be for education purposes only, in reality the judge is hearing and processing it. You can take advantage of the process and subtly try to be argumentative.

**GIRARDI:** The plaintiff would like to hear it, even though you've taken the expert depos and so forth. Now, all of a sudden, you get the best that they can throw at you. You learn what's about to come, and you better listen to it. I think it's terrific from the standpoint of what we would want. ■