

**THE WORLD WE TRY CASES IN**  
**Biases, Beliefs and Codes in Jury Decision Making**

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## The Research

Since the 1990s, tort reform messages of frivolous lawsuits, greedy trial lawyers, doctor flight, lawsuit abuse and jackpot juries have resonated with juries across the country. These messages of distrust and danger were taking a brutal toll in defense verdicts and low damage awards.

In an effort to reverse this trend, two groups of trial lawyers conducted separate series of focus groups around the country from 2005 to 2009 to investigate prevailing juror attitudes, biases and beliefs about personal injury and medical malpractice cases. Greg Cusimano of Alabama and David Wenner of Phoenix conducted focus groups for the American Trial Lawyers Association. Jury consultant David Ball of Raleigh, and trial lawyers Don Keenan of Atlanta, Jim Fitzgerald of Wyoming, and Gary Johnson of Kentucky conducted focus groups for Ball's and Keenan's book, *The Reptile, The 2009 Manual of the Plaintiff's Revolution*. Both groups wanted to determine the key factors which influenced juror decision making in tort cases and to learn how to retool their trial presentations to increase plaintiff victories.

The ATLA and Reptile focus group research and Clotaire Rapaille's marketing research in *The Culture Code* show that jurors themselves often do not know why they make the kinds of decisions that result in a verdict. They may know their tort reform prejudices, but they don't know their decision making biases. This research further shows that jurors don't know that their perceptions of risk and danger, beliefs about cause and effect, and culture codes also are driving their decisions. This is one reason why post-trial juror interviews often do not reveal the true basis of the jury verdict.

The teachings of these researchers and other prominent lawyers have given me useful insights into the elements of trust, empathy, prejudice, danger and betrayal that run the world of juror decision making in tort and malpractice trials. In my last three jury trials, their insights have helped me frame issues, develop themes, sequence presentations, question jurors, exercise peremptory and cause challenges, and meet proximate causation defenses.

We need to understand the biases, beliefs and codes of juror decision making to help counteract the ineradicable prejudices of tort reform. It is critically important to structure the trial presentation to align with rather than offend juror biases, beliefs and codes. Thanks to these teachers, this paper identifies many ways in which this can be done.<sup>1</sup>

## **Framing**

There is a plaintiff's frame and a defendant's frame. Most jurors can fit into either frame.

Framing provides the strategy for conducting the trial. It is the helicopter view of what the case is about and how it can be won.

The key to winning trials is to lead, inspire and persuade the jury to follow the plaintiff's frame and to reject the defendant's frame. The plaintiff lawyer's job is to win the war of credibility, clarity and empathy and not lose a war of distrust, logic and fact. If the jury only thinks it is the *referee* between the parties, the defense wins. If the jury thinks it is the *protector of the community*, the plaintiff can win. The trial is a war over whose frame the juror will choose—the frame of the tort reformer, or the referee, or the protector?

### **DEFENDANT'S FRAME**

**1. Suspicion.** Jurors come into courtroom suspicious of the plaintiff and distrustful of his lawyer's motives. Defendants want to create suspicion about plaintiff's case so the jury

will feel okay about turning the plaintiff away with nothing. 60-70% of jurors believe lawyers will lie in court to win. Watch out for jurors who need more information. They are looking for ways to blame the plaintiff.

To build credibility, you need to address juror suspicion and distrust in voir dire. In *Win Your Case* (2005), Gerry Spence gives an example of how this can be done by indirectly using the “golden rule”:

“I am not going to ask you to trust me. I think we have to earn our trust, just like anyone else. Because I am a lawyer I become one of those who people dump into the bucket with all the other lawyers in the world. To get out of that slop pail we have to earn our way out. But let me say something I would like you to think about: Without me, Shirley White (my client) will have to face this judge and this jury alone with no one to speak for her. Without me she will have to cross-examine the experts who have been hired against her, and she has no training to do so. And without me you will have to take their paid expert’s word for what they say, because there will be no one to tell you the whole truth.

Without me there will be no one to stop Mr. Ketchum from dumping improper evidence into the case and there will be no one to argue the law on her behalf to his honor. And without me she will have to argue her case by herself against the likes of Mr. Ketchum, who is a powerful lawyer with power people behind him. So Mr. Black (a juror), is it all right with you if Shirley has chosen me to fight for her rights?”

**2. Confusion.** Defendants want to sow confusion and doubt so the jury will throw up their hands and vote for defense. The biggest problem the plaintiff faces in many trials is the defendants’ ability to make causation complex. The more complex causation is, the more difficult it is for the plaintiff to prove her case. Doubt about causation gives jurors a convenient excuse to vote for the defendants, even when they believe they are negligent.

Confusion is the stock in trade of the defense medical experts. They know that if they complicate the medical testimony enough to raise uncertainty and doubt, they can confuse the jury into believing the baby was damaged before she got to the hospital.

Confusion also blunts empathy. It fuels a mechanistic approach to justice in which the juror acts as a neutral referee rather than as an empathic human advocate. “How can I be sure that the doctor’s negligence caused the plaintiff’s injury when the doctors themselves disagree about what caused the injury? Does it really matter if the doctor or the nurses made a mistake when it isn’t clear if they actually caused any harm?”

The defendant’s strategy is to give juries a one-two-three punch of rationality, factual complexity, and legal confusion. The defense 1) tells the jurors their job is to decide the case based on facts, logic and medicine, not “sympathy”; 2) has its opinion witnesses complicate the medical evidence to confuse causation; and 3) uses legalistic burden of proof, proximate cause, product liability and segregation of harm jury instructions to confuse the law. Jurors struggle in deliberations with these abstract, unclear, foreign, inhumane concepts, then throw up their hands and vote for the defense so they can go home.

**3. Victimization** is a two-edged sword that cuts back and forth against the plaintiff. Defendants want jurors to believe that they are the victims because a plaintiff’s verdict will raise their insurance rates, hurt the economy, make the doctors leave, and deny them access to health care. Defendants also want the jury to believe the plaintiff is a phony “victim” who will not take responsibility. In David Ball’s words, “A highway wreck becomes a medical threat.”

Amy Simon’s I-330 focus groups in 2004 showed that jurors believe doctors, especially surgeons and ob/gyns, are leaving Washington, or leaving their specialties, or retiring early. Women jurors believe this is happening because of high malpractice rates, which are caused by people suing when serious harm has not occurred. Men jurors believe doctors need to take extra tests and practice defensive medicine so they won’t get “blindsided” by trial lawyers.

Jurors are receptive to the juror victim and undeserving plaintiff themes because most feel they will be sued and do not feel they will need to sue. This is the message of the Allstate television commercial where the inattentive driver causes a few minor fender benders only to wind up being sued 29 times. That's why we all need Allstate's good hands to protect us from the trial lawyers.

**4. Anonymous Causes.** The anonymous, indifferent forces of a cruel world. "Bad things happen to good people." "Stuff happens." "He was in the wrong place at the wrong time." When jurors choose to believe that circumstance or fate rather than the defendant's decisions or actions are responsible for the outcome, the plaintiff's injury becomes a "tragedy" that doesn't need to be compensated. Circumstance and fate take an injury out of the jury's hands. "It is God's will", especially the death of a child, who is "now in a better place." The jury doesn't need to fix, help or make up for bad luck or acts of God.

#### **PLAINTIFF'S FRAME**

**1. Credibility.** In *How to Argue and Win*, Spence says "Every trial is a race to credibility." We can't tell people how to think, so we must create the story in a manner that they reach the conclusion that the doctor betrayed the plaintiff, the city officials didn't care about safety, the corporation cut corners to save money, the defendant deserves to be punished.

Tell the opening story without adjectives or adverbs. Just the facts. Understate everything. You will get tainted if you criticize the defendant too early, before the jury knows what happened. Attribute any evaluative words to authorities or "experts." Save your evaluative words until after you have told the story of the defendant's choices and actions that harmed the plaintiff in neutral language.

**2. Clarity.** David Ball says, “Clarity is critical because complexity is dangerous.”

Jurors are fearful of things they do not understand and suspicious of things that are not explained clearly. “The only reason the plaintiff’s lawyer uses complex language is to confuse and deceive. If I could trust this guy, he would be clear.” Use plain English and short sentences. Don’t overload jurors with details. Eliminate unnecessary facts. Avoid complexity. If the story and the witnesses are not clear and compelling, there will be confusion, and the jury will vote for the defense.

**3. Simplicity.** Make everything simple, especially in the causation of the case.

Focus jurors kept coming back to simple facts that lead them to the conclusion on causation that you want to reach. Use focus groups to get the *cognitive short cut*. What rules of thumb on liability, causation and damages did the focus group use to “get the case”? The real jurors will use these rules of thumb too, if you suggest them.

But there must be *no gaps* in the information. Bias fills the gaps, and the bias stemming from missing information always works against the plaintiff. Also, if there is information out there you must find it. You cannot ignore evidence which might conflict with or disprove your theory. Fact always trumps theory. Either the theory must fit the facts or the theory must be discarded.

The *sequencing* of the opening statement is crucial. Don’t talk about the plaintiff until after the jury knows what the defendant did wrong. If you make the plaintiff an actor in your opening story, the jurors will use the information you give them to make up their own facts to figure out what the plaintiff could have done to prevent the outcome. You will likely lose if the jury filters your opening story through the lens of plaintiff blame instead of listening to what the

defendant did wrong.

**4. Accountability.** “Personal responsibility” of course is the mantra of tort reform. It has become such a banal virtue and ubiquitous slogan that the two words, spoken from the jury box in voir dire, may be a sign but no longer are the fingerprints of a tort reform juror. We must show the injured plaintiff has been personally responsible, that she was not at fault, did not ask for this injury, has done everything she can do to get better, followed up with medical care, taken responsibility. If not, admit it.

Personal responsibility applies to individuals differently than it applies to corporations and medical defendants. Corporate responsibility and medical responsibility aren't personal. Corporations and doctors are bigger than us. Corporations have important obligations to their employees and shareholders and society. Doctors work under pressure to save lives. Society depends on them, not on injured people. Corporations and health care professionals have the expertise. They have a lot of smart people with a lot of money. They're smarter than us. They can figure out things better than we can. The auto manufacturer knows why the plaintiff's alternative design wouldn't work and wouldn't have prevented her injury. The doctors know what's wrong with the plaintiff and why his body failed him. We can't judge them by our personal standards, if they try and care.

The better question for corporate and medical accountability is: *Did corporation or the health care professional meet its responsibility to the public?* The corporation is not bigger than society. Show corporate action and profit motive. Focus on the choices available to the defendant. Lay out the tentacles of danger that the defendant's motives and actions spread over all of us. Identify the corporate actors who disregarded the safety warnings and threw caution to

the wind. The jury will apply personal responsibility to them. Take yourself and the jury into the CEO's office or the corporate boardroom where the officers and directors are making the decision that will save the company money but needlessly endanger the public.

## **Common Biases in Juror Decision Making**

**1. Assimilation Bias.** Jurors have a frame for how and why they believe things happen. They search for evidence that fits with what they already believe. They will modify the data to fit their own perceptions, but will resist modifying their perceptions to fit the data. This is known as the assimilation bias.

To find out what jurors will believe happened in your case, do a pretrial re-enactment of the events with different protagonists and secondary actors from your office or from across the hall. Use focus groups to evaluate situations and find out how the jurors will evaluate and decide your case. What do people think this case is about? What do they think happened? What should have happened? What decisions led to the outcome? How could this outcome have been prevented?

What should the doctor have done? What impact would additional information have had on the doctor's decision? What are the focus jurors' expectations for the standard of care?

How should the plaintiff have behaved? How should the defendant have behaved? How do the jurors see the cost of the lawsuit to society? Can the case provide a community benefit that also will benefit individual jurors and their families? What positive outcome can the jury achieve by deciding the case for the plaintiff?

If the facts you use don't prove your case, consider relying on other facts. What the jurors believe is more important than what the experts believe, so the expert's opinions must be

consonant with what the jurors believe or they will be rejected. Build your case from the re-enactments and focus groups up, not from the lawyers and experts down.

**2. Confirmation Bias.** Close cousin to the assimilation bias, the confirmation bias is at work when jurors sift through evidence to confirm their original beliefs. People don't believe what they see. They believe what they say they see. Because of belief perseverance, it is easier to create a belief than to change a belief. The initial story therefore is critically important. The first impressions must reinforce rather than contradict the jurors' original beliefs. Put the strongest evidence on early in a way that confirms the beliefs of the focus group jurors.

**3. Availability Bias.** Jurors form impressions based on the information that is available to them. You never get a second chance to make a first impression. So the sequencing of the opening story is critical to enlisting the availability bias. You don't want the jury to see the opening story through the plaintiff's actions. Defendant's negative acts are defendant's choices. Focus on multiplicity of the defendant's choices. It is harder for the jury to start blaming the plaintiff when all it hears in the opening story are the defendant's actions and the negative outcome.

**4. Status Quo Bias.** Literature shows that jurors believe they live in a safe world because that is necessary to preserve their sense of personal security. "My obstetrician is good and safe." "If I get sick or hurt, the hospital will know how to take care of me." "My airbag will keep me safe in a wreck." "The appliances in my home won't blow up and hurt me."

The status quo leaves the parties in the position they were in when they came into the courtroom, which means the plaintiff gets his "day in court" and leaves the trial with nothing. A defense verdict preserves the status quo. A plaintiff verdict means this community is a more

dangerous place.

To overcome the status quo bias, use the theme that the defendants want to lower the standard of care and make this community more dangerous than it is now. The defendants are trying to make a riskier world. A defense verdict will lower the status quo and leave you worse off. A plaintiff's verdict will leave you in the same position by preserving the status quo standards. It may even make the community a safer place, raise the standard of care, and promote better health by punishing those who would lower our safety standards.

**5. Hindsight Bias.** Once jurors know the outcome, they exaggerate its predictability and may believe it was inevitable. It can be fatal to the plaintiff's case if the jury believes the plaintiff's choices or actions produced an inevitable outcome that would have occurred no matter what the defendant did.

One problem that must be corrected early is the plaintiff's *hindsight guilt*. Don Keenan says the client always looks at the case through a retroscope. All injured people would have done something different if they could do it over again. This is an automatic response in everyone. You must deal with the client's hindsight guilt before her deposition. If you don't exorcize the guilt, the defense will take the case out of your client's mouth and kill her at trial with her own guilty expressions and words.

But there are several ways to make the hindsight bias the plaintiff's friend rather than her enemy. The antidotes to the hindsight bias are *foreseeability* and the defendant's *superior knowledge*. Doctor should have foreseen the cancer, but chose not to diagnose or test. Auto manufacturer should have recalled its cars and fixed their gas tanks, but decided it was cheaper to pay for its customers' burns and deaths. Innkeeper in a high crime area should have hired a

security guard and installed better locks, but decided to risk the assault and rape of his guests because he was too cheap.

Focus the hindsight on the information that was available to the defendant. If the outcome seems inevitable, the plaintiff usually can claim the defendant foresaw or should have foreseen the danger, but turned a blind eye to it. Show the plaintiff's injury really was not inevitable by identifying all of the defendant's choices and explaining what the defendant could have done differently to prevent it. In *Damages*, David Ball shows how to do this methodically in the opening statement. Show the defendant's precise, superior knowledge and contrast it with the plaintiff's lack knowledge of the danger. If the defendant foresaw the danger, why didn't it fix the problem and prevent the outcome?

The hindsight bias also can be turned against defendants by using engineering, safety and medical *standards* like ANSI, NHTSA, OSHA, MUTCD, JCAHO and hospital bylaws to demonstrate foreknowledge. These safety rules show that the product engineers, safety professionals, highway designers, and hospital regulators recognized the danger before the plaintiff was injured. They knew bad things could happen if someone came off the seat of the riding lawnmower and the blade kept turning, or the construction company didn't provide fall protection, or the county didn't maintain its road, or the hospital didn't train its nurses or credential its doctors. These experts created standards and rules to prevent accidents and injuries like the plaintiff's injury from occurring.

If the experts knew these dangers, the defendants who created them should have known about them too. The defendants should have followed the safety rules to eliminate the hazards before they injured people. Defendant manufacturer should have read the OSHA workplace

safety rules and eliminated or guarded the pinch point from its machine before it left the factory. Instead, it decided to expose Don Martin and all of his co-workers to crush injuries in their workplace. If defendant had eliminated or guarded the pinch point, Don would still be alive today. Manufacturers can't wait to think about safety until after someone is crushed in a pinch point and dragged through a conveyor.

**6. Norm Bias.** The norm bias holds that what people and corporations typically do represents ordinary care. Did the defendant's conduct fit the norm? Did plaintiff's conduct fit the norm? The norm bias makes negligence a question of "Us vs. Them." You need to show that the plaintiff followed the norm and the defendant deviated from it.

There are at least three sources of the norm: 1) official standards like ANSI and WISHA, 2) industry or corporate standards and practices, and 3) public practices and expectations. How do we show it's not the norm when the whole industry is doing it? One way is to pit one norm against another. Here is an example of an industry practices norm vs. a consumer expectations norm:

Wal-Mart sells riding lawn mowers whose blades keep turning dangerously when the driver leaves his seat. So do many other retailers. But Wal-Mart invites me to come into its store to buy the choice of products it gives us. A seller is expected to *stand behind* its product. Wal-Mart says "Trust us because we stand behind our product." So we expect Wal-Mart's riding mowers to be safe, not dangerous. That's why it's fair to make Wal-Mart pay when they roll over and cut someone.

**7. Empathy Bias.** Empathy is the attribute of helping those who are in need and are worthy. Empathy is not sympathy, which is almost worthless in trials. Empathy is putting

oneself in the shoes of another. Empathic jurors are our jurors, the jurors of compassion, the best weapons and messengers we will ever have.

Let the jury know early what the harm is. Show plaintiff is in need and worthy of help. Show plaintiff's efforts at rehabilitation. Focus on plaintiff's courage, not sympathy. Plaintiff is doing the best she can with what she has. Show the good purposes that will be served by an award of dollars. Have an improvement plan which shows how dollars will help.

Prove the plaintiff was not negligent. Jurors will make up facts to create contributory negligence, if it is not disproven. Tell the jury the defendants agree and the judge has ruled that the plaintiff has no fault.

It is easier to empathize with a non-negligent plaintiff. If the plaintiff is contributorily negligent, emphasize the non-consequential nature of the plaintiff's negligence and the shared fault of the defendants.

## **Juror Beliefs about Cause and Effect**

**1. Fundamental Attribution.** In *The Person or the Situation*, psychologist Lee Ross discusses how people judge what happens to others based on human conduct rather than situations and circumstances. Jurors attribute the cause of events primarily to personalities and secondarily to situations. In doing so, they overestimate personalities and underestimate situations. So it is important to tell the story of the trial in terms of how the defendant's bad conduct forced the plaintiff into a dangerous situation that the defendant created and how the plaintiff reacted to the situation as best she could.

Fundamental attribution explains why strict product liability claims, which focus on the unsafe condition of the product, are so foreign and confusing to jurors compared to claims that

the plaintiff was injured because the manufacturer was negligent, greedy or uncaring. The focus on the product rather than on the actor (and the complexity of the product liability jury instructions) is why manufacturers whose dangerous products injure people win these cases again and again.

Because it keeps personalities and people in the foreground and circumstances and situations in the background, fundamental attribution is a useful weapon against the defense frame of anonymous causes. When you show jurors how the defendant's decisions or actions are responsible for the plaintiff's injury, it makes it harder for them to say that "stuff happens" and the plaintiff "is now in a better place."

There are three aspects of fundamental attribution that are critical to overcoming proximate causation defenses: advance warning, last cause and expected cause. I won the *Tavares v. Evergreen Hospital* trial in October 2008 by emphasizing the defendant hospital's advance warning of a high risk pregnancy. I lost the *Ferguson v. Safway Scaffolding* trial in January 2010 because the last cause of the plaintiff's accident was an immune empty chair. The focus groups in *Pobre v. Stevens Hospital*, which settled in March 2010 for \$4.5 million, confirmed the critical importance of the "last cause" defendant.

***Advance Warning.*** At the Birth Trauma Litigation Group seminar in Tucson in 2008, David Wenner reported that in every ATLA focus group where the doctor defendant had to act without advance warning, the doctor won no matter how bad his judgment or negligent his treatment. Jurors feel an overwhelming reactive attribution [see below] for doctors and other rescuers who are put in a position to fail by surprise circumstances and unexpected emergencies. It therefore is imperative to emphasize the advance warning signs leading up to any medical

incident.

In *Tavares v. Evergreen Hospital*, the pregnant mother arrived at the hospital unexpectedly (because the charge nurse didn't tell anyone she was coming), and her baby was born an hour later with severe birth asphyxia after an emergency C-section. It was a classic case of surprise and emergency that should have produced a defense verdict for that reason alone.

But armed with the insight from the ATLA focus groups, I created an elongated story board for the trial, which showed all of the times the mother previously had been to the hospital for ultrasounds, fetal monitoring and labor checks that showed she was high risk for a placental abruption. I used the story board in opening statement and during the testimony of plaintiff's medical experts to emphasize that the hospital had ample advance warning of the abruption that occurred. It was apparent from the defense opening statement that the hospital initially planned to construct a "surprise emergency" defense out of plaintiff's unexpected arrival and one-hour stay. But the hospital had to abandon that defense because it was preempted by the chronology of advance warning on the story board. As Sun Tzu reminds us in *The Art of War*, "What is of supreme importance in war is to attack the enemy's strategy."

**Last Cause.** People look back on an event at its peak and at its end. In deciding who caused an injury, jurors stop at the last causative factor, which usually is the plaintiff. The crucial question is, "*Who is the last actor that caused the injury?*" If the last cause is the plaintiff or an empty chair, you will likely lose. So it is important to make the defendant's conduct the worst event at the end and the last cause of the plaintiff's injury.

I believe I lost the *Ferguson v. Safway Scaffolding* trial because the last cause of the

plaintiff's injury was an empty chair. On Friday morning, Safway Scaffolding delivered a rental scaffold for a concert at Marymoor Park. Safway furnished the wrong size cross braces for the scaffold and did not provide safety instructions to install the ladder on a vertical scaffold post. On Sunday afternoon, a union crew erected the scaffold. The union steward who installed the ladder did not fully tighten the nut that clamped the ladder to the scaffold.

Before the concert on Sunday evening, workers climbed up and down the ladder 7 times without incident. But when plaintiff Ferguson climbed down the ladder for the eighth time during a concert break, the clamp opened and the ladder collapsed, throwing him 20 feet to the ground and causing serious injuries. The defendants conceded that Ferguson was fault free.

I sued the union based on agency liability for its steward's negligence in failing to tighten the nut. I sued Safway for delivering unsafe scaffold parts and failing to provide ladder installation instructions. I could not sue the steward who was an immune co-worker of the plaintiff. The union was dismissed before trial based on the Labor Management Relations Act's collective bargaining immunity, leaving Safway as the only defendant at trial.

At trial, I contended the ladder collapse was caused by 1) Safway's failure to furnish usable cross braces, which made the scaffold wobblier and caused the nut gradually to back off and open the clamp; 2) Safway's failure to provide instructions to install the ladder on a vertical post so it would not collapse even if the nut was loose; and 3) the union steward's failure to tighten the nut with a wrench. Safway argued that the steward's failure to tighten the nut was the sole proximate cause of the accident.

The jury unanimously found that Safway was negligent, but voted 11 to 1 that its negligence did not proximately cause the accident. Based on juror exit interviews and the pretrial

focus group discussion, I believe the jury returned a defense verdict because the steward's failure to tighten the nut was the last and the main cause of the accident, and the jury was unwilling to assign 100% of the liability to Safway under these circumstances.

Last cause attribution also was significant to the liability of a primary care doctor in the case of *Pobre v. Stevens Hospital*, which involved a delayed diagnosis of breast cancer. In *Pobre*, the defendant radiologist mixed up the plaintiff's mammogram with the mammogram of another patient. The radiologist wrote in the plaintiff's mammogram report that she had breast implants but no signs of cancer. Plaintiff actually did not have breast implants, but did have signs of breast cancer. When the plaintiff's primary care doctor read the radiologist's mammogram report, she recognized that it conflicted with her own exam findings that the plaintiff did not have breast implants. But the primary care doctor did not call the radiologist or the plaintiff to clear up the discrepancy.

The focus juries were prepared to forgive the radiologist for mistakenly mixing up the patient's films. (We did not tell them the radiologist was an alcoholic who drank on the job) But the jurors were severely critical of the primary care doctor for not resolving the conflicting information which suggested the mammogram report was for the wrong patient. Even though the radiologist was primarily responsible for detecting the cancer, the focus groups assigned most of the fault to the primary doctor, who was the last actor that could have prevented the injury.

***Expected Cause.*** Ask yourself, "Is this a typical case with a predictable cause or a rare case with an unusual cause?" Typical cases with expected causes are easier to win than unusual cases with unexpected causes. So show that the cause of the injury makes sense scientifically and that the outcome is not surprising, but typical, expected and within the norm.

**2. Reactive Attribution.** It is critical to tell the trial story in terms of the plaintiffs' reaction to a situation or event created by the defendant's choices. Don't tell a story about the plaintiff's decisions or actions leading up to the injury or the jury will look for ways to blame the plaintiff for the outcome. Jurors will forgive a plaintiff's mistake in reacting to a defendant's purposeful act. The plaintiff's lawyer should acknowledge that plaintiff made a mistake while reacting to circumstances created by the defendants and ask forgiveness. Here is one use of reactive attribution:

“The defendant construction company decided to install its construction fence on the public bike path, even though the city's permit did not allow it. Defendant put its construction fence close to an unmarked wood post in the middle of the bike path. To avoid the construction fence, bike riders had to steer left, which brought them into the path of the post.

“The defendant's construction contract required it to do an engineering study to see if putting its fence on the bike trail would create a safety hazard for bike riders. But defendant chose not to hire an engineering study.

“The defendant city owned the bike trail. The city knew the MUTCD bicycle safety code required it to stripe the bike trail and paint and reflectorize the wood post. The code also required the city to keep fences away from the bike trail so bike riders would have enough clearance from obstructions. But the city chose not to do any striping or painting or preserve the required clearances.

“Three weeks after construction began, Susan was riding her bike along the path. She had to steer left to move away from the steel fence. She saw the wood post an instant before her bike hit it, but didn't have time to react. Susan fell over the post onto the pavement, broke her neck, and in that single instant was paralyzed for life.”

Stress the defendant's purpose and motive in creating the circumstances that caused the plaintiff's injury. Who was purposive? Who made the decision not to comply with the rules or standards? Defendant chose to manufacture defective a defective product/practice risky medicine/not perform a test to save money. Jurors will punish this. Stress that the plaintiff was

only reacting to dangerous circumstances that the defendants created.

**3. Egotistical or Defensive Attribution.** A juror who uses egotistical attribution believes he would have done something different than the plaintiff did because he is smarter than the plaintiff. A juror who uses defensive attribution believes she would not have had the plaintiff's accident because she would have taken the necessary precautions to protect herself. "My wheel wouldn't have fallen off because I would have checked my lug nuts to make sure they were tight after Les Schwab installed my new tires." "If I had a lump on my breast and my doctor told me it was benign, I would have gotten a second opinion." "I would have had an obstetrician rather than a family doctor deliver my baby."

Jurors criticize what they know most about. That's why they will criticize the plaintiff more than the doctor or the manufacturer. It doesn't matter if jurors with egotistical or defensive attribution had ever sought a second opinion or really would have acted any differently from the plaintiff. These jurors will hunt for anything plaintiff could have done wrong and blame her for whatever happened.

Howard Nations won a case he otherwise would have lost because of what the women jurors in his focus groups taught him about defensive attribution. A little boy had wandered onto a construction site and drowned in a pool of water. Nations wanted mothers on the jury who naturally would empathize with the grieving plaintiff mother who had lost her little boy. But he discovered that the men in his focus groups blamed the lack of security at the construction site, while the women blamed the little boy's mother. "This would never have happened to me because I would have watched my little boy." If the plaintiff mother lost her little boy without being careless, the mothers on the jury could lose their little boys, even though they were being

careful. That was too terrible to be true.

The defendant made the same assumptions about women jurors that Nations initially made. In voir dire, Nations and the defense lawyer raced each other to knock all the moms off the jury. Nations then won a multi-million dollar verdict from an all male jury.

**4. Self-serving Attribution.** “How will this affect me?” Doctors will leave, my insurance rates will go up, etc. Jurors who use self-serving attribution are susceptible to the defense victimization frame.

### **Other Influential Factors in Juror Decision Making**

**1. Choices.** Jurors hold their power and freedom dear. Give them a series of choices through the trial. Present the defendant as making active choices which caused injury. Present plaintiff’s last choice as a good choice.

Once jurors start to make choices in plaintiff’s favor, they are likely to continue making choices in plaintiff’s favor, unless you betray them. This reflects the influence of *second order decisions* in which a person’s initial decisions will influence what he will decide later: “I choose to follow the rules” means “I will vote against those who do not follow the rules.”

There are several *principles of choice offerings* to guide us in jury trials. The first principle is the *more choices* available to the defendant, the more likely it will be found liable. Also, the more choices the defendant had, the larger the verdict because of the irritation factor.

The second choice principle is the jury should be given *multiple ways* to find the defendant liable. The jury can find the hospital corporately liable because it did not credential the doctor, or train the nurse, or provide enough staff, or because it violated the law which required it to have an obstetrician available to do an emergency C-section. Or the jury can find

the hospital vicariously liable because the nurse ignored the warning signs of fetal distress, didn't communicate with the other nurses, didn't call the doctor in time to rescue the baby, and altered the records to cover up her negligence.

The third choice principle is *shared responsibility*, which is a powerful theme as between defendants. Multiple defendants usually are better than single defendants because they give the jury more choices: Which defendant(s) were wrong? Which defendant(s) should the jury find against? Which kind of wrong (negligence, dishonesty, violation of a rule or standard, etc.) will the jury find caused the plaintiff's injury? In what way was each defendant wrong?"

But the jury should not be forced to choose among too many defendants. Too many choices increases internal decision making tension, creates paralysis, raises doubt, and fuels the status quo retention bias. Usually it is better to limit the defendants to no more than three.

The fourth principle is *no complicated choices*. The more complicated the choices, the more likely the jury will say no. Instead, give the jury a range of uncomplicated choices, as in choosing which of three life care plans would best serve the plaintiff's needs: in-home, shared group home, or institutional care. If a good, just choice (*i.e.* in-home or shared group home care) is pitted against a poor, unjust choice (*i.e.* institutional care), the jury will be more likely to make the good, just choice.

The fifth principle is *lost choices*. What choices has the plaintiff lost? Where she will live and how will she get around now that she is in a wheelchair? Who will she choose to marry? Will she be able to work and support herself? Will she be able to pay for her medical and attendant care or will she have to go without? "Susan will have one of two futures—either a future of independence, health, companionship and safety. Or a future of immobility,

dependency, isolation and danger. You will choose which future she will have.”

**2. Rules and Mistakes.** Generation X now provides 57% of the jurors. Generation X believes in rules and uses them as anchors in making decisions.

Why do rules work? Our first contacts with rules and breaking rules are as children. The intrinsic value of a rule is that it protects me. We demand that others follow the rules that protect us. “I will break rules, but if you break a rule that threatens me, I will punish you.” Rules work because they protect me.

We can’t stop mistakes. To err is human. But we can prevent people from violating rules. Ball, Keenan and Fitzgerald assembled a conservative Cheyenne, Wyoming focus jury and asked them, “Which cases should we take?” They presented five to seven cases to the focus jurors about errors, mistakes and misjudgments that doctors had made. In all the cases, the focus jurors said, “To make a mistake is human.” “You can’t land on someone for making a mistake.” “These doctors should be left alone.” Then they framed the exact same facts as violating rules. The jurors now responded, “That’s a case.” “That doctor needs to lose his license.” “That doctor needs to be put in jail.”

Rules should be presented as being *widely respected and neutral*. “The OSHA rules were developed by safety experts employed by both industry and government. They are independent rules that are designed to make us safer. That’s why they are widely respected and neutral. The defendant and defense counsel agree it is important to follow the OSHA rules. His Honor will instruct you on the OSHA rules at the end of the trial.”

All rule violations should be based on choice. The Defense Research Institute knows this. It teaches defense lawyers always to link the cause of the accident to the choice the plaintiff

made. You should link the cause of the accident to the choices the defendant made.

**3. Community Safety.** We are selling safety. The defense has no safety to provide. The only things the defendant does for safety is to violate safety rules.

Deal with the *immediate danger* first. One of the most important ways a species survives is dealing with immediate dangers before dealing with distant dangers. The caveman reacts to the sabertooth tiger 20 feet away rather than to the three lions 100 yards away. When jurors identify with a product blowing up in their home, they are not afraid that they will be sued.

We have a significant advantage in focusing on the near term threat because the dangers posed by tort reform are all mid term to long term dangers. If we can intercede with even a lesser danger that is immediate, we win. If our dangers are immediate to the juror or his children or grandchildren, we win. Jurors will not act against their reptilian safety instincts because it is almost impossible. Justice for the defendant does not help stave off the immediate dangers that we will show them.

David Ball says, “You need to sell the danger. You need to lay the tentacles of danger onto the jury.” You need a rule that, when violated, creates a *community danger*. The reptilian brain of the male retiree does not care if the doctor ignored the electronic fetal monitor. “I feel terrible for the parents, but there is no reason for me to worry because I’m never going to get pregnant.” But when the *kind of thing* the doctor did is a threat to the juror, then you get traction. What is the threat to me? “If this hospital ignores warning signs and tells all its patients to go home, what will happen if I go into the hospital with chest pains and they send me home?”

What you want to develop in the juror’s mind is, “If we give these people a pass, it will make things more dangerous to me. If we allow this to pass, our city will become a magnet for

doctors who practice like this.” Once the jurors feel they are protecting themselves and their kids, there is no changing them. Were rules violated that threaten the jury? If not, the jurors will be susceptible to tort reform.

After my pretrial focus group in the *Ferguson* case voted 8 to zero that the scaffolding company was not negligent, I retooled my presentation for trial with community danger and betrayal themes that produced a unanimous jury verdict of negligence:

“A scaffolding company is the guardian of the safety of the community when it comes to its products and services. No one else can make its products safe. When a company has the knowledge, the power, and the means to prevent injury and death, the company has a responsibility not to needlessly endanger other people. The company has a responsibility to follow the safety rules that apply to product suppliers. It has a responsibility to warn of known dangers, and to give safety instructions to prevent foreseeable death and injury.

“What happened in this case could have happened to anyone. It has happened to other people at least 3 times in the last 10 years. It happened to the man who fell and was killed on one of Safway's scaffolds in Texas. It happened to the man Safway's expert knew about who fell and was killed in Mississippi. It happened to Don Ferguson. It could happen to any other stage hand, lighting technician, refinery worker or construction worker. It could have injured or killed a concert goer or a child playing under the scaffold at Marymoor Park.

“When a scaffolding company chooses not to use its knowledge, its power, and its means to prevent death and injury, it betrays the trust that it owes to others in our community. When a company chooses not to guard the safety of the community, it becomes your job as the jury to protect the community by holding the company accountable through your verdict. This is not just a case about what happened to Don Ferguson. It is a case about responsibility and accountability for all of us.”

**4. Betrayal.** At the Luvera Seminar at Roslyn, Washington in July 2009, Gerry Spence told the audience, “Every trial is a story of a betrayal.” In closing argument, link the plaintiff’s damages to the defendant’s betrayal:

“The defendants and these defense lawyers want you to give them a discount. But they don’t deserve a discount because Doctor Jones didn’t know how to use the vacuum extractor, and he sucked a third of the baby Jordan’s blood out of his body into his head.

All those suction created a huge blood bruise called a caput on top of Jordan's head. The loss of all that blood caused his kidneys to fail. Now Jordan has to look forward to spending the rest of his life on dialysis and having kidney transplant operations. The hospital doesn't deserve any discount either. It knew from previous birth disasters that Dr. Jones didn't know what he was doing, but it decided to let him go on delivering babies anyway."

**5. Hypocrisy.** One of the highest reptilian reactions is against hypocrisy. We will forgive the murderer before we forgive the hypocrite. The hypocrite will try to deceive you so you will follow him into perdition where you will be wiped out. The strongest level of being despised and feared is reserved for the hypocrite, the wolf in sheep's clothing.

If the defendant stipulates to liability after denying it for years and says he is sorry just before the trial, turn the stipulation into the dirtiest tactic the defendant can possibly do. Show the jury the defendants are trying to deceive you by appearing noble when they are not.

Rapaille did not formulate a culture code [see below] for the plaintiff's trial lawyer. But Ball's focus groups, which consistently show that the plaintiff's lawyer starts every trial with zero credibility, suggest the code of *hypocrite*—the wolf in sheep's clothing who preaches justice and compassion but seeks money and destruction—would be near the top of the list. Credibility is the area that offers us the most room for improvement and success. As Paul Luvera says, "Let's start with you."

**6. Cumulative Error.** Although mistakes are easily forgiven, it is useful to point out to the jury all of a defendant's bad decisions, mistakes and errors, including those that did *not* cause the plaintiff's injuries. Cumulative error usually leads to some consequence. Many errors make it easier for the jury to conclude that the defendant caused the bad outcome.

In the *Tavares* trial, the jurors began deliberations divided over whether the infant's brain injury occurred before or after her mother got to the hospital. The plaintiff jurors ultimately persuaded the defense-leaning jurors that the many deficiencies and errors at Evergreen Hospital—the attending nurse's inexperience, lack of training and lack of supervision, the “overworked and underpaid staff”, the hospital administration's indifference to the charge nurse's patient safety complaints, the falsification of the delivery record and alteration of the nursing notes, and the nurses' failure to communicate with the obstetrician—made it more likely that the brain injury was caused by birth asphyxia in the hospital rather than by chorioamnionitis and fetal inflammatory response two or three days before the baby was born. After the verdict, two jurors told me, “The hospital died a death of a thousand cuts.”

**7. System Errors.** Dumb mistakes make bad cases. System errors make good cases. If you are claiming a doctor made a single dumb mistake, it is difficult for the jury to hold her liable. Medical errors frequently result from poor decisions caused by lack of experience, lack of information, or failure to recognize an anomaly. Jurors expect errors in judgment and are prepared to forgive them. But medical errors do not keep patients safe.

How do we allow the jury to excuse the doctor's bad judgment but still hold the defendant accountable? One answer is to hold the system accountable. The system that the hospital administration, or the clinic director, or the medical insurers created. The system that put the doctor and the nurse in a position to fail.

The system has the experience, expertise, time, money and responsibility to *anticipate dangerous situations* and make *contingency plans* to avoid them. If the system doesn't meet its responsibility to plan and protect, the public will be in danger. So the questions must be: Who

created the system? What system errors are easily identified? How did the hospital, or the clinic, or the insurance companies structure the system to allow inexperience, lack of information, or failure to recognize an anomaly to cause a medical disaster? What would prevent this outcome when the same situation occurs again? Jurors want helpful, credible reference points. So it is important to find out if there are other systems that eliminate such errors and what other institutions are doing to eliminate them.

**8. Endowment Effect and Loss Framing.** The endowment effect holds that once something is yours, it becomes more important and valuable. People want to protect what they already own. Once you own a car with options you will not easily give them up for a certain price, even though you would not have paid that price for the options in the first place.

The endowment effect works in tandem with the principle of loss framing, which holds that losses are disfavored more than gains are appreciated. Use loss framing, not gain framing, because jurors value what a plaintiff has lost more than what plaintiff will gain from a verdict. Start where plaintiff was before the incident. Plaintiff was healthy before; this is what she lost. Plaintiff is doing the best she can with what she has left. In Ball's words, the jury's job is "to fix, to help, to make up for" what the plaintiff lost.

## Codes

In *The Culture Code*, the French-American psychologist Clotaire Rapaille writes about focus group discovery sessions he conducted over a period of 30 years to de-code the unconscious imprints and interpretations which drive people's purchasing and other decisions. Rapaille calls these imprints and interpretations "codes." He uses the codes to unlock the structure of people's decision making and find out "Why do we act the way we do?"

The culture codes of main interest to us are the *survival codes*, the codes for health and safety that are run by the brain stem and cerebellum, which is known as the “reptilian brain.” By running the survival codes, the reptilian brain unconsciously rules the higher functions of the limbic brain, which deals with emotion, and the cerebral cortex, which deals with learning, abstract thinking and imagination. The unconscious survival codes explain much of why we act the way we do. They offer useful suggestions for presenting plaintiff’s damages claims and proving health care liability.

**1. Health.** In America, the code for health is *movement*. Mobility represents good health. Immobility represents bad health and the threat of death. The cerebral palsy research validates this survival code by proving that mobility rather than cognition is the best predictor of life expectancy. The focus should be on the consequences from the plaintiff not being able to get around. Immobility is *dangerous*— a paralyzed person can’t get out of the house on her own. It puts her in exceptional danger if there is a fire or other emergency. Loss of mobility is a much more compelling motivator than loss of time and inconvenience.

**2. Isolation and Family** are two other key survival codes. Nothing is safe unless it is with other people. We are in danger when we are alone because we have no eyes in the back of our heads and need others to look after us. The code for isolation is the opposite of the code for family, which is *essential circle*. In the family, everyone is together, safe and complete. The family is your protector as well as the source of your genes. The entire family experiences the loss whenever a member is missing. Look for whatever harm it is that has led your client to be alone. What drives verdicts is lack of mobility, isolation and threats to the essential family circle. Those dangers and threats come with every disabling injury or wrongful death.

**3. Pain and Justice.** The codes for pain and justice are not as potent as the survival codes. There are no movies about pain because the concept of other people's pain does not resonate. Pain is a defense mechanism, a warning against danger. If someone is in pain, we have sympathy, which means "I feel sorry for you", but not empathy, which means "I feel what you are feeling." Plays are about people who are trying to get from here to there, who are alone, not about pain.

The code for justice is fair, truth, closure. But justice does not drive verdicts because a logical explanation and a just verdict can be rendered for either side. Justice is a product of logic and to some extent emotion. It is a cortical and limbic code rather than a reptilian survival code. Survival is a better motivator than logic.

**4. Injustice.** The code for injustice is *waiting for the other shoe to drop*. Injustice is a more potent motivator than justice, just as loss framing is more potent than gain framing. One of the main themes of ancient Greek theater is the concept of the other shoe dropping. The idea is there must be punishment to redress the bad guy's wrong and restore balance in the community. What is the juror's first, strongest, or most recent experience with injustice? The need to redress an injustice can motivate a verdict that punishes the defendant, protects the community, and makes the insurers scream and pay.

**5. Doctor.** The code for doctor in America is *hero*. Participants in Rapaille's discovery sessions told stories about doctors that "projected images of rescue, of being saved from danger, of being spared a horrible fate." Most Americans are imprinted with the notion that doctors save lives and can recall times when a doctor saved a family member or even saved them personally.

6. **Nurse.** The code for nurse is *mother*. Feelings about nurses are even more positive than feelings about doctors. A recent Gallup poll identified nursing as the most ethical and honest profession in America for the fifth time in six years. Rapaille's focus groups perceived nurses as care givers who spend more time with us when we are sick than doctors do and *always* have our best interests at heart.

7. **Hospital.** According to Rapaille, the code for hospital in America is *processing plant*. His discussion groups often described a hospital as a "meat factory." A hospital is a sterile, impersonal environment that smells antiseptic and artificial. It is the place where we are born and die, where our futures depend on tests, procedures and decisions that are made within its walls. The hospital inhibits our movement by connecting us to tubes and machines and trapping us in our beds. Before the hospital lets us move, it hooks us up to an IV pole or drops us off at the curb in a wheelchair, if we are lucky enough to get out alive. Rapaille's discussion groups described hospitals as a place where they "probe" us, "rush people to the operating room to die", and act like they're "experimenting on a carcass." The unconscious connection we make when we are in the hospital is that we are not people, but products.

8. **"A Few Bad Apples."**

The doctor *hero* and the nurse *mother* care about us and always look after our best interest. They are honest. They know what they are doing. They are there to help, to rescue, to save lives. That's why the *undeserving* plaintiff and *hypocrite* trial lawyer seldom beat doctors and nurses in trials when doctors and nurses *are left on code*.

Amy Simon's focus groups for the Initiative 330 campaign generally embraced the tenets of tort reform and were hostile to medical malpractice lawsuits and trial lawyers. But the women

members in particular also expressed concerns about bad doctors. They were very interested that 55% of the malpractice claims are against 5% of the doctors. They viewed these doctors as “a few bad apples” that were ruining medicine, and they wanted to get rid of them.

The key to establishing health care liability is to enlist the jurors’ assimilation bias by presenting individual health care defendants as exceptions to the norm—*i.e.* as “bad apples”—and by presenting hospital defendants in keeping with the norm—*i.e.* as “meat factories.” This is done by taking the doctor and the nurse *off code* and leaving the hospital *on code*.

The off-code is “*Doctor doesn’t care about me.*” Match the defendant doctor or hospital nurse against the code characteristics and show how they missed code and didn’t conform to expectations: A doctor who cares does not practice beyond his capabilities, heeds warning signs, communicates with other doctors, and does not needlessly endanger a patient. A nurse who cares does not falsify the patient’s records or alter or lose their fetal monitor strips.

But the defendant doctor is hurting patients because he is missing steps, doesn’t listen, doesn’t spend enough time, doesn’t run simple tests, is dishonest, arrogant, doesn’t communicate, takes risky procedures. “The doctor knew the baby was sick, but did not care enough to call her parents or walk 10 feet to examine her when she was dying.” “The hospital nurses knew they were incompetent and negligent as soon as this happened. Why else did they falsify Miriam’s delivery record and ditch her fetal monitor strip in the first hour after she was born?”

Make sure your physician experts match code. Build their credibility by telling the jury about their charitable activities and awards from their medical students as well as their credentials and experience.

9. **Trial.** The code for trial is *opportunity to make us safer*. This is the whole reptilian concept in a nutshell.

1. The research for this paper comes from the following sources:

2) A 2007 ATLA seminar in Atlanta, Georgia by trial lawyers Carrie Frank, Howard Nations, Mark Mandell and James Lees which discussed Greg Cusimano's and David Wenner's focus group research for ATLA on common juror biases.

1) David Wenner's discussion of the ATLA focus group research at a Birth Trauma Litigation Group seminar in Tucson in February 2008.

3) David Ball's and Don Keenan's seminar in Dallas in June 2009 which covered what they learned from their 22 focus groups in Laramie and Cheyenne, Wyoming, Atlanta, Georgia, Birmingham, Alabama, Jacksonville, Florida and Pikeville, Kentucky. Ball and Keenan published their insights from this research in *The Reptile, The 2009 Manual of the Plaintiff's Revolution*.

(4) Clotaire Rapaille's marketing research in *The Culture Code* (2006), which includes public perceptions of doctors, nurses and hospitals and public reactions to issues of health, mobility, isolation, justice and pain.

5) Washington state focus groups conducted by pollster Amy Simon in September 2004 for the Initiative 330 medical malpractice campaign.