

The Forensic Applications of Social Science

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I. Introduction

Effective jury trial lawyers navigate between the directives of the court's instructions, and the psychological realities of human behavior. The better a trial lawyer functions within this domain, the more we say they possess "common sense." A few attorneys were born with this gift. The rest of us have to run to keep up with them. Fortunately, the instincts these "naturals" apply are well known, studied and understood. They involve the application of principles of human behavior and social psychology. Studying these powerful concepts will improve everyone's courtroom skills. The focus of this paper is on both the ideas behind the psychological "rules" and their practical uses.

Why are the concepts behind the labels so important? Because in order to effectively respond to any problem, it is necessary to correctly analyze it. To mechanically apply rules limits the practitioner to being little more than a technician. A real understanding of the reasons behind the rules enhances creativity and effectiveness. Even more important; the more artistic and creative the practice of law is, the more personally rewarding lawyers will find it to be.

II. Lawyers Think, and Judges Instruct Deductively, Yet Jurors Think

Inductively

We lawyers suffer the disadvantage of being legally trained, a contaminant with which ordinary folks aren't burdened. Legal training is grounded on deductive thinking and logic. Lawyers think in syllogisms¹, meaning we begin with the facts, and then carefully build, from the "bottom up", to conclusions supported by the facts. In reality, people process information inductively, meaning they think from the "top down." They form early impressions/opinions, then collect facts to support what they already believe. Inductive processing is obviously different from the legal template commanded by the court's instructions. This general proposition is not news to most jury trial lawyers, however, the degree of the inconsistency is. Within this gaping chasm lie both the challenges and the opportunities.

In measuring the width of the divide, let us begin with the mandates of positive law, i.e., the boilerplate instructions with which judges routinely charge juries. A cursory examination of pattern jury instructions quickly illustrates the schism between the terms of the court's charges and the inductive decision making processes natural to the jurors.

¹ See *Nelson v. Lane County* 79 Or App 753, 766-767 (1986) for an explicit application of a syllogism.

After each of the following instructions, I contrast the mandates of the charge with the realities of the jurors' inductive thinking processes and their strong inclination to assign justice in a "fair" or distributive manner.

Jury Instructions:

1. "You will hear the evidence, decide what the facts are, and then apply those facts to the law that I will give you. That is how you will reach your verdict." Stated differently, "Do not attempt to decide the case until you begin your deliberations." [Jurors form early impressions, which they thereafter defend.]

2. "You must follow the law whether you agree with it or not." [The jurors will do justice, meaning what they think is fair. Three aspects of the instructions, the charge for them to apply their considered judgment, commanding jurors to both draw from and rely upon any reasonable inferences, and explaining that a verdict can be based solely upon circumstantial evidence, all invite and legitimize jurors applying their own notions of fair play and common sense.²]

3. "You must not be influenced by sympathy for, or prejudice against, any party." UCJI 5.01 [This is the heart of jury selection. These values resist being sanitized from jurors and their deliberations.]

4. "The jury is not to consider whether any of the parties have insurance, or the ability to pay for any loss." Under ORE 408 insurance is not admissible. UCJI 16.01. [In determining which of the parties should bear the loss, jurors may not only discuss insurance, but also whether the plaintiff really needs the money, a point which is entirely separate from whether the plaintiff is entitled to it under the court's instructions.³]

5. "Do not determine whether a party was negligent by consideration of subsequent events." UCJI 20.04. [This collides with hindsight bias. An excellent example is in an insurance "bad faith" case, where the evidence in the later bad faith trial consists not only of all the earlier insurance offers in the underlying case, but most important, the verdict.]

² *McKee Electric Co. v. Carson Oil Co.* 301 Or 339-352 [1986]. "From the driver's account, which was direct evidence, the jury is entitled to draw inferences based on any of the logical inductive or deductive processes by which the brain arrives at reasoned conclusions from given data."

³ See *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 609 (1970) for a judicial concession of this point.

6. “The amount of money requested by the plaintiff in the complaint should not be considered in arriving at your verdict except that it does fix a maximum amount you can award the plaintiff.” UCJI 70.02. [The amount of the prayer is psychologically important because it is where jurors begin their analysis, this is known as an anchoring number.]

The next three judicial directives deal with matters of evidence.

7. “When the court orders that evidence is stricken from the record, the jury must disregard that evidence.” [Yeah, right! This is called “unringing the bell!”]

8. “When evidence is admitted for a limited purpose, you may consider it only for the purpose it was received.” ORE 105 [The temptation to stray is almost irresistible.]

9. “Whenever I sustain an objection to a question, ignore the question and do not guess what the answer would have been.” [Same problems as numbers seven and eight.]

Application: Motions in limine, including ORE 104 pretrial motions, are all antidotes to insulate the jury from hearing what they should not. The prohibition against speaking objections is a subdivision of this general concern.

The application of positive law (the substantive and procedural rules that govern the case) to the facts of the case, when filtered through the common sense of ordinary citizens serving on juries, assures that our civil justice system remains grounded in community values. The result is known as our common law, which is a gestalt that is both a process and a result.

Successful jury trial lawyers are deft at tiptoeing between the mandates of the positive law and the subtleties of jury persuasion. It strikes me that personal injury lawyers tend to fall into two skill sets that are a reflection of their differing job requirements. Defense attorneys are strong on the law, all motion practice, and the technical aspects of causation. Plaintiffs’ attorneys hope to survive all the factual

and legal hurdles the defense throws at them, and live to deliver passionate closings. While all good trial lawyers appreciate the importance of preparation, plaintiffs' lawyers are probably better with improvisation. Each has their strengths, and they are certainly not mutually exclusive, as anyone who has ever tried cases against Richard Bodyfelt or Bill Wheatley can attest.

It is also my impression that lawyers who try commercial cases are more comfortable with the technical aspects of their cases than they are at telling stories about the people they represent. Without disrespect, many commercial cases are arbitrated or bench trials. As lawyers move farther away from juries, the more "book smart" they seem to become. The closer lawyers get to juries, the more "people smart" they necessarily become. Being "book smart" has little to do with being "people smart", in fact they are probably reverse correlates.

When challenged or stressed, it is natural that we all instinctively resort to our perceived strengths, whether it be power of analysis and "book smarts" (I call this "stack-o-facts") or our people skills. These differing orientations color our very perception of "what the problem is." This is called correspondence bias, and explains why, within a common set of facts, a "book" lawyer will try one case, and a "people" lawyer will try quite another.

III. Jurors Mete Out “Justice” In a Composite/Distributive Manner

Jurors make decisions in a composite, or distributive manner, without strict compliance with the court’s instruction. This allows astute trial lawyers who are psychologically ambidextrous to persuasively weld the letter of the law to the jurors’ common sense, producing the results they desire, a.k.a., “justice.” Yes, strong liability can provoke weak damages, and good damages can provoke weak liability. There will never be a final answer to the trial lawyer’s question, “Which is more important, a ‘good plaintiff’, or a ‘target defendant?’” This is the stuff of professional folklore. Even the judicial system with its deductive mantras concedes this.⁴

The bottom line here is, the sequence of questions on a special verdict form, beginning with liability and ending with damages, presents the format jurors must follow during their deliberations. I’m sure they do, if they think it’s fair . . .

⁴ “. . . evidence of fault can influence the jury’s measurement of damages, and the kind and degree of injuries may influence some jurors in their evaluation of the evidence on liability.” *Maxwell v. Port Terminal RR Co* 253 Or 573, 577, 476 P 2d 484 [1969], see *Wells v. Marleau* 79 Or App 784, 793 [1986].

In *Wilson v. B F Goodrich* 52 Or App 139, 153 [1981] the court insightfully commented “The argument can be made that the quoted language from *Maxwell* presupposes that juries will not follow the court’s instructions. In our view, however, a more convincing argument can be made that *Maxwell* recognizes a predictable reality about jury behavior to which courts should not be blind in fashioning remedies.”

IV. What Jurors Think - Their Outcome Determinative Beliefs

Jurors individually and collectively represent all the messy stuff that makes us the people we are. This includes all of our biases, sympathies and prejudices, the very attributes courts instruct all jurors to put aside. The legal system's answer is that sufficient fairness is produced by allowing all sides to question prospective jurors, and then eliminating the extremes on both ends by exercising juror challenges. The result is a jury, a committee of the community, that our culture deems to be "fair." We also know all sides are trying to obtain a jury that is biased in their favor. This is as it is intended, as the adversary model assumes justice will result when opponents vigorously pursue self interest within this system.

Each of the following beliefs is introduced by title with a brief explanation, followed by a paragraph captioned "Application", which discusses the concept's use in the courtroom. An example follows when necessary.

It is important to understand this section deals with what people believe, meaning the content. Distinguish this from how people think, meaning process information. These are the outcome determinative attitudes that foreshadow jurors' votes. Common content or belief examples include: "Money really won't really do any good, because it's not going to bring back the dead," "A rich person may be legally entitled to a verdict, but not need the money as badly as a really nice

defendant who owes it,” “any matter concerning race, gender or religion” or that a plaintiff or defendant is either “too attractive or unattractive.” These are the concerns attorneys for both sides must explore. A good way to identify these outcome determinative attitudes is to ask yourself, when the jury later retires to deliberate, “What are the first things they are going to talk about that scare me?” We all know the court instructs the jury not to be influenced by “bias, sympathy or prejudice” and that “There is to be no conjecture, speculation or guess work.” If these mandates were self fulfilling we wouldn’t need jury selection.

1. Personal Responsibility⁵ - This means not blaming others for life’s challenges or choices you have made. Personal responsibility is one of America’s most enduring and endemic values. Being irresponsible is a sign of immaturity, while taking responsibility is viewed to be a sign of maturity and moral strength. Many of my defense attorney friends suggest this idea is aptly summarized by the bumper sticker seen in the movie “Forest Gump.” The fact that a plaintiff has filed a lawsuit claiming someone else is responsible for his or her injuries arguably places them in opposition to notions of personal responsibility.

I begin each case assuming that jurors will impose a higher standard of responsibility on the plaintiff than on the defendant. It is my sense jurors believe it

⁵ DeWitt, J.S. & Richardson, J.T. (1997). Novel Scientific Evidence and Controversial Cases: A Social Psychological Examination. Law and Psychology Review 21.

is more likely they will be sued rather than becoming injured themselves and suing, thus making it easier for them to identify with the defendant.

Application: Splinter the allegations of fault against the opposing side into as many discrete choices or acts as possible. With choice comes power, which ultimately means responsibility. Even more important than being able to identify each separate, negligent act, is being able to explain why the opposing side made that choice. Motive is so important because juror decision making is a process of story formation, and at the center of any story is always the “Why” question. At this point, plaintiffs’ lawyers talk about corporate profit and defense lawyers talk about “people who sue.”

2. Anti-plaintiff bias - This is part of the belief that the civil justice system is broken, and is closely related to the next bias, i.e., anti-lawyer bias. These are all planks in the conservative tort reform political agenda, i.e., there are too many (frivolous) lawsuits, lawyers, big verdicts, and punitive damages awards.

Application: Do not attempt to take on the system and try to defend the McDonald’s hot coffee verdict. Differentiate your client from the jurors’ perceptions of how plaintiffs who file frivolous lawsuits act.

Example: As plaintiff’s counsel, admit during jury selection that “Yes, occasionally frivolous lawsuits probably do occur, however, the question for this

particular jury is ‘Is this case one of those?’ With this introduction, your next question is: “Mr. Juror, in answering that question, what types of facts will you be looking for to determine if this case is frivolous?” Jurors generally answer: “Well, I would look for exaggerations, a failure to return to work promptly, and how soon after the injury did they contact and hire a lawyer? Can the doctors find anything (physically) wrong with them? What is the plaintiff’s work history? Has this plaintiff filed lawsuits before? If so, how many and for what? How much money is the plaintiff suing for?”

3. Anti-lawyer bias - Many people like their lawyer, yet hate lawyers generally. Many voters like their congressman, yet distrust Congress. This is why lawyers should avoid conduct that conforms to jurors’ preexisting negative stereotypes of attorneys, such as looking or acting slick, contentious, or pandering to the jurors’ emotions. This conduct assures you will fail the jurors’ citizenship test, and thus fail to earn their trust.

Application: Similar to how the anti-plaintiff bias was processed.

Example: Concede that there might be too many lawyers and that the credibility of the legal profession is low. Directly ask the jurors what you, as an attorney advocating to them in this courtroom today, can do to earn their trust? They will tell you: “Always be honest, never exaggerate, and if you make a

mistake, quickly admit it.” You now know what you must do. If you honor these requests, the jury will trust you. They have told you so. If you do what the jury requests, you might still lose, but it won’t be because of your poor citizenship. Every trial lawyer will tell you the most important attribute is credibility. Why? Because, without it, it doesn’t matter what you say . . .

V. The Order of Proof - Why It Is So Important

Solomon Asch, an eminent social psychologist, demonstrated the importance of sequential order in an experiment.⁶ In the study, subjects received the following statements and then were asked to rate the person.

1. Steve is intelligent, industrious, impulsive, critical, stubborn, and envious.
2. Steve is envious, stubborn, critical, impulsive, industrious, and intelligent.

The two statements contain the same words, simply in reverse order. What Asch found was that Steve was rated more favorably when he was described with positive traits first.

1. Availability Bias⁷ - Whatever most occupies juror attention during the trial will influence what the jurors focus on during their deliberations. Why?

⁶ Solomon E. Asch, Forming Impressions of Personality, 41 J. Abnormal and Social Psychology. 258 (1946)

Because jurors mistakenly equate the availability of information with frequency, probability, and causality. For example, people often assume that murder is more common than suicide, even though it occurs almost 50 percent less often. The reason for this assumption is that murder is more widely reported and suicide is under reported; thus, murder is more available in memory. Another example is when the public is bombarded with information about frivolous lawsuits, people understandably assume such cases are common, when statistically they are not.

Application: Seize the initiative. Try your case. Keep the focus on the opponent's misconduct. When I began practicing law more than thirty years ago, the prevailing thought was to begin the case by calling the plaintiff first, thereby introducing the plaintiff to the jury as a real person. The insights of the trial consulting profession concerning availability bias have changed this. Opening with the opponent's misconduct defines what the case is about. Following with the plaintiff also permits the injured person's shortcoming to be viewed in a more favorable light. There are many attractive plaintiffs' arguments that naturally flow, including "The law says that a defendant/wrongdoer takes their victim 'as is'", and, "it is no defense to a wrongdoer's misconduct to highlight the shortcomings of their victim . . ."

⁷ Waddington, L. & Morley, S., Availability Bias in Clinical Formulation: The First Idea That Comes to Mind. The British Journal of Medical Psychology. (2001). March; 73(Pt 1) :117-127

2. Belief Perseverance Bias - This bias refers to jurors' tendency to cling to a story once adopted, even in the face of conflicting evidence. It is a sequential corollary to availability bias.

Application: An (early) adopted trial story becomes a conceptual template for interpreting and understanding subsequent evidence. Jurors do not continually update an adopted trial story as new evidence is introduced. Consistent evidence strengthens a trial story once adopted, while inconsistent evidence is critically scrutinized and often ignored.

Primacy, Recency and Preemption⁸ - Every lawyer is familiar with this trilogy, however, each are so important that no discussion concerning the order of proof is complete without at least mentioning them.

3. Primacy - Information presented early tends to be remembered best, and therefore has an inordinate influence. Primacy reinforces the potency of both the availability and belief perseverance biases. The power of primacy applies not only to the entire trial, but to every part thereof.

Application: Begin and end each witness with strengths, begin and end each day, and each part thereof, with your best points.

⁸ O'Keefe, D.J. "Persuasion Theory and Research" Volume 2. (1990). Chicago: University of Illinois.

4. Recency - The last thing jurors hear is more easily remembered. Melding primacy and recency, it follows that your “weakest” evidence should be buried in the middle of the trial and each part thereof. This is one of the reasons why defense counsel will request that the court instruct the jury after the closings rather than before; thereby avoiding the jury retiring to deliberate with plaintiff’s rebuttal argument ringing in their ears.

5. Preemption - This involves being the first to present negative material. Preemption is done not only to preserve credibility, but also to reduce the impact of any unfavorable facts, thus minimizing the opponent’s opportunity to exploit such material. Use preemption during the jury selection and opening statement. The psychological result of effective preemption is called deconditioning. The more one is exposed to a particular stimulus, the weaker the response becomes. The repetitive playing of the video tape showing the police beating the defendant in the initial Rodney King state court criminal trial is a good example. The video tape was played to the prospective jurors more than 60 times during jury selection and the opening. The arresting officers were acquitted. At a personal level, each of us can see the effect of this deconditioning in our own response to violence in the media.

Before utilizing preemption, determine if you can turn any weaknesses into strengths. Once again, the “as is” or previous infirm condition (UCJI 70.08), is a good example, i.e., “The more fragile the plaintiff was, the less trauma it took to injure him.”

VI. How Jurors Think - Five Information Processing Behaviors Called “Biasing Errors”⁹

While a number of these “biasing errors” are similar and superficially may seem the same, each is unique. The differences are more than labels. These errors describe thinking processes that affect perception, and therefore ultimately the conclusions a person comes to embrace. Biasing errors (process) must be distinguished from the specific beliefs (content) that a juror has.

1. Confirmation Bias Error¹⁰ - This is at the heart of processing information inductively. Jurors will search for evidence that confirms their preexisting beliefs, critically scrutinize evidence that is contrary, and interpret ambiguous evidence consistent with their preexisting beliefs.

Beliefs are primarily driven by life experience. This is why it is imperative to fully explore life experiences during the jury selection. A core belief will prevail

⁹ Some experts criticize the term “errors” because it implies that something is “wrong,” when it is simply human nature. They are more comfortable with the term “tendencies.” I too prefer “tendencies”, however, my research indicates that “errors” is a clinical term of art.

¹⁰ Kahneman, D., Slovic, P. & Tversky, A. (Ed.) (1982). Judgment Under Uncertainty: Hueristics and Biases. Cambridge University Press

over evidence that challenges that belief. These are contaminating outcome determinative attitudes. Core beliefs must be identified, discussed, and thereby neutralized during jury selection. If not confronted during *voir dire*, it is too late when the jurors retire to deliberate.

Application: This is what jury selection is all about - identifying the “outcome- determinative” attitudes of each juror that foreshadow their ultimate decisions. Stated differently, how a juror finally votes is generally determined by their preexisting attitudes. When unfavorable to you, these attitudes need to be clearly identified, acknowledged, and to the extent possible, neutralized. Life experiences will generally trump the court’s prohibition against bias, sympathy and prejudice. Legal directives rarely negate a bias, however, skilled jury selection can reduce it. Consider ORCP 59 B and the use of written instructions for reinforcement of the prohibition against bias, sympathy and prejudice during closing. A copy of the instructions then goes back to the jury room, where it continues preaching during the deliberations. Make the effort to prepare a copy for each juror.

Example: I write on an easel in large letters the outcome determinative attitudes that are unfavorable to me. I label these as biases. A legal verdict is only supposed to be based upon the law and evidence. There is to be no bias, sympathy

or prejudice, nor conjecture, speculation or guesswork. This begins a frank discussion along the following general format. I begin with the general statement that we are all biased in some way, inviting the jurors to admit they have strongly held beliefs on topics that are relevant to this case, such as tort reform, and that given these firm beliefs it is difficult to begin the trial being completely impartial to both sides. I then progress to the question in the juror's mind, given their strongly held beliefs and the facts of this particular case, "Is this is the right case for this particular juror to sit on?" If they decline my invitation to ask the judge to excuse themselves (I call this "attempted self-recusal"), I then inquire how they are going to prevent strongly held beliefs/biases from contaminating their decision making. The magic here isn't what the juror you're questioning says, it is the rapt attention the other jurors are paying as they listen to the comments of their fellow jurors. This begins a kind of group inoculation against biases.

2. Fundamental Attribution Error¹¹ - FAE refers to the tendency to over attribute to other people the influence of "internal" factors, (i.e., personal responsibility, individual choices, etc.), yet when it comes to themselves, the same people flip-flop. They will under attribute the influence of their own actions or choices, and over attribute causality to external factors or situational factors, such

¹¹ Stadler, D.R. Does Logic Moderate the Fundamental Attribution Error? Psychology Reports (2002). Jun; 86 : 879-82

as the acts of others. This quality is common to all people - that is why it is called fundamental. For example, most parents are excessively proud of their children. If their child is sitting on the bench in athletics it is because of bad coaching. If the same child were playing more, it is always because of talent, never bad coaching.

In a car accident, the juror will look at the plaintiff and say: “You dumb driver, you were not paying attention.” The same juror is later in a car accident herself and says, “I am a good driver, my brakes failed, the other driver wasn’t paying attention and that’s what really caused the accident!”

Application: I have two responses to FAE. First work hard to present your witnesses as people the jurors will like. Why? Because if the jurors positively relate to them, they might see themselves in the shoes of that witness and identify with them. The jurors will then attribute the favorable internal presumptions to that witness; the converse is just as true if the witness is not liked by the jurors. Second, specifically develop and emphasize all the evidence that either supports or contradicts the internal and external presumptions foreseeable to your side that flow from this FAE.

3. The Just World Hypothesis Error¹² - This is when a juror says “If you play with matches, you are going to get burned!” or “The plaintiff got just what they

¹² Finkel, N. & Crysta, D. Commonsense Notions of Unfairness in Japan and the United States. (2001). Psychology, Public Policy and Law. June. Vol. 7

deserved.” It relates to peoples’ psychological need to believe that the world is an orderly place and that everything happens for a reason, i.e., “Good people are rewarded for good deeds, and bad choices produce bad results.”

Application: To the jurors, conclusions flowing from a just world hypothesis are just plain common sense. Such conclusions are so organic to the jurors’ values that jury selection neutralization techniques are not very effective. A pre-emptory strike is necessary. Given that each side usually has only three pre-emptory strikes, this is when motivating a prospective juror to try and recuse themselves is so important.

Example: Similar to the format used earlier with confirmation bias, try to entice jurors to request that the judge allow them not to serve on this particular case, because by their own admission they will find it difficult to be fair. This line of questioning does help neutralize, to some extent, the issue for both the individual jurors and the panel at large. It is my sense that it is easier to neutralize confirmation biases than conclusions flowing from a just world hypothesis. Revelations of strongly held (adverse) beliefs on matters central to the case also preclude the disclosing juror from later sneaking up on the other jurors during deliberation with an undisclosed agenda. This is because the entire juror panel knew exactly where that specific juror stood before the trial even began.

4. Hindsight Bias Error¹³- This is nothing more than Monday morning quarter-backing. It smells a little like confirmation bias. Hindsight simply allows one to interpret the past with the benefit of knowing the outcome of a choice. Because of hindsight biasing errors, jurors skip the analytical questions of foreseeability and go straight to the conclusion of fault, answering “yes.” This erroring bias tends to favor an injured plaintiff as the plaintiff can argue that “Because of choices the defendant made, there was an ‘accident’ waiting to happen, and this time it did.” Stated slightly differently, “There was no question someone was going to get hurt, the only question was ‘who’ and ‘when’, not ‘if.’” The defendant conversely will use hindsight bias to their advantage when arguing comparative fault by focusing on choices the plaintiff made.

Application: If defending, emphasize that the law states that fault is determined at the time of the acts, not in hindsight. Simply saying that the judge will also later be instructing the jurors that this is the law is not enough, even with

¹³ Williams, C.W., Lees-Haley, P.R. & Brown, R.S. Human Response to Traumatic Events: An Integration of Counterfactual Thinking, Hindsight Bias, and Attribution Theory. Psychology Reports (1993). April; 72 (2) : 483-494

Thompson, S.C., Armstrong, W. & Thomas C. Illusions of Control, Underestimations, and Accuracy: A Control Heuristic Explanation. Psychological Bulletin (1998). March; 123 (2) : 143-161

Hoffrage, U., Hertwig, R., Gigerenzer, G., Hindsight Bias: A By-product of Knowledge Updating? Journal of Experimental Psychology: Learning, Memory and Cognition (2002) May; 26 (3) : 566-581

written instructions. The jurors must, with your assistance, generate examples from their own lives. They always give greater weight to examples from their peers than those coming from a lawyer.

Example: Invite the jurors to think of an instance where they already know the outcome of a choice, and later criticize it. It's easy to know the answers to the test questions when you have the answer sheet. How many of us are quick to criticize prior investment choices based upon what we learn a week later in the *Wall Street Journal*. The jurors must generate their own examples, not simply embrace yours.

5. Defensive Attribution Error - When jurors are anxious because they feel threatened at a deep psychological level, they tend to blame the injured person as a way of processing or dealing with their own emotional discomfort. When jurors imagine themselves confronting the same situation the plaintiff did, they ask themselves how their ideal self would have behaved, not "Have I ever acted like that?" This explains why jurors who are mothers so harshly judge other mothers in child dart cases, especially those mothers on the jury who have never left their child unattended, not even for a moment!

This biasing error involves jurors unconsciously blaming the victim in order to avoid thinking that they too might suffer a similar fate. If the hindsight error

favors the plaintiff, then defensive attribution favors the defense. This biasing error is vexing because without specific knowledge of both the existence of the biasing error, and that it operates unconsciously, most lawyers will think they want a juror similar to the plaintiff. Paradoxically, this similarity is exactly what prompts the frightened jurors to defensively attribute fault. This is an example where instincts and common sense betray many lawyers.

Neutralizing techniques generally do not work well. The process is similar to handling FAE. Will the jurors like the witness? Emphasize facts that either support or contradict FAE presumptions. These facts are probably less useful for you to use in attempting to persuade unfavorable jurors, than they are for partial jurors to later use during deliberations in their attempts to persuade “swing” votes.

VII. Applying Biasing Errors to the Issue of Causation

There is a good reason why the LSAT specifically tests the applicant’s analytical skills. Learning to “think like a lawyer”, in large part, involves refining your ability to understand and communicate precisely why a particular event has occurred. Typical examples of causation arguments include “The plaintiff would never have been injured if . . .” and “Yes, it might be true, but . . .” Remember, what we lawyers call “causation”, jurors understand as an explanation.

Consultants teach lawyers that in determining “the” cause of an outcome, jurors instinctively construct alternative scenarios that might lead to different results. This process is called “counterfactual” thinking. The more easily jurors can imagine a different sequence of events producing a different result, the more likely jurors will focus on the interchangeable element as “the cause” of the result in question. Illustrating with a basic slip-and-fall case, if jurors can comfortably construct an alternative scenario to what actually happened, such as the plaintiff traversing a different route into the building, they are likely to conclude, “Had the plaintiff just gone the other way, the accident would not have happened.” Thus, the plaintiff becomes the focus, ergo increasing his responsibility. If jurors construct an alternative scenario that includes the building custodian placing a “slippery when wet” sign at the base of the stairs, the jurors are likely to conclude, “Had the building custodian just put a sign up, the accident wouldn’t have happened.” Thus, the building management becomes the focus (remember availability bias), thereby increasing the defendant’s responsibility.

Effective defense lawyers encourage jurors to embrace an alternative (counterfactual) scenario that favors their client by questioning the plaintiff (e.g., “Did you see the sign that said ‘slippery’ near the stairs?”) and articulating all the choices/responsibilities the opponent ignored. Experienced lawyers sweep up

and down the entire factual continuum of the case, both before and after the precise moment of the plaintiff's injuries, carefully searching for the best spot, or "causation event" from which to either attack or defend. When defending, they look for something unique that happened to explain the bad outcome. This works because if an unusual occurrence explains what happened, the suggestion is it probably will not happen again, i.e., the world is a safe place and there is no need for the jury to educate the defendant with a large plaintiff's verdict to prevent a similar injury from recurring. The plaintiff, on the other hand, wants to assign fault to an event, or non-event, which is characterized as a choice, as early and as often as possible in the continuum of events. Both sides will then want to splinter each choice into as many discrete acts as possible. Again, the reason is that with increased choices comes increased responsibility, and therefore potential legal liability.

Whatever issue the attorneys decide to build their case theme and trial around, it must align with community values, namely fair play. This comports with common sense. The art is in selecting the right issue(s) on which to try your case. The more successfully this is done, the "better" the lawyer. This ability is often called instinct. Senior Eugene attorney John Jaqua said it best when, a long time ago, I heard him compliment an opposing lawyer saying, "He had a great sense of

sidewalk justice.” The tactical high ground you choose to try your case on will be driven by your view of what the controlling community values are.

Trial effectiveness requires that a lawyer be able to anticipate the core issues of the opponent’s case. This knowledge allows you to preempt and neutralize the opponent. This does not mean you should ever allow an opponent to dictate how you try your case; it does however permit you to begin the process of preemption by framing the contested issues in a light most favorable to you and by refining your proof in these areas.

This is crucial for the plaintiff. Why? Because it is the plaintiff who wants compensation and only the plaintiff has the burden of proof. The defendant can do nothing and win.

I offer one additional point with all proper respect and deference to the worthy lawyers whom our office routinely faces. When serious claims are brought by plaintiffs, the insurance companies understandably and properly hire only the finest lawyers. The attorneys they employ are uniformly men and women of stature. By virtue of professional standing, they bring a certain air of authority to the legal positions they advocate. They are the essence of credibility and competence. This means that when a prominent defense lawyer explains to a judge and a jury that this is a very simple case that can be boiled down to one issue, you

know you are in big trouble! Assume the defense lawyer has framed the issue, and thus the case, in a manner that is favorable to his or her position. Unless this is effectively anticipated and blunted, you are probably going to lose.

Once you anticipate the issues or “high ground” on which the opponent will try their case, ask yourself, “What credible responses are available?” Jury consultants will tell you that when liability is clear in medical malpractice cases, the defense still wins most of the time by focusing on the separate issue of causation.

After the opposing lawyer’s opening is delivered, have it transcribed by the court reporter. This provides you with their road map. If they vary from it, remind the jury of this during the closing argument by reading, verbatim, what the opposing lawyer promised during the opening.

VIII. Conclusion

The principles discussed herein are equally available to all lawyers in all courtrooms. Think of each concept as a tool. The more knowledgeable you are about the tool, the more effective you can be in its use.

Understanding the psychology of human behavior will improve your jury selection, alter the order of your proof, provide you with new paradigms in developing your case theory, and improve the quality of your trial tactics.

As your confidence grows and your instincts sharpen, you will progress beyond the mechanics of being a good trial lawyer to becoming a craftsman of your trade.

The best of luck to you . . .

IX. Addendum

If the reader is interested in further developing their understanding of forensic psychology and jury behavior, I recommend subscribing to a newsletter called “News From the Mental Edge,” published by Eric Oliver, a jury consultant with a background in neurolinguistics. Eric works with both defense and plaintiff lawyers, criminal defense and prosecution. He provides his newsletter, three times a year, free of charge. May I respectfully suggest a voluntary contribution of \$10.00 per year should you request to be on his free mailing list. (Note: this last comment is completely without Mr. Oliver’s consent or knowledge.) Contact Eric at 42015 Ford Road, P.M.B. 224, Canton, Michigan, 48187. Phone 1-734-397-8042. E-mail: MetaSystEO@aol.com.

The Association of Trial Lawyers of America puts on at least two seminars each year that specifically deal with the challenges of jury selection and the application of principles of human behavior. These seminars are titled “Overcoming Juror Bias” and “Ultimate Trial Advocacy: The Art of Persuasion.” The “Ultimate” is held each year during spring vacation at the Harvard Law School. Admission is limited to members of ATLA. Much of the information in this paper is both discussed and drawn from various articles contained within the handouts for these two seminars. See specifically “Combating Juror Bias” by attorneys Gregory Cusimano and David Wenner. Further information can be obtained by calling ATLA’s CLE department at 1-800-424-2725, extension 612.

Any lawyer can become an attorney member of the American Society of Trial Consultants. Dues are \$160.00 per year. The ASTC has a number of fine articles from past publications which can be purchased. They also have a publication called Court Call. Their website is www.astcweb.org.

Don’t be shy about requesting a free face to face meeting with a trial consultant. Fees generally run from \$200 to \$300 per hour. At this free meeting ask questions about what they can do for you and at what cost. Ask for references. You will probably find yourself more comfortable with some rather than others. Each consultant will have their strengths and weaknesses.