

The Verdict of the Jury

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Everything is evidence to jurors—not just the exhibits and the testimony formally introduced. This makes the narrative used by a trial lawyer, the themes, and the cognitive strategies linking everything critically important.

How to Captivate Jurors like a Hollywood Movie Director



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In approaching litigation, in-house counsel for defendant companies spend a great deal of time asking outside counsel to assist their companies with analyzing the facts and the law, assessing witnesses, and evaluating the potential

issues and damages of a jury trial. In deciding whether to take a case to trial, however, another equally important facet should be taken into account, namely, how jurors actually decide cases. The facts and the law alone are often not what jurors rely on to decide cases. That is because in a jury trial everything is evidence.

Think about the last time that you went to the movie theater and watched a preview of an upcoming film. Each preview was only several minutes in length and was comprised of two- to three-second clips. By the end of the preview, however, you probably had formed an opinion about whether you would like to see the movie and had a pretty good idea about the movie's storyline. How does this happen? The anticipated "story" that you formulated was a result of "connecting the dots" from the preview based upon your knowledge of that particular genre, producer, and actors and familiarity with similar storylines, as well as your own life experiences. In the same way, jurors begin to develop a story about an entire case based upon the previews given in voir dire and opening statements. Jurors fill out the story using their own experiences, attitudes, and perceptions as a framework. As in the movie example, jurors fill in the gray areas in the dispute at hand and "connect the dots" based upon related experiences and their overall views of the world. Jurors then selectively filter information presented to them to maintain a coherent story. While the story is elaborated upon throughout the trial, there is a strong tendency for jurors to overlook or even discard information that is inconsistent with the main storyline that they already have developed.

The Story Model of Decision Making

Many people's initial reaction to jury duty is, "Oh no, how do I get out of this?" Jurors are ordinary people torn away from their daily routines and placed in an unfamiliar and highly ritualized environment. By the

time that they reach the point of deliberations, however, jurors usually go through a transformation and feel invested in the trial that they were once trying so hard to avoid. Most jurors want to give voice to the story of the case that they have formulated throughout trial.

Jurors are asked to make important and often complex decisions. After they have been orally instructed in lengthy and unfamiliar legal terminology, they are asked to determine which of two (and sometimes more) conflicting versions of the facts is correct. So what do jurors do? How do they make sense of the conflicting information presented at a trial? Years of study of jury behavior have shown that from an information-processing standpoint, all jurors do similar things regardless of the issues in the case, the lawyers, the venue, or the jurisdiction. Each juror strives to make sense of the conflicting information by *formulating a story* that explains the situation in familiar terms. The "juror story" about a case is the picture of the case that the juror will remember long after the trial is completed. It is the narrative "self-talk" that a juror will use to explain the conflict in familiar terms. This "juror story" is the essence or the heart of the story, reduced to the three or four key messages or themes that define a case from a juror's perspective. As the story teller, the trial lawyer can influence how a juror describes a case and formulates his or her story.

Jurors can often sum up their stories in as little as one sentence. From a negligence case involving a trucking accident, one juror's story was the following: "This young man's life would have not been taken away if the company had followed policies and procedures!"

Why do humans use the story form to organize information and make sense of conflicting data? The human mind has little tolerance for discrepant and ambiguous information. Our natural tendency is to organize information into meaning-

ful structures. Story structure is unique in that it allows us to sort out human affairs, and it can incorporate almost any kind of information.

Indeed, in one study, 95 percent of individuals chose to organize information into a story as opposed to other potential organizing schema. (Zeigarnik, master's thesis, Clark U., 1994). While a trial attorney can

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choose a variety of ways to organize the issues and the facts in a case, the average person attempts to organize case elements using a story.

Why is storytelling an appealing way to persuade an audience? Because it nurtures whole-brain learning. A story has elements that appeal to both sides of the brain. Cognitive psychologists have long known that the right brain, with its artistic and creative side, responds to the thematic and the aesthetic elements in a story that evoke emotions, while the left brain is satisfied by the temporal and the organizational structures in a story. Therefore, a good trial story should contain both thematic appeal and a narrative structure.

Storytelling is an essential element of persuasion not only because of its explanatory power, but also because it allows jurors to transcend a case and place themselves in the case scenario. Therein lies the rub: the structure of a trial is inconsistent with how jurors listen. The traditional trial structure is one that calls for inductive information processing. That is, a lawyer presents fact one, plus fact two, plus fact three, perhaps through a series of witnesses and documents. Due to the nature of trial presenta-

tion, these facts are often disjointed and not in logical or chronological sequence. Trial lawyers often use the analogy of a picture puzzle: you take different pieces and put them together until you have a complete picture. The presumption is that at the end of the day the jurors will assimilate the information and reach your desired conclusion. In fact, traditional trial lore was that the lawyer then puts it all together in a dramatic closing argument to win the case. This is not, however, how jurors listen and process information. Jury research has discovered that by the time of closing arguments, the jurors have long since made up their minds. Jurors listen deductively, developing a story that explains the conflict early in the trial process and then they filter the evidence selectively to maintain a consistent picture, while adding their own pieces of the story to fill in missing gaps. Therefore, a trial lawyer must tell a complete story—which includes compelling themes, a specific narrative structure, and narrative elements—in the opening statement if he or she is to convince the jurors to form a favorable story of the case.

Decades of studies on jury behavior have demonstrated several decision-making tendencies among jurors across cases. This substantial body of knowledge accumulated by jury research experts is very enlightening and often is counter to what lawyers traditionally have focused on when they prepare for trials.

Everything Is Evidence

For lawyers, evidence means an exhibit that's been admitted or testimony that has been elicited from the witness stand. For jurors, *everything* that they see and hear during trial gets put into a "decision-making bucket"; it goes well beyond testimony and also includes what is *not said*. Jurors view as evidence their impression of witnesses and how a litigant behaves in court, as well as other impressions made by lawyers, parties, and even the judge. These impressions, which are often subtle, or even subconscious, can have a large bearing on the outcome of a trial.

Take the case of a fast food franchisee who sued a well-known fast food chain that enjoyed a very positive brand image. The plaintiff claimed that the fast food chain had violated their agreement by awarding

franchises to other franchisees, which he claimed were in his territory. The jury ruled in favor of the defendant and found no contract violation. Post-trial juror interviews revealed that the jurors used two unexpected pieces of information as evidence. First, the plaintiff's wife brought their toddler to court on several occasions, and the plaintiff would hold him during breaks and make eye contact with the jurors. The jurors viewed this as a manipulation attempt to gain sympathy, which negatively affected the jurors' opinion of the plaintiff. Second, the jurors noticed that the plaintiff's dress shoes did not match his suit and that both shoes were worn out, with holes developing in the soles. The jurors extrapolated that the plaintiff must not have been as organized and buttoned up as he claimed in the lawsuit, and they assumed that a lack of attention to detail was likely the reason that he was not awarded the franchises. Does this mean that their verdict was wrong? Not necessarily. The jurors simply looked for other extraneous support for their verdict. And jurors believe that they are uniquely qualified to interpret parties' motives and judge character.

Jurors evaluate a witness's testimony by adding to what was actually said. For example, when a witness uses the phrase "I don't recall," that often signals to the jurors that the witness may be hiding something. Why? Because "I don't recall" is not commonly used in everyday speech and has come to take on a different meaning (*i.e.*, "I have some recollection, and it is not favorable"). Jurors assume that witnesses have been prepped by lawyers before testifying (whether at trial or during deposition) and that they would remember important details even if a long time has passed.

When a witness hesitates before answering a question, this can convey to jurors that the witness is trying to manipulate the answer to avoid getting in trouble. This includes even what a witness may think is a subtle hesitation, such as taking a sip of water between the question and the answer, or glancing around.

Jurors also view other minor behaviors as indicators that a witness is hiding something important or failing to be completely truthful. One of the most common signals of deception is when a witness does not make eye contact and instead looks up

at the ceiling or down at the floor. Another example is when a witness fidgets on the stand. These are common layperson indicators that people are lying, and jurors will bring those views into the courtroom to analyze the witnesses.

Jurors also focus on a lawyer's conduct and do not like it when they believe that the lawyer is trying to distract them from the facts. If a plaintiff's lawyer starts to tear up or get overly emotional during opening statement or a closing argument, the jurors will see that as trying to distract the jurors with emotion, and they may infer that the plaintiff's facts must be weak. Lawyers also lose credibility when they tell jurors to "use your common sense" because jurors feel that the lawyers are talking down to them instead of simply presenting the facts.

Litigants can also lose credibility based upon their actions at the counsel table. If a corporate representative fidgets or looks distracted throughout a trial, this indicates to jurors that the representative does not want to be there. Inappropriate facial expressions or head nods can leave the impression that a corporate representative does not care about a plaintiff or is dismissive of the plaintiff's claims. Jurors take time out of their own lives to give the parties their day in court, and therefore, they feel insulted if corporate representatives look as though a trial is a burden to them. Consequently, a corporate representative—and by extension the defendant—lose credibility with the jurors.

Knowledge and Control Are Paramount

Appearances are not always what they seem. Many times a trial team's initial assessment of a case can be inaccurate because the lawyers will look at cases through the lens of legal requirements and direct evidence. In contrast, jurors look at cases through a lens that analyzes knowledge and control. Jurors tend to assign blame based upon how much knowledge the parties had about the circumstances and how much control the parties had over the outcome. The more knowledge and control that a plaintiff or a defendant possesses in the eyes of the jurors, the more the jurors will hold that party accountable for the incident. Jurors' perceptions of a case, while often different from the legal

team's perceptions, are explained by cognitive psychology.

Consider the employment case involving what one plaintiff juror described as "the gentle giant." This case involved a large male plaintiff who was a former marine sergeant and football player. He claimed that his manager, a small diminutive female, was sexually harassing him. Although the common assumption was that the jurors would simply scoff at the plaintiff's claim due to the size differential and not take the claim seriously, the jurors in this case realized that the harassment was about power rather than size. The jurors felt that in this employment relationship in which the plaintiff desperately needed the job to provide for his family and needed to please his boss, he was in a weakened position. Additionally, the fact that there was a significant size differential actually reinforced the jurors' perceptions about the power that the supervisor had over him. The jurors concluded that the supervisor had all of the control in the situation while the plaintiff had no control.

Similarly, the jurors reached a somewhat counterintuitive position in a mock medical malpractice case involving a "dangling aborted fetus." In this case, the patient, who was pregnant with twins, called her doctor on a Friday night after miscarrying one of the fetuses. The doctor told her to take scissors and cut the cord, preserve the fetus, and come to his office on Monday. The plaintiff did so while sitting on the toilet. The patient also followed his instructions by preserving the fetus in a plastic bag. The remaining twin was viable for a while but eventually died in utero. The plaintiff theorized that the cut umbilical cord for the dangling, demised fetus became a "wick for infection that killed the second fetus." The plaintiff believed that the negligence case was a layup win, which was correct; the jurors were appalled by the physician's advice. Pretrial jury research, however, found that causation was a different matter because the jurors were similarly appalled by the mother's decision to follow the instructions. The jurors placed significant blame on the mother, who was an educated lawyer, for following through with the doctor's outrageous advice. The jurors also blamed her husband, who was an educated professional, for not interven-

ing and taking his wife to the emergency room. Knowledge and control are the kings when jurors evaluate comparative fault among parties.

Decision-Making Shortcuts

Jurors look for shortcuts to make sense of a case by using certain "cognitive heuristics." Cognitive heuristics are mental shortcuts

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used to process information and make decisions when faced with complex or unfamiliar information. People use these shortcuts in everyday life, and as jurors, they bring this with them into the courtroom. Some every day examples of how people use cognitive shortcuts are (1) using stereotypes to characterize strangers or people who you meet for the first time; (2) favoring a politician's entire platform based upon his or her view of a single issue that you support, such as immigration or healthcare; and (3) hearing about a plane crash and deciding that you will never fly on a plane even though vehicle accident deaths are far more likely.

Jurors commonly use the following four heuristics in deciding a verdict: (1) hindsight bias, (2) confirmation bias, (3) anchoring bias, and (4) availability bias.

Hindsight Bias

Hindsight bias, also known as the "knew-it-all-along effect" and "Monday morning quarterbacking," is the belief that an outcome was predictable, even though there was little to no basis for predicting it. Already knowing that an outcome occurred makes it easier for jurors to believe that various parties should have foreseen an

incident. This allows jurors to use “magical thinking” to invent better ways that the parties could have acted to prevent an incident. The following are examples of how jurors have used hindsight bias in making decisions.

Jurors already know that a plaintiff was injured while using a defendant’s product. Therefore, the defendant should have given

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more warnings to prevent the injury, or the defendant should have included more safety features that would have prevented this accident.

Jurors already know that a patient in a medical malpractice lawsuit was injured due to misdiagnosis. Therefore, the doctors should have run *all* tests that exist to have made the proper diagnosis.

Jurors may decide that a company or an executive committed fraud. Therefore, they will conclude that everyone around the fraud-committing actor (*e.g.*, auditors, investors, lending banks) should have discovered the fraud.

One example that shows the strength of hindsight bias is a case in which a wealthy man stole over \$70 million from numerous banks by lying to them and using forged documents to obtain multi-million dollar loans. The man was sentenced to federal prison for bank fraud, and a trustee was placed in charge of his estate. The trustee sued one of the banks that had loaned money to the man but then demanded and received repayment of the loan before the man’s arrest. The trustee claimed that

the defendant bank knew that the criminal was defrauding the banks, which was the reason it demanded repayment of the loan, but rather than uncover the man’s fraudulent scheme, the defendant bank decided to look the other way and allow another bank to issue the man a large loan to get repaid. The defendant bank was aware that the man was paying back his loan by obtaining a loan from this second bank. The trustee claimed that the defendant bank should have called the police or the FBI, but instead it ignored red flags because it wanted to be repaid its loan and turned a blind eye to the fraudster’s subsequent bank loan applications with a different bank. Pretrial jury research indicated that the trustee’s list of red flags was the most difficult hurdle for the defendant bank to overcome because the jurors already knew that the conman had committed the bank fraud. Therefore, the jurors assumed that the defendant bank must have “known it all along” at the time of the incident because the jurors had the benefit of hindsight.

Confirmation Bias

Confirmation bias is the tendency to favor information that confirms someone’s beliefs. Simply put, it is easier to convince someone about a viewpoint that he or she already believes than a new one. The key to persuasion is showing jurors how *your* case story meets *their* expectations. All jurors harbor preconceptions that influence their interpretation of a case. Therefore, you should identify those preconceptions that favor your client and frame the case in a way that activates those preconceptions. This is why voir dire is so critically important in a trial: it is the only opportunity that lawyers really have to learn about and to assess jurors, not only to select individuals for a jury, but then to tailor a case to those jurors, individually and collectively. It is during voir dire that a lawyer can identify the jurors who hold confirmation biases that will hurt a case.

Keep in mind that it is easier to swim with the current than to swim upstream. Information that is inconsistent with jurors’ beliefs can sometimes go completely unnoticed or backfire. Therefore, it is critical to avoid themes that try to convince jurors of something that goes against their

preconceptions (*e.g.*, large corporation put safety ahead of profits).

For example, generally jurors believe that injuries at home with everyday products are more likely a result of failure to follow safety rules than because of defective products. A plaintiff might have contributed to an at-home accident by acting in a way that the bad outcome was predictable and therefore avoidable, or there may have been instructions and warnings on a product to show how to use the product safely and avoid injury. Thus, jurors would blame the plaintiff for not following the instructions and adhering to warnings.

Similarly, jurors tend to believe that if you fear your health or believe that your life is in danger, self-preservation becomes your main focus. If a plaintiff faced a dangerous situation at work (*e.g.*, she was pregnant and started bleeding; he smelled gas on the premises), then the plaintiff should have left even if his or her boss said that the plaintiff must stay. The jurors would probably blame the plaintiff for not following his or her survival instinct.

We observed the confirmation bias at work in several recent gas explosion cases. Jurors universally hold the preconception that if someone smells gas, then he or she leaves the area and reports it to authorities. This relates to the cardinal rules of safety because most people learn when they are young that the rotten egg odor of ethyl mercaptan signifies potential danger. In many gas explosion cases, the jurors fault the plaintiff for failing to report or to evacuate when he or she smelled gas. In one recent case, a woman stayed in her house for two days while smelling gas off and on, even though the gas company instructed her to leave when she called to report the smell. Pretrial jury research found that many jurors faulted the plaintiff entirely for her injuries because the plaintiff’s conduct did not meet their expectations to leave when she smelled the gas. Witnesses who knew the plaintiff further reinforced the confirmation bias because they testified that the plaintiff knew that she should evacuate the house if she smelled gas. As one juror stated, “The most convincing points for the gas company defendant were the testimonies from people who knew that the plaintiff knew what to do and even after being told to leave, she did not.”

Anchoring Bias

Anchoring bias is when people place heavy reliance on a fact, perception, or issue when making a significant decision related to a complex problem. For jurors, anchoring bias occurs when they rely heavily upon a piece of information that ultimately dictates their verdict. This often will involve an issue that they are unable to reconcile in the context of each party's position and it preoccupies the jurors' attention.

A classic example of anchoring bias is referred to as "the case of the blue arm." The plaintiff was a newlywed husband who sued a large hotel chain. The incident took place in the hotel's swimming pool and resulted in his bride suffering partial paralysis. The initial defense strategy was aggressively to take on the negligence claims (failure to maintain the pool and identify hazards, failure to provide safety equipment and warnings). The negligence defense failed time and time again in the pretrial jury testing. However, it was discovered that mock jurors were haunted by one unusual fact: the bride's arm was a bright blue, and no expert doctors could explain it. The bride had no recollection of the events in the pool leading to her losing consciousness. The revised strategy became (1) use the testimony about the blue arm and uncertainty about the cause as the psychological anchor to activate the jurors' desires to solve the mystery surrounding "what happened?", and (2) use the burden of proof to underscore the uncertainty about the plaintiff's causation theory. The blue arm invited much speculation about the triggering event that caused the young lady to lose consciousness. Did she walk too deep in, or did she have some type of unexplained seizure? Was there some other unknown, preexisting health condition that triggered a loss of consciousness?

Another example of a juror anchor was the statement, "Daddy, I don't want to walk." This case involved a hospital that directed the parents of a little boy who was sick with a fever and seizures to a hospital that was farther away. The delay in treatment caused the illness to progress so much that the child had to have his legs amputated. During the trial, the boy accompanied his father to the stand to testify. The father was demonstrating the prostheses for his legs and was trying to put

them on his son. The son started crying and struggling, and said, "Daddy, I don't want to walk." At that moment, the case was over in the jurors' minds, and they awarded the plaintiff \$25 million against the hospital.

Availability Bias

Availability bias is when people have a bias toward information that is more available to them. People are more heavily influenced by information that can be easily brought to their mind and accessed. The order of issues and "enriching" certain facts, perceptions, and evidence influence the way that jurors formulate the story of a case. Often it is a factoid, or case perception, and sometimes a legal issue.

Defense attorneys frequently spend the critical beginning of opening statements focusing on a defendant company; what a good corporate citizen it is, and what lengths it went to produce a safe product. Instead of this approach, one critical availability bias method that favors a defendant is to focus instead on a plaintiff's actions leading up to an incident during an opening statement.

Consider the key facts in an automotive product liability case in which the plaintiffs alleged that a defect in the transmission led to the drowning of their child.

- The plaintiff put the car in neutral rather than park.
- The plaintiff left the child in the car seat at night with the engine running.
- The vehicle was parked on uneven gravel.
- The young parents were going away for a weekend of partying.

Are you starting to formulate a story based on these four facts? These facts should be featured in the initial framing shot of the defense opening so that the jurors will connect the dots and formulate a story that involves the parents' negligence.

Here are some other examples that shift the focus to the plaintiffs.

- The plaintiff was not wearing the proper safety equipment.
- The plaintiff failed to conduct due diligence.
- The plaintiff lived an unhealthy lifestyle, (smoked, poor diet, no exercise), which led to numerous medical issues throughout his or her life.
- The plaintiff spent much of the day drinking alcohol before the accident.

Another strategy for activating the availability bias is to focus on third parties and other alternate causes when possible.

- The plaintiff worked in many other factories that could have exposed him or her to asbestos.
- The plaintiff's parents were not watching him or her as the plaintiff handled the dangerous product.

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- The plaintiff also took other medications while taking the defendant's drug.

One specific example from a recent defense verdict in a tire-failure case illustrates how the tire manufacturer defendant used the availability bias to its advantage. The plaintiff claimed that the tire was defectively designed and manufactured, which caused the tread separation on the tire. The plaintiff was riding on poorly maintained, underinflated tires, however, and the subject tire was improperly repaired one week before the accident. In addition, she took her hand off the steering wheel during the incident. Post-trial juror interviews revealed that the jurors were first and foremost focused on causality when making their decisions, and they ultimately found in favor of the tire manufacturer. All of the jurors who were interviewed after the trial stated that the most compelling evidence that led to their defense verdict was the plaintiff's testimony that she took her hand off the wheel to kiss her hand and touch her daughter's forehead, and then she closed her eyes and said a prayer, literally requesting that "Jesus take the wheel." The jurors also concluded

that the improper repair was the cause of the tire failure because of its proximity to the timing of the accident. Therefore, the defense had successfully implemented the availability bias by shifting the jurors' focus to the plaintiff and alternative causes of the accident first, followed by a defense of the company's manufacturing and quality control practices.

Jurors do not like living in an unpredictable and random world in which a tragedy can happen to anyone. Instead, they want to feel safe by believing that bad events that happen could have been prevented.

Formulating a Trial Story

Stories help jurors organize the information that they hear in a way that makes sense to them. It helps keep them interested as they try to figure out exactly what happened. Jurors will fill in gaps in a story with their own beliefs, and sometimes, they will think that they heard actual evidence that supports the gaps in the story that they created.

Consider the case of alleged child sexual molestation against a Baptist Church in Houston. The plaintiff theorized that the day-care staff at the church had used the children in satanic rituals, including sexually molesting the children. The basis of the evidence was medical testimony that the red rash on a child's genitals could be consistent with trauma (disregarding the simpler explanation that it could also be diaper rash). The evidence also included a rough drawing made by a three-year-old girl of "the shot" that she said she received from the people at school, which she said hurt very badly. The drawing had the shape of a phallic symbol (the same shape as a doctor's syringe). The jurors were unwilling

to find that nothing untoward had happened because the psychological risk of an "incorrect" defense verdict was so high when child abuse was involved, and thus the jurors created a powerful story to fit the plaintiff's theory, including many details for which there was simply no supporting evidence.

If a fact or evidence is contrary to a story that a juror is formulating, he or she will filter out that information using defense mechanisms such as denial, distortion, or minimization ("it is true but doesn't matter").

In cases involving an event that caused a plaintiff to experience physical or financial harm, jurors will first want to know, "what is the cause of this bad event, and who was in a position to prevent it?" This is because jurors want the world to be orderly, and they believe in a just-world theory that bad things happen because someone deserved it. People generally feel safer by believing that everything that occurs in life has predictable consequences. Therefore, when jurors hear about a case that indicates that an outcome was not predictable, and thus the world is not a just place, they react to restore their notion of a just world in one of two ways: (1) they conclude that the defendant could have predicted the outcome and award damages to the plaintiff to restore justice; or (2) they conclude that there really was no injustice in this case by blaming the plaintiff for the incident (*i.e.*, the plaintiff deserved the negative outcome and/or could have prevented it).

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Jurors use counterfactual thinking (also known as "if only" thinking) to try to figure out which actions could have undone the outcome, which then leads them to conclude who is to blame. Jurors think that "if only" a plaintiff or a defendant did something differently, then the incident might have never occurred. When jurors figure out the actions that they believe could have prevented an incident, then they know who they want to blame.

An example that epitomizes this line of thinking occurs in child-restraint and car-seat cases. It follows simple reasoning

that mothers and mothers-to-be would be most sympathetic to the plaintiffs in cases in which a child is catastrophically injured while in a car seat and the parents sue the car seat manufacturer. In one case in which a child suffered serious, long-term cognitive defects, mothers and mother-to-be were found to be the opinion leaders behind a defense verdict at trial, which confirmed the psychological attribution defense theory. Mothers and mothers-to-be were in the best position to fault the plaintiff parents for various reasons, such as not having the child restrained properly, not having the seat properly latched to the vehicle, and not having the proper type of seat. These jurors sought to distance themselves from feelings of vulnerability that a bad injury or death could happen to their children in a car seat, which led them to blame the parents under the notion that the parents did something wrong and "a similar incident would never happen to me."

Implications for Trial Lawyers

Theme development is critical. Themes are the connective tissue for a story. The simplest definition of a theme is that it must be repeatable, readily comprehensible, and have broad appeal.

It is critical to develop case themes that jurors can repeat in deliberations. The following is an example of how actual jurors in a trial repeated the organizing themes of the case that were developed and refined through jury research.

This case involved a cable-shopping network suing a technology company for fraud and breach of contract due to failing equipment, and the venue was the plaintiff's hometown. In this instance, the jury research revealed that the defendant could not criticize the plaintiff because the community was proud of the company for pioneering a new concept in cable shopping, and therefore, the company held hero status in the venue. Instead, the technology company defendant changed the strategy from criticizing the plaintiff to telling a story that embraced the growth and success of the plaintiff. The organizing theme for the defense became, "This case is about a pioneering company that invented a novel and remarkable concept, but it was a victim of its own success." The defendant's narrative stated, "The plaintiff grew too big, too

fast and did not have the infrastructure and management in place to keep up with its impressive and tremendous growth.” After two months of trial and many weeks of witness testimony, the jury only deliberated for a few hours before rendering a full defense verdict and awarding damages to the defendant on its counterclaims. The jury foreman was interviewed by news media on the courthouse steps and asked how the jury decided so quickly. His on-air comment to the news media was, “We the jury agreed that although the plaintiff was a successful and a good company, it was a victim of its own success and grew too big too fast and didn’t have the infrastructure to keep up with its fast growth.” Therefore, while the case involved many technical aspects and extensive and esoteric documents, the jurors related to the defense’s themes to the point that the foreman repeated them verbatim to summarize the jurors’ decision path immediately after the verdict.

The implication for defense lawyers is that a defense story should begin by providing jurors with an explanation of the cause of a plaintiff’s harm that focuses on a plaintiff or third parties. This allows you to take advantage of the availability heuristic and to provide a more palatable backdrop against which a company’s story can be told.

The availability bias teaches us that the more “available” a party is in jurors’ minds, the more available the party is to the jurors to criticize. Take advantage of the availability bias by focusing on the plaintiff’s background, third parties, and potential alternate causes. The moral is that you want jurors focusing on the plaintiff’s role and conduct and the roles of other parties, rather than on the defendant’s role and conduct. Both the order and the richness of your case story matter, which means that you should focus on the plaintiff or third parties or both first and foremost. Begin your opening statement with these themes and have your witnesses reinforce the other parties’ roles throughout the trial.

The key is to make sure that jurors include in their stories what you want them to focus on rather than adopting or responding to the plaintiff’s focus. The ideal situation is to have jurors discussing everyone else but your client in deliberations. Thus, you want to provide them right away with story details that can fill in the

gaps that they have about how an incident occurred and show them that the plaintiff and other parties are to blame.

After jurors feel that there are others to blame besides the defendant, then you can defend your client company’s conduct now that jurors are psychologically comforted by attributing the cause of the bad outcome to the plaintiff. The defendant’s company story has more credibility at this point and has a better chance to resonate with jurors.

Conclusion

When presenting your case to a jury, you have to remember that *everything is evidence*—more than just the exhibits and testimony formally introduced. Therefore, the narrative used by a trial lawyer to present a case, coupled with compelling themes to provide the connective linkages that jurors use to “connect the dots” in the story of the case, are of critical importance. You need to present your case with a compelling and moving story line that speaks to jurors, takes advantage of the cognitive shortcuts that they naturally use to make sense of the case, and that reinforces a thematic narrative that directs the jurors toward your client’s positions and away from the plaintiff’s viewpoint. **FD**