“Substantive Best Practices”
Best Practice in Jury Trials

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Biographies of Speakers

- The Honorable Sherry R. Fallon, Magistrate Judge, U.S. District Court
- Michael Biek, Ph.D., Trial Consultant, Decision Quest

Program Materials *

- The Psychology of Decision-making and ADR
- The Pros and Cons of Admitting Liability
- The View from the Jury Box

* The forms included herein are samples only and may not be appropriate for any particular matter.
Sherry Ruggiero Fallon was appointed as a U. S. Magistrate Judge for the District of Delaware on April 25, 2012. She is formerly a Partner of the Wilmington, Delaware law firm of Tybout Redfearn & Pell, with a jury trial practice in all Delaware State and Federal Courts. Magistrate Judge Fallon’s primary areas of practice included insurance defense, insurance coverage and bad faith litigation, toxic tort, product liability, retailers’ premises liability, construction litigation, creditors’ claims in commercial bankruptcies, and defense of employment litigation claims. Prior to becoming a Magistrate Judge, she had been a member of Tybout, Redfearn & Pell since 1985.

Magistrate Judge Fallon earned her Bachelor of Arts Degree from the University of Pennsylvania in 1983. She is a 1986 Graduate of the Delaware Law School of Widener University, where she was a member of the Moot Court Honor Society, the Delaware Journal of Corporate Law and Phi Delta Phi Legal Fraternity.

Magistrate Judge Fallon has been admitted to practice in the States of Delaware and New Jersey, since 1986. Magistrate Judge Fallon is admitted to practice before the United States District Courts for the Districts of Delaware and, New Jersey, and is admitted in the Third Circuit Court of Appeals.

Magistrate Judge Fallon is a member of the Delaware, New Jersey and American Bar Associations. Magistrate Judge Fallon has been a member of the American Board of Trial Advocates (ABOTA), an organization for civil trial lawyers, in which membership is by invitation, from 2003 through the present. Magistrate Judge Fallon served as President of the Delaware Chapter of ABOTA, from 2009-2010. Magistrate Judge Fallon is a former member of the Defense Research Institute, Defense Counsel of Delaware and the Delaware Claims Association. Following her appointment as a Magistrate Judge, she became a member of the Rodney Inn of Court and the Technology Inn of Court. Magistrate Judge Fallon is a frequent lecturer on various aspects of civil litigation, trial practice and insurance coverage.
Dr. Michael Biek has over 18 years of experience as a trial consultant, and he has advised clients in over 800 cases. His work includes pre-trial studies, which help attorneys develop case themes, and statistical studies in support of venue motions and jury selections. Dr. Biek is an adept courtroom strategist, and he often advises clients throughout trial in order to help them with their arguments before triers of fact.

As a jury psychologist, Dr. Biek has particular expertise in the fields of intellectual property, contracts, securities, employment, product liability, professional malpractice, insurance and pharmaceutical cases. His research allows the trial team to make a wide-range of decisions; in addition to aiding clients inside the courtroom, he often helps achieve favorable out-of-court resolutions.

EDUCATION:
Texas A&M University, Ph.D., Psychology, 1992.
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SELECTED PUBLICATIONS:
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“The Impact of Technology on the Jury & the Effective Use of Courtroom Technology,”

“Trials Approaches to Jury Persuasion,” National Employment Lawyers Association

“A View From the Jury: Medical – Legal Issues Facing CHOP Practitioners,” Children’s

“Juror’s Reactions to Technology in the Courtroom,” Widener School of Law, 2007.


“Jury Psychology and Medical Malpractice Cases,” American Physicians Assurance
Corporation, 2006.


“Pros and Cons of Admitting Liability,” Long Term Care Defense Summit, 2005.


“Case Analysis & Jury Analysis: An Overview of Mock Trials,” with Judge Marvin Halbert
(ret.), 2002.

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1990 - 1992 Ph.D., Psychology, Texas A&M University, College Station.

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PAPERS AND PRESENTATIONS


Making the Most of Voir Dire. American Inns of Court, Pittsburgh, PA, February 16, 2011.


The Impact of Technology on the Jury. Presentation to Widener School of Law, Wilmington, DE, January 7, 2011.


The Impact of Technology on the Jury. Presentation to Widener School of Law, Wilmington, DE, August 20, 2010.


Is Your Case Right for Focus Group Research? Telephone CLE to the Kentucky Justice Association, June 7, 2010


Social Media & the Jury. “Facebook, Twitter, and Blogging…Oh MySpace” Pennsylvania Bar Institute, Philadelphia, PA, March 24, 2009


Social Media & the Jury. “Facebook, Twitter, and Blogging…Oh MySpace” Pennsylvania Bar Institute, Philadelphia, PA, November 10, 2009


The Impact of Technology on the Jury. Presentation to Widener School of Law, Wilmington, DE, August 13, 2009.


Preparing Witnesses. Hunton & Williams, Richmond, Virginia, April 6, 2009.


Preparing Witnesses to Testify. Greenbaum, Rowe, Smith & Davis, LLP, Iselin, New Jersey, March 17, 2009.


The Psychology of Jurors.  CLE Presentation to Morris James, LLP.  Wilmington, Delaware, June 10, 2008.


Preparing Witnesses.  CLE Presentation to Pepper Hamilton, LLP, Pittsburgh, March 6, 2008.


The Impact of Technology on the Jury.  Invited Speaker, The Supreme Court of Delaware, Bridge the Gap Program, Wilmington, Delaware, October 26, 2007.


Jury Psychology & Employment Cases.  Presentation to the National Employment Lawyers Association, New York City, October 10, 2007


The Impact of Technology on the Jury. Guest lecturer, Widener University School of Law, January 6, 2005.


Voir Dire in Medical Malpractice Cases. Presentation to the Pennsylvania Bar Institute’s “Jury Issues and Selection in Medical Malpractice Cases,” in Mechanicsburg, PA, April 16, 2004.


Voir Dire in Medical Malpractice Cases. Presentation to the Pennsylvania Bar Institute’s “Nuts and Bolts of the Medical Malpractice Case, November 8, 2001 in Mechanicsburg, PA, and November 14, 2001 in Philadelphia.

The Strategic Use of Juror Psychology in Litigation. Presentation to the Annual Meeting of the Nebraska Association of Trial Attorneys, October 19, 2001.


Jurors’ Perceptions of Attorneys. Presentation to Schnader, Harrison, Segal & Lewis Litigation Group, July 19, 2001


No Use Suing Over Spilled Coffee? How the *McDonald’s* Case has Influenced Jurors’ Attitudes in Civil Lawsuits. Presentation to the State Bar of Michigan - Litigation Section. August, 1996.


**RESEARCH AND PUBLICATIONS**


REVIEWING AND EDITING

Journal of Personality and Social Psychology

AWARDS

Texas A&M University College of Liberal Arts: Dissertation Fellowship 1991 - 1992
American Psychological Association: Science Directorate Award 1990
COURSES TAUGHT

Social Psychology
Experimental Psychology Lab Methods

FIELDS OF INTEREST

Psychology and law
Persuasion/Attitude change
Personality and social behavior
Statistics/Research methodology

[Revised April 5 2011]
TESTIMONY & AFFIDAVITS

May 1997 Commonwealth of PA v. Scher Susquehanna County. Testified briefly regarding methodological issues involved in a change-of-venue survey conducted by FTI.

May 1995 Frederick v. Altoona Hospital, et. al Blair County. Submitted affidavit in support of motion for use of a written juror questionnaire.
Litigating disputes to a jury is often a stressful experience for everyone involved. Part of this stress comes from the underlying difficulty in predicting how a group of people, often chosen on the basis of having as little knowledge or experience relevant to the dispute as possible, will make decisions about the case at issue. Attorneys and their clients often worry about whether jurors will be able to make rational decisions based on evidence, especially in complex or emotionally charged cases. These concerns affect both plaintiffs and defendants and sometimes lead to a decision to forgo a jury trial in favor of a bench trial or to attempt a resolution through the use of alternative dispute resolution practices.

Are judges likely to be better decision-makers than jurors? This is clearly a complex question, and a complete answer would need to consider factors such as group versus individual decision-making, cognitive abilities and the ability to understand and apply legal constructs (among many other things). This paper will address the issue of systematic errors that people tend to make when evaluating decision options and interpreting information and examine whether judges tend to make the same sorts of errors as laypersons.

**Limitations on Jurors / Cognitive Biases**

Psychologists have learned that human beings rely on mental shortcuts, known in the jargon as "heuristics," to make complex decisions. Reliance on these heuristics facilitates good judgment much of the time, and helps people deal with what would often be overwhelming amounts of information, but it can also produce systematic errors in judgment. Just as certain patterns of visual stimuli can fool people's eyesight, leading them to see things that are not really there, certain fact patterns can fool people's judgment, leading them to believe things that are not really true. Reliance on heuristics can sometimes create cognitive illusions that produce erroneous judgments.

Research on juries indicates that cognitive illusions can adversely affect the quality of the decisions jurors make. Researchers have found, for example, that juries believe that litigants should have predicted events that no one could have predicted, allow irrelevant or inadmissible information to influence liability determinations, defer to arbitrary numerical estimates, and rely on incoherent methods to calculate damages. Several of the more important heuristics that have been studied in the legal arena are as follows:
Hindsight bias

People overstate their own ability to have predicted the past and believe that others should have been able to predict events better than was possible. Psychologists call this tendency for people to overestimate the predictability of past events the "hindsight bias." It occurs because learning an outcome causes people to update their beliefs about the world. People then rely on these new beliefs to generate estimates of what was predictable, but they ignore the change in their beliefs that learning the outcome inspired. Few judgments in ordinary life require people to assess the predictability of past outcomes, but such judgments are pervasive in the law. This bias frequently operates against defendants because jurors tend to overestimate the likelihood that bad outcomes could have been foreseen (the defendant being blamed for the bad outcome). However, it can also work against plaintiffs in situations where jurors believe that contributory negligence (alleged or not) may have been a factor in a plaintiff’s injury.

Anchoring

When people make numerical estimates (e.g., the fair market value of a house), they commonly rely on the initial value available to them (e.g., the list price). That initial value tends to "anchor" their final estimates. In many situations, reliance on an anchor is reasonable because many anchors convey relevant information about the actual value of an item. The problem, however, is that anchors that do not provide any information about the actual value of an item also influence judgment. Anchors affect judgment by changing the standard of reference that people use when making numeric judgments. Even when people conclude that an anchor provides no useful information, mentally testing the validity of the anchor causes people to adjust their estimates upward or downward toward that anchor. As a consequence, even extreme, wholly absurd anchors can affect judgment. For example, if you ask people whether the average annual temperature of a city like San Francisco is higher or lower than 550 degrees, virtually everyone who understands the concept of temperature will answer that the average temperature is lower. However, when you then ask them to estimate the true average temperature, their estimates will be significantly higher than the estimates given by people who have not first been asked the anchoring question. Another example from the research is to ask an audience to think of the last 4 digits of their social security number, and then to estimate the number of physicians in New York. The correlation (which should be about 0 on a scale from -1 to 1) between an individual's social security number and their estimate in this situation is around 0.4—far beyond what would be expected by chance. The simple act of thinking of the first number strongly influences the second, even though there is no logical connection between them. Anchoring is relevant in many litigation scenarios, particularly when it comes to parties involved in settlement negotiations and jurors making estimations of damages.

Egocentric biases

People tend to make judgments about themselves and their abilities that are "egocentric" or self-serving. For example, people routinely estimate that they are above average on a variety of desirable characteristics, including health, driving, professional skills, and likelihood of having a successful marriage. Moreover, people overestimate their contribution to joint activities. For example, after a conversation both parties will estimate that they spoke more than half the time. Similarly, when married couples are asked to estimate the percentage of household tasks they perform, their estimates typically add up to more than 100%.
Egocentric biases occur for several reasons. For one thing, people remember their own actions better than others' actions. Thus, when asked to recall the percentage of housework they perform, people remember their own contribution more easily and, consequently tend to overestimate it. Egocentric biases can be adaptive, but they can also have misleading influences on the litigation process. Due to egocentric biases, litigants and their lawyers might overestimate their own abilities, the quality of their advocacy and the relative merits of their cases. Research demonstrating this asked participants to evaluate a dispute scenario from the perspective of either a plaintiff or defendant and to judge the potential settlement value of the case. Participants evaluating the case from the perspective of the plaintiff predicted that a judge would award significantly more than the defendant-participants predicted. Similarly, when asked to identify what they perceived to be a fair settlement value, plaintiff-participants selected a higher value than the value selected by defendant-participants. These results suggest that self-serving or egocentric biases could be a factor in bargaining impasses.

**Framing**

When people confront risky decisions such as deciding whether to settle a case or to proceed to trial, they tend to categorize their decision options as potential gains or losses. This categorization, or "framing," of decision options influences the way people evaluate options and affects their willingness to incur risk. People tend to make risk-averse decisions when choosing between options that appear to represent gains and risk-seeking decisions when choosing between options that appear to represent losses. For example, most people prefer a certain $100 gain to a 50% chance of winning $200 but prefer a 50% chance of losing $200 to a certain $100 loss. Litigation produces a natural frame. In most lawsuits, plaintiffs choose either to accept a certain settlement from the defendant or to gamble, hoping that further litigation will produce a larger gain. Most defendants, by contrast, choose either to pay a certain settlement to the plaintiff or to gamble that further litigation will reduce the amount that they must pay. Thus, plaintiffs often choose between options that appear to represent gains, while defendants often choose between options that appear to represent losses. As such, plaintiffs are more likely to prefer settlement, the risk-averse option, while defendants are more likely to prefer trial, the risk-seeking option.

**Representativeness heuristic**

When people make categorical judgments (e.g., assessing the likelihood that a criminal defendant is guilty), they tend to base their judgments on the extent to which the evidence being analyzed (e.g., the defendant's demeanor) is representative of the category. When the evidence appears representative of the category (e.g., defendant is nervous and shifty), people judge the likelihood that the evidence is a product of that category as high (i.e., evidence of guilt). When the evidence being analyzed does not resemble the category (e.g., defendant appears at ease), people judge the likelihood that the evidence is a product of that category as low (i.e., evidence of innocence). Psychologists refer to this phenomenon as the "representativeness heuristic." Although the representativeness heuristic can be useful, it can lead people to discount or ignore more relevant statistical information. In particular, people undervalue the importance of the frequency with which the underlying category occurs in an underlying population, essentially ignoring the "base-rate" of the phenomenon under consideration.
Impediments inherent in the system

Our legal system is based on assumptions about human decision-making, some of which have been demonstrated to be invalid. For example, the system assumes that jurors can disregard inadmissible information when instructed to do so, even though this is psychologically impossible. Indeed, the fact that such information gets pointed out for special attention has been shown to actually increase its impact on juror decision-making in some circumstances. A partial listing of aspects of the system, varying wildly from place to place, that make jurors’ jobs difficult (some of which are being addressed in some jurisdictions) include:

- Not being told the law until near the end of the process.
- Not being able to read a written copy of the law.
- Not being given instructions in words that have meaning for laypeople.
- Not being able to ask questions.
- Not being able to take notes.
- Verdict questions that are sometimes constructed with no thought to the difficulty they might pose to laypeople.
- Being told that some of the things they have heard and seen are evidence and others are not.
- Distinguishing between questions and statements of attorneys as non-evidence versus answers, admitted exhibits and other stipulations which are evidence.

Simply put, being a juror is a difficult job, on top of which the rules of the task (while created for sound legal reasons) frequently add to its difficulty. Indeed, our interviews with actual jurors post-trial show that they have often been confused about some of the most basic principles, e.g., that the answers given from the witness stand are evidence. We have asked jurors what they made of testimony and whether it was important to their decision only to hear, “They were just saying that.” For such jurors, if there is not written material backing up the testimony, it does not count as evidence, even though those verbal answers are at the heart of what evidence is supposed to be.

The Superiority of Judicial Decision-making

Given cognitive biases and other limitations on juror decision-making as discussed above, is it any wonder that parties involved in disputes often wonder whether they would be better off in front of a judge and foregoing a jury trial? One would expect that judges should have an easier time making decisions based on evidence and legal principles and ignoring (or at least minimizing the influence of) tangential or emotional considerations. Judges certainly have a greater amount of knowledge and informational resources available to inform their decision-making and are highly motivated in that they are not interested in seeing their decisions overturned due to error.

But are judges more reliable decision-makers than jurors? Are they less susceptible to making decisions based on erroneous cognitive processes? Whether or not judges tend to make similar cognitive errors as jurors has not received a great deal of systematic study. Despite the important role that judges play in the courtroom, psychologists have focused most of their research efforts on juries. One study that provides an excellent overview on this topic, as well as experimental data collected from a large population of federal magistrate judges was conducted...
by Chris Guthrie, J.D., Jeffrey Rachlinski, J.D., Ph.D. and the Honorable Andrew J. Wistrich, J.D., and published in the May 2001 issue of the Cornell Law Review. Their study examined the responses of magistrate judges to scenarios that were manipulated in order to assess the effects, if any, of the cognitive biases discussed above. The sample of 167 judges comprised nearly one-third of all such federal magistrate judges on the bench at the time the data were collected. The results showed that judges did better than lay jurors in some areas but that judges appeared to be just as susceptible to certain cognitive errors as were jurors. A brief summary of the key results is as follows:

**Hindsight bias**

Judges in this research were asked to evaluate a hypothetical fact pattern and make decisions about the likelihood of an outcome of an appeal. They were asked to predict which of three potential actions the court of appeals was most likely to have taken (affirm, vacate or remand) after having been informed, on a random basis, that one of the three actions had been taken. After being given all three possible outcomes and asked to predict which of these decisions the court of appeals was most likely to have made, judges were more likely to predict the outcome that was consistent with the outcome that they were told had occurred; that is, judges who were given a particular outcome were more likely to predict that outcome than judges given the other possible outcomes. This demonstrates hindsight bias because the outcome provided to them should have been irrelevant to their own predictions about what the appeals court was most likely to do.

These results may have important implications for courtroom decision-making. For example, in a situation where one side succeeds in keeping certain evidence out, the jury may be shielded from that evidence if it was excluded as part of a pre-trial hearing; hence it cannot contribute to a jury finding being based on hindsight. In a bench trial, in contrast, the judge as fact-finder cannot avoid being exposed to such evidence.

**Anchoring**

To study anchoring effects, judges were asked to assess a damages amount in reaction to a personal injury case where liability was conceded. They were randomly assigned to a “no anchor” condition and an “anchor condition” in which the only additional information was a statement that the defendant had moved for dismissal based on the argument that the claim did not meet a jurisdictional minimum of $75,000 (a clearly merit-less motion given that the damages described were obviously greater than $75,000, including months of hospital bills, loss of the use of plaintiff’s legs, etc.). Although the $75,000 figure in the anchor condition communicated no useful information, it nevertheless had a significant effect on the damages awarded. Judges in the “no anchor” condition made average awards almost 30% higher than judges in the anchor condition, indicating that the mere presence of the $75,000 figure served as a lower anchor and depressed awards in that group.

These data show how easily anchors can affect the way judges think about damage awards. It appears that plaintiffs’ damage requests may have unintended effects on both on juries and judges. The potential for statutory damage caps to anchor judges is another area of potential concern. Although judges might be able to keep juries in the dark about caps on damages, they clearly cannot blind themselves to such caps.
Egocentric biases

In testing this bias, judges in the study were asked to estimate their own reversal rates on appeal, putting themselves into one of four categories as compared to their peers, equivalent to saying whether they were reversed more than 75% of their peers, more than 50% of their peers, more than 25% of their peers or less than 25% of their peers. Results showed that judges are susceptible to egocentric biases. Over 50% of the judges (56.1%) reported that their appeal rate placed them in the lowest quartile; 31.6% placed themselves in the second-lowest quartile; 7.7% in the second-highest quartile, and 4.5% in the highest quartile. In other words, 87.7% of the judges believed that at least half of their peers had higher reversal rates on appeal. This pattern of results differs significantly from what one would expect if judges were unbiased.

It is possible that egocentric biases might prevent judges from maintaining an awareness of their limitations, and this may make it difficult for litigants to convince judges that they might have been wrong, thereby increasing the hurdles faced by parties in the situation of having to ask a judge to vacate a prior ruling or to set aside a jury’s verdict on the basis of a judicial mistake.

Framing

Judges in the study were asked to place themselves in the role of overseeing settlement negotiations. They were given identical economic options as choices, however, for half the decision had been constructed around a “Plaintiff/Gains” perspective whereas the other half received a “Defendant/Losses” perspective. Although the hypothetical litigants in this problem faced settlement offers that were identical in terms of their expected value, the materials created the illusion that the plaintiff faced a choice between potential gains and that the defendant faced a choice between potential losses. The results showed that review from the defense (or risk-seeking) perspective was more likely to lead to an evaluation that the case should not be settled (75%) than review from the plaintiff (or risk-averse) view (60%). From the plaintiff's perspective, settlement seemed relatively more attractive, while from the defendant's perspective, trial seemed relatively more attractive, even though the two perspectives presented identical economic choices. Although this difference was statistically reliable, it should be noted that the 15% difference shown by this sample of judges was much less than that typically seen in studies of non-expert decision-makers (often as high as a 40-50% difference). Although judges were affected by framing effects, it appears that they may be less susceptible to this bias than many other people.

Representativeness heuristic

Judges were provided with a scenario asking them to estimate the likelihood that an event occurred due to negligence, given a variety of statistical information about the occurrence rates of various steps in a series of events that led to a plaintiff’s injury. Research with most populations evaluating the same scenario shows that the tendency to ignore base-rate information leads a substantial majority of people to overestimate the extent to which negligence was a factor. Here, 40% of the judges (much higher than other populations) made the correct decision taking into account relevant statistical information. Of the 60% who answered incorrectly, however, a large proportion (40% of the total) did appear to have been affected by the representativeness heuristic. Hence it appears that judges are less affected by this cognitive bias than most other people (although they are still somewhat vulnerable to it). Still, the representativeness heuristic might account for some judges' apparent preference, observed by
some researchers, for individuating evidence (e.g., eyewitness testimony) over statistical
evidence (e.g., base rates).

So, Jury versus Bench?

This question is too involved to answer thoroughly within the scope of this brief review. Even so, the research on cognitive biases in information processing does provide some information that is applicable to the consideration of whether to forgo trial by jury. If one of the major arguments being put forth in favor of a bench trial is that judges are less affected by extra-legal thought processes than jurors, the answer appears to that this argument does not carry a great deal of weight. Judges, being human after all, are influenced in their decision-making by many of the cognitive shortcuts and biases as human jurors.

A point that also needs to be considered is that of individual versus group decision-making. Unfortunately, the prior research does not provide a straightforward conclusion about whether groups make better decisions about disputes than individuals. There is evidence that juror deliberations can result in the lessening of the effect of cognitive biases in some instances, improved memory for trial evidence, increased complex reasoning about the evidence and arguments presented, and reduced variability in decisions. However, there is also evidence that group deliberation may exacerbate biases under certain conditions and can result in more extreme judgments in a process known as group polarization.

It should be pointed out that there is not even agreement among academic researchers about how to determine whether a jury’s or judge’s decision is the “right” one in the first place, and a number of different ways have been used to attempt to define the measure. In addition, given that every case is at least somewhat different from every other (sometimes wildly so), there is never likely to be a “one-size-fits-all” answer. Fortunately for those of us in the world of applied jury psychology (and for litigants themselves), there is an easier way to deal with this; the “right” decision is the one that provides the best possible result for our client. This is a testable question. Research methodologies exist which allow us to test whether a judge or a jury trial is more likely to lead to a better outcome for the client in any particular situation. Customized studies can help to determine whether judges may be better able than juries to focus on a particular narrow legal issue, for instance. In cases where bench trials or ADR approaches are required, e.g. Markman hearings, some contractual disputes, etc., applied research techniques can also be used to test approaches and refine arguments to make sure that the most persuasive case possible is being presented to the final fact-finder. Hence, parties facing a judge versus jury decision can make it supported by evidence as opposed to hunches; parties obligated to litigate in a non-jury format can take advantage of persuasion techniques that are applicable to both juries and judges.
THE PROS AND CONS OF ADMITTING LIABILITY

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INTRODUCTION

The study of psychology in general, and the study of jury behavior in particular, has long been used by counsel for both plaintiffs and defendants to sharpen the persuasive power of their trial presentations, aid in identifying and avoiding potentially biased jurors at trial, enhance the presentation skills of fact and expert witnesses, and to help educate clients about the most likely settlement value of cases that should not be tried. It is a basic fact of litigation that some cases are tougher than others, and it is another fact that jury consultants generally see the worst cases out there. We don’t often get called in on easily win-able cases because lawyers with great cases usually don’t need the extra help. We get called in on cases that are difficult at best, and often downright impossible, and as a result, we have a great deal of experience studying what happens in cases where liability is admitted, as well as what happens in very bad cases where liability is not admitted. This brief paper will summarize some of those findings. Let’s start with the negatives.

CONS

You’re going to lose something. If your case is bad enough that you are considering whether to admit liability, you may already be ready to accept this, however, convincing a client that this might be an acceptable possibility is often rather difficult. No one likes to admit that they were wrong, and defendants in litigation are affected by the same basic psychological factors as the rest of us. Even so, it is often possible to get defendants to understand that wins and losses can be relative. Indeed, we frequently consult on cases where large amounts of money get paid to plaintiffs and the defendants are quite happy because it wasn’t a great deal more. It is true that an admission of liability, on its face,
sounds like a complete admission of defeat to many attorneys and their clients, but in cases with bad facts and significant exposure, an admission of liability can actually form the basis of a relatively successful defense.

**PROS**

**Gaining credibility with the jury.** The greatest benefit to an admission of liability is the potential to gain an enormous amount of credibility with the jury, and in doing so, to enable them to take your remaining arguments seriously. When the facts of a case are such that a strong denial of liability is totally contrary to jurors’ interpretations of those facts, it is only natural that taking such a position leads to juror skepticism of the entire defense case. For example, imagine a collision case where a tractor-trailer runs a red light at high rate of speed, and there is no evidence of any attempt by the truck driver to either decelerate or even swerve to avoid the impact. Unfortunately the truck driver has perished in the collision and won’t be able to testify as to whether or not he saw the light, the other vehicle, the impending crash, etc. This is admittedly an extreme example, but it is certainly realistic that some defendants will insist on trying to find a way to shift liability to the driver of a passenger vehicle who was obliterated on his or her way through the intersection at the moment the tractor-trailer came barreling through. When a defendant with such facts contests liability, it makes it very difficult for jurors to listen seriously to anything the defense says about causation or damages. Similarly, even in cases where there are some legitimate issues that the defense might raise regarding liability, if the facts do not fit jurors’ expectations about how the world works, jurors are more likely to distrust the entire defense case, if they already believe that the defendant is at fault for the incident or occurrence at the heart of the dispute. Thus, an admission of liability (or at least an appropriate portion of it)
as to the basic occurrence at issue can help jurors understand that the defense is not just denying everything with no rational basis, and hence might be worth listening to on other issues such as damages.

**Contesting causation.** There are many cases where mistakes have been made, but there are issues about whether or not those mistakes were the cause of the injuries claimed by the plaintiff. Causation arguments are often difficult, but they are certainly more so if jurors believe that the defendant is liable and the defendant is still persisting in contesting liability in the first place. An admission of liability can allow a defendant to say with greater credibility, “It is true that mistakes were made. The job now is to move past the fact that mistakes were made and analyze whether or not those mistakes really have anything to do with what the plaintiff is claiming in this case, and ladies and gentlemen of the jury, the evidence in this case is clear that the mistakes we made have absolutely no connection to the injuries claimed by the plaintiff.”

**Contesting damages.** In an analogous manner to causation, damages often need to be contested because they were not caused by any errors on the part of the defendant, or because the claimed damages are wildly inflated and/or speculative. In cases where liability is contested, many times defendants are reluctant to talk about damages at all for fear that doing so creates an appearance of an admission of liability. In such instances, damages are often addressed in a very unappealing (from a jury standpoint) way, e.g. “We believe that the evidence in this case is clear that we didn’t do anything wrong here, but if you think we did, then the evidence also shows that the plaintiff’s damages calculations are flawed, and if we owe anything at all (and our position is that we don’t, but if you think we owe anything at all), it’s this amount, and not the amount claimed by the plaintiff, and here are all of the
reasons why.” Certainly there are better ways to present alternative damages theories in cases where liability must be contested. The point for present purposes is that an admission of liability can enable a defendant to bypass such awkward damages discussions, and argue with a straight face that, “We regret that this accident occurred, and that our driver was at fault, and we want to do the right thing here and provide reasonable compensation for these plaintiffs. We are asking you, the jurors, to help us figure out what is reasonable here, and we believe that if you carefully examine the plaintiff’s calculations, you will see that their numbers are unreasonable because of the following facts…”

**Focusing on co-defendants.** There are plenty of cases in which numerous parties, sometimes including the plaintiff, have contributed to an accident, and the arguments in such cases often involve lots of finger-pointing and blame-shifting. We know from our pre-trial research and our post-trial juror interviews that jurors generally take a dim view of the tone of such arguments. An admission of an appropriate portion of the liability can help make one defendant’s arguments that other defendants share in the blame appear more reasonable, especially if the other defendants are still contesting what appears to be fairly clear liability. Some cases are so bad that the best strategy may actually be to settle with the plaintiff, thus removing potentially horrible emotional/physical damages from the mix, and then to go back as the plaintiff against the other defendants and argue, “We did the right thing here. We have paid these people for the harm they have suffered. Now we are coming to you because these other defendants don’t want to pay their fair share. The evidence is clear that this accident was caused not only by our driver, but by the construction company who failed to post the appropriate warning signs, by the State Transportation Department who knew this was an accident-prone area yet still failed to properly oversee the construction, etc.”
**Avoiding punitive damages.** Along with gaining credibility as discussed above, the other primary benefit to an admission of liability is the possibility of decreasing juror anger, and thus avoiding punitive damages. If jurors understand that punitive damages are for sending a message, they may very well believe that the defendant who “just doesn’t get it” is the defendant who needs to get such a message. An admission of liability, in a particularly bad case where punitive damages are a real possibility, allows a defendant to attempt to appear more reasonable, e.g. “This was a terrible tragedy. We understand that this was unacceptable, and we have made changes to ensure that it never happens again.” This also sends the unspoken message being that the defense does not need to be sent a punitive message in this case.

**CONCLUSION**

Given the benefits discussed above, admitting liability may be the rational thing to do in some cases. The difficulty often lies in assessing for which cases this holds true and for which cases liability should be vigorously defended. How does a defendant know in advance which cases might benefit from such an admission, and which cases might turn out disastrously worse if such an admission is made? How does a defendant decide whether an admission of liability will help jurors apportion a greater share of the blame to a co-defendant? Questions such as these can be answered by conducting applied psychological research beforehand. Jury studies, using the proper methodologies and analyzed appropriately by experienced professionals, can be designed to answer such questions, thus enabling attorneys and their clients to make informed decisions about whether an admission of liability is appropriate for any given fact pattern.
THE VIEW FROM THE JURY BOX:

JURORS’ REACTIONS TO TECHNOLOGY IN THE COURTROOM

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BACKGROUND

How does anyone really know what jurors are thinking as they watch trial attorneys do their jobs? While it may be difficult or impossible to predict what is going through any individual juror’s head at any given moment, there are a number of reliable findings that have emerged through years of psychological research into understanding juror behavior. As applied social scientists, we study jury behavior in a variety of ways. We spend most of our time helping attorneys find effective ways to present complex disputes to people who often do not have much experience dealing with the subject matter at issue, or even with the task of analyzing complex information in order to decide how to resolve a dispute. We conduct research studies every week in which representative potential jurors are presented with arguments and evidence and asked to evaluate it. They tell us about what they believe and what they don’t believe and about what they understand and don’t understand about the facts and arguments being presented. They tell us about what they like in terms of attorney performance, and they are not shy about telling us what they dislike. We talk to real jurors after real cases and they tell us exactly the same sorts of things. In addition, we regularly survey national samples of the jury-eligible population in order to gather quantitative data about jurors’ attitudes and experiences.

In addition to finding out what jurors think about the disputed issues in litigation, our research activities allow us to gather information about how jurors respond to the use of technology and demonstrative evidence in the courtroom. This paper will discuss some of our findings, as well as provide a brief tutorial on juror psychology and information processing that is important for understanding how jurors view litigants.
JUROR PSYCHOLOGY

Jurors process the information and evidence in a lawsuit though the filters of their attitudes and life experiences. They have certain expectations about how the world works. Regardless of whether those expectations are accurate or inaccurate, they influence how jurors perceive the evidence at trial. Social psychological research has demonstrated conclusively that people are more likely to believe and remember points that are consistent with the way they view the world, and to reject points that are inconsistent. For example, if a juror has a pre-existing bias that most big companies treat employees poorly, that juror will tend to believe and remember the plaintiff’s arguments in an employment case better than they will believe or remember evidence introduced by the defense.

Jurors’ attitudes may be more influential in some types of cases than in others. For example, most jurors will have employment experiences that they use to help them analyze which side they believe is right in an employment discrimination case, but most jurors do not have a great deal of experience with antitrust or patent issues. Although they may have general attitudes such as respect for inventors, or suspiciousness of complex business deals, most are not able to defend such attitudes with concrete examples in the jury room. Still, jurors will usually try to bring their personal experiences to bear on the facts of a case. Thus, jurors will interpret a complex breach of contract case, perhaps involving numerous interrelated, lengthy contracts, in terms of their own experiences with the contracts they signed to purchase a car or home.

Because the information in civil trials is often complex, it is important to understand that human beings are not perfect information processors. They are not able
to attend to, evaluate, and integrate every piece of information presented to them. As a result, people tend to use cognitive shortcuts, known to social scientists as heuristics. This is not necessarily a bad thing. People are able to be incredibly efficient information processors, which is a basic requirement for living in a world flooded with information. Heuristic information processing mechanisms are adaptive techniques that allow people to try to make sense of the information that matters, while cutting through the vast majority of information that doesn’t.

The example given earlier concerning the bias to accept information that is consistent with one’s attitudes, while rejecting inconsistent information, is based in part on the availability heuristic. People tend to be influenced more by attitudes that are readily accessible in memory. The more times a given concept (e.g., tort reform) is activated or thought about, the more accessible or retrievable it is from memory. More importantly, the likelihood that the person’s opinion about that topic will surface spontaneously and influence their evaluation of new information is increased.

**HOW JURORS LISTEN**

Research also shows that jurors make sense of the conflicting information that forms the basis of a lawsuit by constructing a story in order to help understand the conflict. Such stories provide a cognitive structure that helps jurors to understand and remember evidence. It is well documented that jurors construct such stories early in the trial process. Evidence that is consistent with the story created tends to be incorporated into memory, whereas inconsistent evidence is rejected or forgotten. As noted above, jurors’ pre-existing attitudes, experiences and expectations are important because they are
largely determinative of how jurors will evaluate the evidence in a case. These factors also serve as sources of material to fill in gaps in the story left by the lawyers. It is important for trial counsel to use the narrative story format in presenting cases, and to do everything possible to ensure that the story being told is consistent with that created by jurors. The party that presents a story that does not meet jurors’ expectations as to how the world works is the party that is going to lose.

THE IMPORTANCE OF DEMONSTRATIVE EVIDENCE

Demonstrative evidence forms an important part of the presentation of a case for several reasons. When integrated strategically with the trial story, demonstrative evidence helps reinforce key points, helps keep jurors’ attention, and provides cues that improve jurors’ retention of information.

A. The boredom factor.

Our research shows that jurors often become bored during even the most exciting trials. What appears to be a hectic pace for counsel can be excruciatingly slow for jurors who must sit and wait for things to happen. Jurors are accustomed to very quick sound-bites and persuasive appeals in their daily lives (e.g., commercials), and they are used to being able to exercise some control over the information flow (e.g., the remote). A major value of demonstrative evidence is that it helps break the boredom cycle. Anything that gets jurors’ attention is valuable, even if only for that reason.
B. **Comprehension.**

Many concepts are more easily presented in a visual, rather than an oral, manner. This is particularly true of numbers and relationships among objects. The use of visual aids can help make the evidence clearer to the jury, and thus more comprehensible. In addition, research shows that learning style is an idiosyncratic variable. Some people learn better by listening; some people learn better by reading or watching. The more options provided to jurors for learning the issues in the case, and the more routes to persuasion that are used, the better the odds that counsel will make points with as many jurors as possible.

C. **Retention.**

Visual information is retained better than oral information. A clear chart will be better recalled by jurors than will clear oral testimony. The two modes of presentation used in combination are more effective than either when used alone, especially when recall is measured at a later period. In other words, information is retained longer when a presentation is composed of both oral and visual elements.

D. **Black and white makes it real.**

Jurors tend to believe that anything that is written down, printed or exists on paper must be real. An oral statement is far less credible than a black and white presentation of this same statement. When we ask jurors in post-trial interviews about why testimony from a key witness was not persuasive, they often tell us things like, “The witness was just saying it;
there was no evidence.” Oftentimes jurors never quite grasp the fact that in our system, statements from witnesses are evidence, hence they tend to discount testimony that is not supported by documentation. This observation leads to the following recommendation: when showing videotaped testimony at trial, synchronize the footage with a rolling transcript. The addition of the written words along with the oral testimony increases the likelihood that jurors will perceive the testimony as “evidence.” Similarly, instead of simply reading prior testimony to a witness to impeach their current testimony, use document management software to show the quoted text to the jury at the same time, in order to make it real for them.

TECHNOLOGY & THE EFFECTIVE USE OF DEMONSTRATIVE EVIDENCE

A. Timing.

Be careful of confusing the jurors with lengthy oral explanations before presenting graphic evidence. They may have already closed their minds to the issue you are trying to present to them in graphic form. Also, be careful not to explain the evidence in so much detail that they are no longer interested in the graphic evidence when you present it to them. Prepare jurors to be receptive to graphic evidence by letting them know you are about to present it, before actually presenting demonstrative exhibits.
B. The presentation.

As noted above, you must prepare jurors to view the evidence. You must explain that it is coming, what it is about, and how you want them to view it. Then present the graphic evidence and lead them through it. You must tell them what the demonstrative shows, rather than letting them draw their own, possibly incorrect, conclusions.

C. Taking advantage of retention.

Because jurors retain visual evidence longer than oral evidence, it is important to refer back to prior graphics as you proceed through your case. These pieces of graphic evidence can become visual milestones, or anchor points to hang your case on, that will be easily remembered by jurors.

D. Pacing.

Pacing is related to timing, as discussed earlier, but the point to remember here is that the pace you go through a complex document or other exhibit is crucial. Go too slow and you will lose jurors’ attention and tax their patience. Go too fast and you risk losing them altogether, or possibly even creating the impression that you are rushing them because you don’t want them to see the “whole picture.” This is especially important when you are highlighting or otherwise drawing attention to an isolated portion of a document. If counsel appears to skip over material, for instance, paragraphs before and after the paragraph of interest, jurors may view the key paragraph as “out of context,” and therefore as not credible.
WHAT JURORS TELL US

The following are some of the more important things jurors tell us relevant to technology, demonstrative evidence, and trial conduct in general.

A. Teach me.

Jurors want to do the right thing. They want to make correct, fair and just decisions. In order to do that, they need to understand the facts and issues. Even though this sounds obvious, the fact that attorneys must serve as teachers as well as advocates is often forgotten or neglected. Especially in complex litigation, the ability to teach jurors, and make them feel like they really understand the issues, is crucial. The side that is able to get jurors to say, “They made me feel like I really understood it,” is at a tremendous advantage. The effective use of technology to present demonstrative evidence, such as charts, lists of issues, timelines, representations of complex processes, etc., can provide a significant advantage in this effort.

B. Keep it simple, but don’t condescend.

Jurors are generally smarter and more capable than they are given credit for. To the extent that they make “mistakes” in decision-making, it is often due to the fact that presentations by counsel and witnesses are disjointed or full of jargon. Often the legal instructions and interrogatories are incomprehensible to lay people. Graphic evidence can help tremendously in simplifying complex material without making jurors feel inferior. Likewise, computer animations or re-creations, or even relatively simple physical models, can be helpful in summarizing lengthy testimony.
in a way that is much easier to understand than trying to put together the point that is supposed to be drawn from a witness’ answers.

C. **Don’t play tricks or games.**

Many jurors are cynical about attorneys’ motivations. They understand that it is an adversarial system, and they expect attorneys to fight hard on behalf of their clients. This leads many jurors to expect bad behavior; therefore, they are attuned to anything that strikes them as suspicious. As noted earlier, jurors often suspect that demonstrative evidence is being used to mislead them. Although there are many technological tools now available to manage and present evidence, care must be taken to provide jurors with context, and to make them feel that they are getting the “whole picture,” in order for them to trust demonstrative evidence. If jurors suspect for an instant that portions of a document are being called out and highlighted in order to draw attention away from something else in the document, use of such technologies can have a detrimental effect on jurors’ perceptions.

D. **Be professional.**

Jurors want attorneys to be consummate professionals. They expect a thorough command of the facts and physical materials, and they resent having their time wasted. An attorney who has frequent difficulty managing exhibits, e.g., “If the witness will please turn to Tab 15 in Binder 3…I’m sorry…Tab 12 in binder 2,” is at a disadvantage. Jurors appreciate the attorney who is readily able to find and use documents and
exhibits, who gets to the point, and who makes things clear without being overly repetitive. Competent handling of demonstrative evidence goes a long way toward generating a perception of competence generally. The use of document management software and electronic presentation systems can help attorneys meet jurors’ expectations for a smooth and organized presentation.

E. We are not afraid of technology.

We find that jurors are much less afraid of technology than many counsel, or even than counsel’s clients. Jurors are accustomed to getting their information from television and computer screens. The fear that a party using technology will be perceived as “too slick” is unfounded. In fact, we virtually never hear jurors express this view; rather, they will often make negative comments about the side that eschews technology, e.g. “They were old-school.” Some clients worry that using technology may make it appear that they have too many resources, or perpetuate a “David vs. Goliath” dynamic. Here is a tip: jurors already believe that you have resources, and they expect you to use them. No jury is fooled by (or sympathetic toward) an attorney who appears to be trying a case on a shoe-string budget. Jurors expect technology to be used as part of modern presentations. The fact that new software tools allow instant, random access to digitized documents and videotape, as well as the means to manipulate such evidence on the fly (highlighting, enlargement, etc.) allows attorneys to use demonstratives quickly, simply and effectively. In
some cases, counsel can even forgo the production of traditional court boards, because the same content can be easily displayed on screens or monitors around the courtroom. Rather than boxes and boxes of documents cluttering up the courtroom, it is becoming more frequent to see counsel tables adorned only with laptop computers. Jurors are perfectly comfortable with this. It is crucial, however, that counsel using such technology be comfortable with it as well. Having a system freeze up, or even to be awkward to use, can be a disaster. Use technical people who know what they are doing, have back-up options available, and practice extensively before using high-tech tools in front of a Judge or jury. All of the above notwithstanding, it is important to vary the media to keep jurors’ attention. Also, remember that “low-tech” exhibits can still be among the most effective. An attorney who can teach the jury by summarizing key points on a flip chart as they go often spontaneously produces the key exhibit that wins the case.