PROVING AND ARGUING LIABILITY IN PROFESSIONAL MALPRACTICE CASES TO "CONSERVATIVE JURORS" (IN CALENDAR YEAR 2017): THE ART, THE SCIENCE, THE MYTHS, AND THE INSANITY

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John F. Romano is a senior partner in the West Palm Beach, Florida, law firm of Romano Law Group, an "a./v." rated law firm. He is a former President of both the Academy of Florida Trial Lawyers and the Southern Trial Lawyers Association. Mr. Romano is a Fellow of the International Academy of Trial Lawyers. He was named one of Florida's "Super Lawyers" 2006-2017 (every year). He has served as former Chairman of the National College of Advocacy and former Chairman of the AAJ Criminal Law Section. He is board certified by both the Florida Bar and the National Board of Trial Advocacy as a civil trial advocate. He has lectured and authored extensively on trial advocacy, litigation techniques, demonstrative evidence, and more. He has authored several books, including the textbook *Strategic Use of Circumstantial Evidence*; *The Deposition Field Manual*, published in 2002 by PESI Law Publications; and *Opening Statement: Winning the Jury*, published in 2004 by PESI Law Publications. He is editor and chapter author of *Anatomy of a Personal Injury Lawsuit*, 4th Edition, published by Trial Guides LLC and American Association of Justice in February 2015. Recently handled or currently pending cases include the following: orthopedic medical malpractice, plastic surgery medical malpractice, vehicular rollover product liability, trucking collision wrongful death, automobile neck injury-back injury, white collar criminal fraud, security negligent premises liability, business litigation fraud and breach of contract, business litigation attacking medical peer review system, toxic tort and pollution litigation. Additionally, Mr. Romano has received numerous awards, including recently the Al J. Cone Lifetime Achievement Award presented by the Florida Justice Association, the Tommy Malone Golden Eagle Award presented by the Southern Trial Lawyers Association, and the Annual Clarence Darrow Award presented by Mass Torts Made Perfect. He received the prestigious Perry Nichols Award presented by the Academy of Florida Trial Lawyers (FJA) (as its highest honor) in 1997. John Romano previously served as a Captain in the United States Marine Corps. John Romano lives in West Palm Beach, Florida, with his wife, Nancy. Nancy and John have four children and 11 grandchildren. John and Nancy are the co-founders of Vive Verde, Inc., the entity which owns and developed the "world's first living office building" – an environmental wonderland office building in South Florida which is "green" and "LEED-certified" and "living" (water purification systems). In 2016, John was inducted into the "Trial Lawyer Hall of Fame" by the National Trial Lawyers.

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I. OVERVIEW – LESSONS FROM RECENT TRIALS

I have tried many cases in the last 48 months including medical malpractice, product liability, auto and trucking negligence, premises liability, and more. Lessons are learned from trials – win, lose, or draw! It never ceases to amaze me how much a learning experience we obtain in every trial, every deposition, every mediation, every meeting with clients, and really just about everything we do day-in and day-out as trial advocates. Some of these lessons learned in this last 36-48 months include the following:

1. Don't dance around the issues! You must be brutally honest with jurors in 2017. The old method of "walking on eggshells" in order to get to a particular point is, for the most part, a dead strategy! Although it is true that there may well be some exception, you have to be straightforward and up-front and 100% candid with jurors. Otherwise, they can see and feel and hear and smell and taste the lack of candor and the trial lawyer's hesitancy about positions.

2. Get to the point (with today's modern jurors)! Beating around the bush will cause you to lose jurors from the get-go.

3. When you pick an expert, you had better make sure that he/she is near perfect. An expert with baggage – especially "credibility-baggage" – is a virtually useless expert today.

4. You must have a plausible explanation for anything your client – (whether a plaintiff or a defendant) – did in terms of his/her conduct assuming you are trying to, so to speak, explain it away.

5. You had better watch what is on your website! Jurors are looking at lawyers' websites nightly. The jurors' family members are looking at your website nightly. You as the trial lawyer are being researched nightly by jurors and their families and friends.

6. Although it may well be important to research jurors' social media sites…the real key to information is what is being said by jurors' spouses, children, Facebook friends, and others.

7. Get a trial consultant and get him/her on board early so that you have the benefit of that trial consultant's input, ideas, and strategies from the get-go! Hiring a trial consultant to do a "feel-good-mock-trial" a few weeks before trial is a useless waste of time, effort, energy, and money!

8. Make sure your "I.T." is of top-quality. Make certain that you have an I.T. professional in the courtroom with you. Don't do it yourself! Don't have one of your young lawyers or paralegal do it! Have a professional do it – one who is making a living on being an expert at I.T. Using such tools as "Trial Director" during trial is of tremendous benefit to your presentation and to the judge and jury. There are other tools. Use them wisely. Get these folks on board early.

II. INTRODUCTION

So, here we are in the greater metropolitan area of Nashville, Tennessee (on what we hope will be a time of beautiful weather). We are now in a time where you can actually dial up Courtroom View Network ("CVN") on the Internet and watch – with the live presentation – ongoing jury trials in personal injury and wrongful death cases, including medical malpractice cases. These cases are being televised daily over the Internet. We are in a time when our citizens (including jurors) literally have thousands of vehicles of information with which to learn, obtain news, watch recreational events, and so much more.

You are attending a seminar program of the American Board of Professional Liability Attorneys. What will you learn? Will you learn anything? Will you learn something you can readily apply to your practice this coming Monday? How valuable is the information you will learn? You ask these - and many more -questions - as you are a lawyer having been tasked with the responsibility of walking your clients through the minefields of litigation and trial. These "minefields" are devastatingly dangerous but none more hazardous than the minefields of medical malpractice litigation and trial. IMHO, there is no case more difficult and stressful and more obstacle-laden than the medical malpractice case. These cases are especially intense because of the personal feeling by, between, and among the clients and the defendant physicians or healthcare providers. To these "defendant doctors" - "this is personal!" And it is these defendants, and their lawyers, and the insurance company representatives who work with them who will do everything within their power to manipulate and play on conservative principles of conservative jurors to attempt to obtain a dismissal, or a summary judgment, or a defense verdict regardless of the merit and validity of the plaintiff's case or cause. It is therefore ever so essential that you as the plaintiff's trial lawyer and advocate fully understand and appreciate how to speak to and effectively communicate with conservative jurors.

Some have said conservative jurors just don't award adequate damages to plaintiffs in personal injury and wrongful death cases. Some have said conservative jurors are bad jurors in personal injury and wrongful death cases. And some have said they simply don't want conservative jurors in their jury pool. History and experience have demonstrated that they are wrong. In fact, it is conservative jurors who most often are the best jurors to sit in judgment of a personal injury or wrongful death case – so long as the plaintiff attorney understands the needs of adequately communicating with the conservative jurors. Part of the problem is trying to determine who is conservative and what is conservative. You see – there are many jurors who would say, "I am a hard-core conservative," and yet as you walk that person through a series of questions about social issues, you learn the person is more moderate or liberal than conservative.

The opposite holds true for many who would otherwise call themselves "liberals." The key is to try to find out what the person – or individual juror – is really all about and then to determine how best to communicate the truth and accuracy of what happened and why it happened in the case to that juror so that that juror will be motivated to do what is right and return the optimal verdict.

Kenneth L. "Kenny" Connor is a splendid and wonderful lawyer from Washington, D.C. (by way of Tallahassee). Kenny has been very involved in the conservative movement for years and is a strong Republican. He and I have had many discussions over the years about our philosophical differences – i.e. Republican versus Democrat, conservative versus liberal, etc. Kenny has obtained many outstanding verdicts with panels of jurors who were considered to be "very conservative people" and in communities which were considered to be so conservative that "you just can't get a plaintiff's verdict in a place like that." According to Kenny Connor:

> "Many plaintiff attorneys assume that their clients have no friends in conservative jury pools – but they're wrong. Finding conservative jurors who will respond to your trial story is a matter of effective communication."

Here is how Kenny Connor describes the conservative movement:

> *"Generally, today's conservative movement has two factions: the "blue-bloods" and the "blue-collars." The "blue-bloods" – big money, fiscal conservatives – are the primary financial backers of the Republican party and many conservative organizations. They are the big business elites. As fiscal conservatives, the "blue-bloods" are interested in small government, low taxes, and minimal government interference in their businesses. In spite of their fiscal conservatism, they are often socially liberal. However, given their ties to big business, they generally don't trust plaintiffs. They see these lawsuits as increasing the cost of doing business and eating into corporate profits. The "blue-collar" conservatives (viewed by many as the base of the Republican party) are both fiscally <u>and</u> socially conservative, but they are motivated less by their financial interest than by what they feel is morally correct. Their biggest concern politically is that the country is on the wrong track. They are often deeply religious. Themes involving right versus wrong, good versus evil, and the sanctity and dignity of human life resonate with them, as do themes that emphasize accountability and responsibility."*

The problem is that a lot of what we think and how we describe conservatives and liberals is such a crock of nonsense. In recent history, we have seen banks and insurance giants and other financial institutions operated at the highest level by "fiscal conservatives," and yet we learned they were wild in their spending and wasting and outlandish consumption and need for toys and thrills. We often see politicians and religious leaders speaking daily about their morality and conservatism – and yet finding out more and more about their affairs and utter disregard for the family unit. On the opposite end of the spectrum, we sometimes see liberals promoting every form of freedom known to mankind, and yet find that in their own lives and businesses – by their own actions – they detest allowing others to be free. The key is not really

"how to talk to conservative jurors" but rather "how to communicate effectively on conservative principles with those who either think they are conservative or who are wannabe conservatives."

III. WHAT IS A CONSERVATIVE? – IDENTIFYING CONSERVATIVES

There is no way in the world to accurately define conservatism or to piece together the concept of "what is a conservative." However, there are some common themes or philosophies that tend to make up conservatism. Just a few of those are as follows:

1. A philosophy or attitude which advocates institutions and traditional practices which have developed organically within a nation over a period of time (Wikipedia).

2. Conservatism is less a political doctrine than a habit of mind, a mode of feeling, a way of living (R.J. White).

3. Conservatism is the negation of ideology (Russell Kirk).

4. "I am a political conservative. I am a fiscal conservative. I am a social conservative. I am a cultural conservative. I am a religious conservative. I am not sure what any of that really means – but I know that's what I am." (This concept comes from a friend of mine whom I challenge to debate every time we go to dinner. I like to explain to him "you know what you are, but you're not sure of what you think you are.")

5. Someone who is frugal with money; pro-life; pro-national defense; generally a Republican (but not always); listens daily to Rush Limbaugh (but denies it constantly); thinks he or she is a disciplinarian (even if he or she is really a softie); etc.

Justin Quinn, in his *Guide to Conservative Politics*, simply points out that conservatives tend to group together the following issues as most important:

a. Traditional family values and the sanctity of marriage;
b. A small common non-invasive government;
c. A strong national defense focused on protection and the fight against terrorism;
d. A commitment to faith and religion;
e. The right to life for every human being.

Finally, I suppose I must include in this paper an overview of what has been commonly referred to as the "ten conservative principles" as set forth by Russell Kirk, one of the leading conservatives (at least in terms of people who think they speak for the conservative movement):

1. The conservative believes that there exists an enduring moral order.

2. The conservative adheres to custom, convention, and continuity.

3. The conservatives believe in the principle of prescription (which he seems to describe as a theory of that which has "immemorial usage" shalt not be changed).

4. Conservatives are guided by the principle of prudence.

5. Conservatives pay attention to the principle of variety.

6. Conservatives are chastened by their principle of imperfectability.

7. Conservatives are persuaded that freedom and property are closely linked.

8. Conservatives uphold voluntary community, quite as they oppose involuntary collectivism (??????????).

9. Conservatives perceive the need for prudent restraints upon power and upon human passions.

10. The thinking conservative understands that permanence and change must be recognized and reconciled in a rigorous society.

IV. THE INTERESTING DICHOTOMY BETWEEN LIBERALS AND CONSERVATIVES

If Ralph Nader finds wrongdoing on the part of a manufacturer and persuades a group of trial lawyers to file suits against the manufacturer – and if it turns out he is right and there was wrongdoing by the manufacturer – and then a jury finds the manufacturer guilty of wrongdoing and awards compensatory damages to plaintiffs and assesses punitive damages against the wrongdoing manufacturer – is the punishment the upholding of liberal principles or conservative principles? When trial lawyer and former President John Adams successfully defended British soldiers over their alleged criminal conduct regarding the Boston Massacre back during the time of the American Revolution – was his defense conduct upholding liberal principles or conservative principles? The problem is that we could keep asking dozens and dozens of these questions and the debate would go on and on forever. Suffice it to say that there are indeed certain principles that we generally – (and "generally" is a big word here) – utilize when we think of more conservative people, or Republicans, or those who tend to be "on the right." And I will categorize those principles as follows:

1. People should be held accountable for their actions or inactions.

2. Personal responsibility is or should be a mainstay of being a human being who is alive and who has a beating heart.

3. Discipline – to curb bad conduct or to teach – is good and helpful.

4. Whiners and complainers with little to whine about or complain about are not deserving of much of anything.

5. Religion is important.

6. There is a God and he better always or almost always be on your mind.

7. There are certain things you better respect in a major way and one of them is the American flag and "the uniform."

8. Everybody loves a worker – a strong work ethic tells so much about a human being.

V. BASIC PRINCIPLE OF TALKING TO CONSERVATIVE JURORS

The principle can be stated as follows: "Never talk to a conservative by using 'liberal language' if you intend to persuade the conservative."

Hint: Conservatives are minimally fond of terms like "entitlements" or "rights" or "wise government programs." If you want to turn off a conservative juror, then say something like this during the trial: "My client is entitled to an award of damages because a government agent violated my client's rights." On the other hand, you might gain some level of persuasive traction if you say something like this: "The evidence demands restitution in this case due to the sinful wrongdoing of this defendant."

VI. VOIR DIRE

Consider first the Kenny Connor voir dire chart of "conservative-friendly" themes:

A. ACCOUNTABILITY

1. What does accountability mean to you? (After some discussion, suggest the answer: Can we all agree that it means to be answerable for your conduct and subject to giving account?)

2. Does everyone agree that wrongdoers should be held accountable for their conduct?

3. Do you stress individual accountability in your life? How so? (Ask this with regard to jurors' work, family, and social interactions.)

4. Do you teach your children that they are going to be held accountable for their actions? Why? Were you taught that?

5. What happens when wrongdoers are not required to account for their wrongdoing? (Inevitably, jurors will respond that the wrongdoers are likely to repeat the wrongdoing.) [If you ask these questions in a way that invites jurors to say more than "yes" or "no," you will be able to engage them in a conversation centered on the idea that when people do bad things, they should be held to account, and that if they aren't, wrongdoers will likely repeat their misconduct. Conservatives already believe that. You are building on this belief in your trial, allowing their feelings about these issues to surface. You are helping them to recognize that the same principle of accountability they use in their personal lives is applicable to the case you are going to put before them. As they approach the evidentiary phase, they will be waiting to hear about what the defendant did wrong and how they can hold the defendant responsible.]

B. JUST COMPENSATION – Jurors must understand that you are seeking just compensation and not a "windfall" – you can elicit their attitudes about compensatory damages through the following questions:

1. What does the word "compensation" mean to you?

2. Can we all agree that "compensation" means payment of what is owed and that it is not a gift, windfall, or winning lottery ticket?

C. STANDARD OF CARE

1. Is anybody's health or safety dependent on the way in which you perform your job? Please explain.

2. Are you held to a certain level or standard of performance in your job? How so?

3. Are you familiar with the standard of performance that is expected of other workers with similar qualifications who are performing similar jobs? Do you know what is expected of you, even if it wasn't written down?

4. Are you held accountable for the way in which you perform your job? Please explain.

5. Do you agree with the proposition that a (i.e. nursing home, hospital, manufacturer…) company should be held to a certain standard of care in carrying out its job?

6. Should a…defendant company…be a member of a privileged class, not required to account for the harm it has allegedly caused?

7. What do you think would happen if…hospital, nursing home, or company…were not held accountable for their failure to…i.e. render adequate care…adhere to certain manufacturing standards...etc.?

D. BIG DAMAGES

1. How many of you feel that there are too many frivolous lawsuits? (Ask those answering in the affirmative to define what they mean by frivolous lawsuits.)

2. Have you heard of "lawsuit abuse"? How do you define it?

3. Do you think there is a place for lawsuits in our society? Why or why not?

4. Do you think each case should be judged on its own merits?

5. Some people do not believe in lawsuits or think it's morally wrong to file a lawsuit. How do you feel?

6. Are you, or is someone close to you, a member of any organization involved in lawsuit "reform"? Have you been exposed to advertising by, or signed petitions for, such groups? What have you concluded about the issue?

7. Some people object to serving on a jury because they think it's wrong to sit in judgment of another person. Do any of you feel that way? Please explain.

8. What concerns, if any, do you have about giving people money for bodily injuries and pain and suffering they've experienced as a result of the misconduct of others?

9. Do you think that jury verdicts are too high, too low, or just about right? Explain.

10. Have you heard about jury verdicts in which millions of dollars were awarded? How do you feel about that? Do you know what injuries the people who received those verdicts had suffered?

11. Do you feel verdicts should be limited in some way? Should there be a cap on damages? How might your feelings affect you if you serve as a juror in this case?

12. Do you have an amount in mind beyond which you will not go to compensate my client, regardless of what the evidence shows about how much my client has suffered? What is the figure?

E. PUNITIVE DAMAGES

1. How do you feel about being asked to punish a wrongdoer for his or her misconduct? Would any of you have difficulty with that? Explain.

2. Have you had to punish anyone to get the person to change his or her ways? Explain.

3. Do any of you have experience with the use of financial incentives – bonuses or penalties – in your business or personal life? Do you agree that incentives or penalties can affect behavior? (Use the example of rewarding a child with a "bonus" over his or her allowance for doing a good job cleaning his or her room or penalizing a child by withholding allowance for failing to clean the room.)

4. Does the stiffness of a penalty make a difference in its effectiveness? (Ask jurors to comment on a driver's likely response to a traffic fine carrying a five-cent penalty versus one carrying a $500 penalty.)

F. JURY SYSTEM

1. Do you believe the jury system is a fair way to resolve disputes?

2. Can you sometimes be swept away on a tide of emotion?

3. Are you worried that some smooth-talking lawyers can cause you to take leave of your good judgment and common sense and do something ridiculous? (Ask this with humor to establish the absurdity of the proposition.)

[Kenny Connor delivered a presentation to the Academy of Florida Trial Lawyers some years ago and walked us through the above suggested voir dire. My continued thanks to him for helping us to understand how to talk to conservatives.]

Some additional suggestions for voir dire and the concept of discussing issues with conservatives:

1. My suggestion is that you minimize the use of the word "compensatory" or "compensate" and move more towards words like restitution, reparations, refund, etc.

2. It is important to ask the jurors feelings about "frivolous lawsuits." Consider also asking the jurors feelings about "frivolous defenses." You are likely to be very surprised with some of the responses.

3. When dealing with issues of "personal responsibility" and how it might relate to safety measures utilized in a given case, ask jurors to comment upon their own use of safety measures, such as life jackets while boating, helmets while bicycling, seat belts while driving, and more.

4. Ask as many open-ended questions as you can in order to obtain all of the information possible from each juror. Extracting information and knowledge about each juror is the most important aspect of voir dire. Although lawyers are tempted to want to use voir dire as a "persuasion exercise," stick primarily to the goal of information gathering. Lawyers who do a lot of talking during voir dire are really not getting much in the way of information and this minimizes the benefit of voir dire to your client or to your cause.

VII. CASE "THEME"

Choose themes and sub-themes wisely. Choose themes which "connect" to conservative principles.

A. DEFINITION OF "THEME"

The word or term "theme" has been defined in the American Heritage Dictionary of the English Language as follows: (1) a topic of discourse or discussion, often expressible as a phrase, proposition, or question. (2) an idea, point of view, or perception embodied and expanded upon in a work of art; an underlying or essential subject of artistic representation. (3) a short composition assigned to a student as a writing exercise. (4) in music - a melody forming the basis of variations or other development in a composition.

In the text, Courtroom Communication Strategies, Larry Smith and Loretta Malandro discussed the topic of developing your case theme as follows:

> "Every case should have a case theme. A case theme is a thread that runs through the entire case. It should be cemented in such a fashion that it becomes a psychological anchor. That is, when you present the case theme, the words ought to be said the same way with the same tone of voice, from the same spot, and with the same gestures every time. This anchor or theme should run throughout your case.
>
> "What is a theme? A theme is a series of words said together, hopefully 10 or fewer words, that changes why your client should win and win big. Possible case themes should be contemplated from the time you start handling the file. Put a pocket in the file and deposit theme ideas there. Start thinking of the case by beginning with the

phrase, "This is a case of...." If you think of your case as "This is the case of...," you will usually arrive at one or two or three words that set the tone of the case. This then becomes a case theme.

"In addition, case themes need to be psychologically acceptable to the jurors. [They should tie into the communication principle that people use stereotypes to organize their perceptions.] For example, your case theme might encompass the idea that human life is valuable, a very acceptable value. Or, it might encompass the idea that just debts ought to be paid. Most everyone accepts this theme as a fact of life.

"Two examples of case themes are appropriate to illustrate the point. In one case, a one-and-one-half-year-old child was partially blinded and brain damaged as a result of the osteopathic anesthesiologist failing to promptly treat a laryngeal spasm. The evidence indicated that whether or not he failed to notice the onset of the laryngeal spasm, during the resuscitation attempt, he had thrown instruments across the recovery room. Various themes were contemplated. One finally was chosen and worked very well: "This is the case of a professional who panicked." This phrase: "the professional panicked" was used throughout the trial very effectively. It was used as the case theme. It was the thread that held the case together. Every time it was used, it was anchored.

"Another example is the case of a plant built by a large, well-known construction company. The plant blew up and seriously burned one man and killed another. The evidence showed that in constructing the plant the defendant construction company had installed 132 valves backwards and violated known safety standards. They had installed valves which bleed volatile hydrocarbons directly into the atmosphere. The explosion occurred during an attempt to correct the bleed into the atmosphere. In that case, the theme was: "Instead of building an oil refinery, they built a bomb." Throughout the case, the jury heard about the contractor who contracted to build a plant and instead built a bomb.

"The knack for developing a case theme, like swimming or riding a bicycle, comes with practice. In some instances, such as a rear-end collision where the defendant admits liability, your theme may simply be a stock-trade theme like the value of human life or it may be focus on the injury. For instance, if the case involves a man who had asymptomatic osteoarthritis made symptomatic by trauma, perhaps the theme should be: "This is the case of the man with the egg-like neck." But whatever themes you develop, each case should have a theme, it should be as short as possible, and it should sum up your case and your major proposition as to why your client should prevail."

In Herbert J. Stern's great treatise on advocacy, Trying Cases to Win, he discusses the meaning and critical importance of the case theme and refers to it as "the principle of the whole." According to Stern, in his book:

"It takes real self-discipline to pitch enough of your personal commitment into your case to establish its credibility, while simultaneously withholding the overt partisanship that destroys your credibility with the jury. It takes even more self-discipline - which may often require you to jettison some arguments - even a possible winner - in order to maximize your chances to win."

Stern states that psychologists call this phenomenon "the principle of the whole." Stern states that it rests, in part, on four cornerstone premises:

"(1) Everyone, including jurors, remembers a general principle, an overall theory, a central theme, if you will, better than individual details.

(2) Jurors feel a need to resolve conflict and that need gets critical as the trial nears its end.

(3) Jurors get nervous when offered alternative positions by the suitor. It tends to destroy their confidence in all of his positions.

(4) Jurors look for that one explanation, that one central theme, that best reconciles the greatest number of discrepancies.

"Some call this last point the 'Rosetta stone' approach to life. We all have it. Whatever life's problem, we all want to think there is some simple solution to it, somewhere: a master key, a formula, which - if we could but find it - would unlock the secret to success. We want to believe this because it provides the possibility of a shortcut around the thicket of hard work and perseverance, which is the only true Rosetta stone to success in life."

Another legal philosopher on this subject of "case themes" is Ann Fagan Ginger. In her book, Jury Selection in Civil and Criminal Trials, she discusses case theme in depth. In Ginger's words:

"Every case has a major theme that brings all the threads of the case together. If the jury can understand and accept the theme, you should be able to win the case. Developing the theme is a high priority during pretrial.

"In order to find the theme, and to separate it from various subthemes, you need to become immersed in the case. One good way to get started is to go to the scene of the tort, crime, or incident. The purpose is to see, smell, hear, feel, and taste the surroundings in order to approximate the sensations of the participants and to figure out how best to present these feelings to the jurors through testimony. In the process, you try to walk in the shoes of the client and other participants - the victim, opposing party, and key witnesses.

"Determine the theme - (early in the case) - give it a name, and repeat it throughout the trial. The name should be short enough to fit in a parenthetical

description of the case that a reporter might write. Develop a theme that goes with the current, with the conscience of the community from which the jurors come, so that it is easily acceptable to a majority of jurors."

Author Richard A. Givens in his advocacy book, The Art of Pleading a Cause, discusses case themes as follows: The key to effective presentation of a case is a central theme to which all subordinate points can be related. In order to retain the attention of the trier of fact, the central core of the case must be able to be explained. Preferably, it should be able to be stated in one sentence that can be delivered in 15 seconds or less. Any amount of subordinate detail can support a theme of grand simplicity so long as it is related to equally succinct subthemes in a pyramidal structure.

In terms of proving the injury (or proving damages in a personal injury or wrongful death case), your case theme can be defined as follows: A short, plain and simplistic statement or phrase that projects the visual image of your case directly into the minds of the jurors. Your case theme must have meaning. Your case theme must be credible. Your case theme must have impact.

B. "CASE THEME" AND "CASE THEORY" ARE TWO DIFFERENT THINGS [THEY'RE DIFFERENT! THEY ARE NOT THE SAME THING!]

I have often heard lawyers use the term "case theme" and "case theory" interchangeably. This can be dangerous, as they are not the same thing at all. Keeping in mind what has been stated above with respect to definitions of "case theme," it is now important to set forth a definition or at least an understanding of the meaning of "case theory."

The new college edition of the American Heritage Dictionary of the English Language defines the word or term "theory" as follows: (1) systematically organized knowledge applicable in a relatively wide variety of circumstances; especially a system of assumptions, accepted principles and rules of procedure devised to analyze, predict or otherwise explain the nature or behavior of a specified set of phenomena. (2) abstract reasoning; speculation. (3) broadly, hypothesis or supposition.

Should we turn to the classic, standard, definitive Roget's International Thesaurus, we will find the following words to be synonymous with "theory": belief, explanation, idea or supposition. On the other hand, we find these words to be synonymous with the concept of a "theme": morphology, story element, topic or treatise.

In preparation for this lecture and paper, I conducted what I would certainly refer to as a highly informal survey. When I asked three lawyers, "What is it that you would tell me if I asked you to tell me about your theory of a given case?" The three responded as follows:

Lawyer #1 - "I would give you my idea or analysis of how a collision occurred or how an explosion happened."

Lawyer #2 - "I would give you my position as to how the accident would be reconstructed or how the thing happened."

Lawyer #3 - "I would review with you the sequence of events about the incident - in other words, how it took place."

Indeed, each of these three lawyers is talking about a "case theory" and not a "case theme."

In Professor James W. McElhaney's book entitled A Practical Primer on Trial Advocacy - Trial Notebook, he discusses what the "theory" of a case is all about. According to McElhaney, each case has a "legal theory" and also a "factual theory." However, the actual "theory of the case" is the basic, underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a coherent and credible whole. Whether it is simple and unadorned or subtle and sophisticated, the theory of the case is a product of the advocate. It is the basic concept around which everything else revolves. In essence, your theory of the case is your idea about how it happened (and perhaps how it could have been prevented).

C. BASIC PRINCIPLES IN ESTABLISHING AND UTILIZING A CASE THEME IN PERSONAL INJURY, WRONGFUL DEATH AND OTHER TORT CASES

Principle #1 - Create and mold your case theme as early as possible in the handling of the case.

Principle #2 - Be flexible and adaptable after you have created and molded the initial case theme as you may want or need to adjust it or change it as you move forward with the litigation and discovery. Adaptability is a necessity.

Principle #3 - Consider optional or alternative case themes.

Principle #4 - Consider, create and use subthemes.

Principle #5 - At trial, never do or say anything inconsistent with, or contradictory to, your theme.

Principle #6 - Develop your case theme so that it can be stated in as few words as possible.

Principle #7 - Create and develop a case theme that is simplistic in concept.

Principle #8 - Create and develop a case theme always anticipating your opposition's comments, arguments and attacks as against your case theme.

Principle #9 - Create and develop a case theme that is morally, socially and practically acceptable to the jurors.

Principle #10 - Don't switch your case theme in the middle of the trial unless you have concluded that your ship is sinking and it is time to fire all guns.

D. SEVEN-STEP METHOD ON HOW TO CREATE AND DEVELOP A CASE THEME

Step #1 - Learn, know and understand the facts by dissecting every aspect of the case. Know every scenario. Know the testimony of every witness. Know the possible variations of testimony that may occur at trial. Leave no stone unturned in terms of knowing and understanding the facts.

Step #2 - Know and understand the legal positions of all parties involved.

Step #3 - Know and understand the defenses and the probable (and possible) defense strategies.

Step #4 - Have your case objectives and case goals in clear focus.

Step #5 - Know and understand the local and regional community attitudes and beliefs. Additionally, be aware of current events that may cause you to need to adjust the case theme. Such as, for example, when a major event occurs in the local community like defendant corporate sponsorship of a community bailout or a catastrophic event that may have affected many individuals within the community.

Step #6 - Determine the image that you want to project and portray during the trial in terms of the "image of the case." This can be best developed through a lot of brainstorming and cerebration and also through the use of mock trials, focus groups, along with the help of the jury consultant or juror psychologist.

Step #7 - Articulate the image by putting your case theme into a succinct and powerful "case theme."

E. SAMPLES AND EXAMPLES OF CASE THEMES ON DAMAGES ISSUES THAT HELP YOU PROVE THE INJURY

Sample #1 - In a wrongful death case involving a 12-year-old girl, the following case theme was utilized (and was fully articulated in opening statement although discussed in voir dire): "Ladies and gentlemen, we bring you a case today unlike the normal course of human events. We bring you not the case of children burying a parent, but rather the case of a young mother and father standing on a hill under a tree at the grave site of their little girl."

Sample #2 - In a fraud and tort of outrage suit where plaintiffs were an evangelist and his wife who had been defrauded in the purchase of a Christian broadcasting television station, the theme of the case was stated as follows: "This is a case about a con man and his wife purportedly selling a Christian broadcasting T.V. station to a young husband and wife that the

con man sucked right into his scam. It is a case of fraud and dishonesty. It is about a scam with a trail of victims."

Sample #3 - In a case involving the wrongful denial of health insurance benefits, the case theme was articulated in the following manner: "This is a case about a young and vibrant teenage girl whose heart stopped while at school. It is a case about the two insurance companies that coldly and wickedly turned their backs on her when the bills came due."

Sample #4 - The following theme was developed by Howard Nations and Larry Smith. In a rear-end collision, a young man was struck so hard that his head broke the rear window of the truck and he sustained brain damage. The case occurred because a laundry truck driver was changing lanes quickly in heavy traffic and did not see the plaintiff bring his vehicle to a stop in front of him. The theme for that case was: "An erratic lane change led to a catastrophic life change." That theme obviously said everything about the case. It said it was a serious case and that the injuries had substantial effect on the plaintiff's life. It states that the injuries occurred because the defendant was negligent in changing lanes.

Sample #5 - You might remember this one from a recent criminal case: "If it doesn't fit, you must acquit!"

F. THE THEME OF THE CASE SHOULD BE REPEATED WITH EVERY OPPORTUNITY

Although throughout the trial you will repeat the words and phrases that make up your case theme, keep in mind that you want others to repeat it as much as possible. You must make sure at every stage of the trial that your theme is very clear to the jury. You want to repeat that theme effectively by approaching the same basic theme from several different positions in your proof. Use it during the direct examination of your witnesses. Use it during the cross-examination of the defense witnesses. Use and repeat the theme in voir dire, opening statement, during arguments that may be heard in front of the jury dealing with various objections. And certainly repeat it throughout summation.

G. THE FOUR INGREDIENTS OF AN EFFECTIVE CASE THEME

Ingredient #1 - An effective case theme is easy to remember.

Ingredient #2 - An effective case theme is something that a favorable juror can use during deliberations.

Ingredient #3 - An effective case theme makes sense and is consistent with the jurors' concepts of fairness and justice.

Ingredient #4 - An effective case theme is consistent with and supported by the evidence.

[The above case themes written and discussed in various presentations by Attorney Jim Perdue and Ira Leesfield.]

H. POWER LANGUAGE

It is imperative that you use power language - where possible and where credible - as a part of the phraseology of your case theme. The more memorable and forceful the phrase (or theme), the more impact it will have in a favorable way upon the jury. A series of key words or phrases have been developed by Attorney Jim Perdue for purposes of incorporating them into a case theme:

1. needless, senseless, endless
2. maximum side impact
3. came out of nowhere
4. tragic and avoidable collision
5. tragedy and courage
6. freedom and independence
7. innocent
8. impacting of iron and steel
9. crashing impact of tons of metals
10. recipe for disaster
11. a tragedy that has maimed my friend
12. crippling injuries
13. painful and agonizing disruption of flesh
14. brain damage and paralyzing injury
15. struggle for independence
16. catastrophic consequences
17. nightmare of tragedy
18. maiming and misfortune.

Now let's include some power words and phrases from criminal cases:

1. venom in his blood

2. den of thieves

3. corrupt conspirator cops.

And here are some that may relate to commercial or business dispute cases:

1. a man who would cheat his own mother

2. corporate rape

3. blind ambition.

The use of power language and power words is vital with respect to your case theme. Use "crash" instead of "accident." Don't say things like: "May I suggest to you that it probably happened this way..." Don't say: "I think this is what you will find..." Be a persuader of conviction and confidence.

I. DAMAGES AIN'T NO "TAG-ALONG"

It is baffling to me how many lawyers think of the presentation and proof of damages as somewhat of a "tag-along" to liability. I know of lawyers who try premises liability cases, auto crash cases, medical malpractice cases, product liability cases, and much more, who consistently do brilliant work in the litigation, discovery and trial of the case on the aspect of liability, seeming to always "get a verdict" and who pay minimal attention to the damages case. Jurors need to learn and hear about and know about your damages and injuries right from the start, and it needs to be repeated throughout voir dire, opening statement, your case-in-chief, the cross-examination of opposing witnesses, summation, and even during objections and arguments that may be heard in front of the jury. The jurors need to see, feel, hear, taste and touch the damages aspect of your case wherever and whenever possible. It is your responsibility and duty to see that this gets done. Accordingly, the trial advocate representing the plaintiff must try to incorporate damages aspects into the case theme. As, for example, in a case with severe injuries from a severe rear-end impact where the case theme began as follows: "For just a moment he broke his attention and in just a moment it broke her neck."

J. ATTACKING THE THEME OF THE PROSECUTOR IN CRIMINAL CASES

Prosecutors love themes. Young prosecutors overdo it with themes. Young prosecutors overdue it with themes and go overboard! Sadly, seasoned veteran prosecutors often go way too far with themes when they overcharge, exaggerate or push the envelope with a prosecution taking it beyond the bounds of their prosecutorial duties and responsibilities. You as a criminal defense

lawyer must be ever so vigilant to be on the alert to identify these problems with prosecutorial themes and then go on the attack. Here are some helpful hints on attacking prosecutor's themes:

1. Explain to the jury in summation after the prosecutor has used the theme that the prosecutor has "over dramatized" the case through the use of a theme in order to take the jurors away from their fact finding duties;

2. Explain how the theme violates rules of logic;

3. Misleading theme;

4. Explain how prosecutor's theme is nothing more than an attempt to provide the jurors with a "sound bite;"

5. Explain how the theme is taking something out of context;

6. Try to demonstrate to the judge and/or jury how the theme is an attempt to change or alter the burden of proof;

7. Explain to the jury how the theme is simply an attempt to wrongfully prejudice the jurors;

8. Explain how the theme is an attempt by the prosecutor to ask the jury to create or assume facts not in evidence and that the theme is nothing more than a made up story.

K. ALWAYS MAKE A RECORD WHEN ATTACKING AN INAPPROPRIATE THEME

1. Move in limine to exclude inappropriate themes;

2. Always object to an inappropriate theme and state the specific reasoning for your objection on the record;

3. Move to strike the reference to the theme from the record;

4. Where appropriate, move for a mistrial immediately after the theme has been stated.

L. EXAMPLES OF THEMES IN CRIMINAL CASES

1. He who excuses himself, accuses himself;

2. Not to disapprove is to approve;

3. If it doesn't fit, you must acquit;

4. He is not presumed to consent who obeys the orders of his master;

5. An error which is not resisted is approved;

6. The case of the dominoes that wouldn't fall;

7. This is the case of a victim who protests too much;

8. The case of the detective who made up her mind and then later gathered evidence to arrive at an opinion;

9. The case of the madman punished by his own insanity;

10. One drink too many;

11. The case of the officer who ran a police procedures red light.

VIII. LEGAL BLAME: (HOW JURORS THINK AND TALK ABOUT ACCIDENTS) – AN IN-DEPTH LOOK AT JURY THINKING AND JURY DELIBERATIONS

A. INTRODUCTION

"When we attribute responsibility for an accident, we also declare what is appropriate and inappropriate behavior. We define the role expectation of employers and employees, manufacturers and consumers, physicians and patients, drivers and pedestrians. We decide whether it is fair and just that someone whose behavior arguably helped to bring about the harm pay for the injured person's losses. Ultimately, we define ourselves: how we think and feel about what happens to us and others and whether what happens is a matter of fate or an occasion for blaming someone."

"Legal blaming is multi-dimensional: it springs from common sense and is also shaped by legal rules, expert rationales, and the facts of the individual case. And common sense itself is various and contradictory, not systematic or coherent. Our common sense consists of many general habits of thought and feeling, as well as case-specific beliefs and preconceptions. Often

these habits and beliefs incline jurors to view accident cases as personality-driven melodramas in which bad outcomes are traced to that party's behavior that most deviates from salient cultural norms. Yet other aspects of common sense compete with and, in any given case, may overcome this melodramatic conception of responsibility."

"If there is any overarching pattern in this complexity, it is that jurors in accident cases try to achieve what I call total justice. They strive to square all accounts between the parties (even though the issues the law asks them to resolve may not be framed in those terms), to consider all information they deem relevant (even if the law tries to keep them from relying on some of it), to reach a decision that is correct as a whole (even if they reach it by blurring legally distinct questions), and to feel right about their decision (even though the law discourages them from using their emotions to decide). The decisions that result are often, like common sense itself, 'right for the wrong reasons': consistent with the law but not necessarily the result of strict adherence to legal rules and procedures."

See Neal Feigenson, Legal Blame – How Jurors Think and Talk About Accidents (American Psychological Association, 2000).

B. WORKING DEFINITIONS

In order to proceed with an analysis of "blame" and how jurors make decisions on issues in liability cases, it is necessary to have working definitions of certain words or terms:

Bias: an inclination of temperament or outlook; a highly personal and unreasoned distortion of judgment; systematic error introduced into sampling or testing by selecting or encouraging one outcome or answer over others; a prejudiced outlook.

Blame: an expression of disapproval or reproach; fault; responsibility for something believed to deserve censure; deserving of punishment; at fault; responsible for.

Bonding: causing persons to adhere together mentally, psychologically, or emotionally; to bring together and hold together; the combining, uniting, or strengthening of relationships between two or more persons; uniting of emotions or like thinking.

Persuasion: the art of coaxing or convincing; the process of changing another's opinion; the ability to sway one from a particular belief to another belief.

Psychology: the science of mind and behavior; the mental or behavioral characteristics of an individual or group; the study of mind and behavior in relation to a particular field of knowledge or activity.

Sociology: the science of society, social institutions, and social relationships; the systematic study of the development, structure, interaction, and collective behavior of organized groups of human beings; the scientific analysis of a social institution as a functioning whole and as it relates to the rest of society; the study of men/women in groups.

C. THOUGHTS ON WHY JURORS OFTEN IDENTIFY WITH DEFENDANTS IN PERSONAL INJURY/WRONGFUL DEATH CASE

Jurors often tend to identify with defendants whether that defendant comes in the form of a defendant automobile driver, a defendant manufacturer, a defendant physician, or a defendant property owner. Here are some of the reasons why jurors tend to identify with defendants:

(1) Belief that they might personally be financially harmed by a plaintiff's verdict (directly or indirectly).

(2) Jurors often see themselves as a potential defendant – i.e., "there, but for the grace of God, go I." This is often referred to as "*defensive attribution bias*." This results in a juror judging the plaintiff for his/her conduct. It attributes the adverse outcome to the plaintiff's lack of diligence in taking care of himself/herself. It provides a foundation for a defense lawyer arguing that, "…the plaintiff has failed to exercise personal responsibility." "Defensive attribution bias" is considered to be a survival technique employed unconsciously by jurors (such as, for example, where a juror might believe that he/she would have gone for another opinion, or taken a different route, or chosen a different physician).

(3) Jurors tend to condemn or criticize most harshly that with which they are most familiar. This is commonly referred to as the "availability bias" and it is another method whereby the defense raises plaintiff's lack of "personal responsibility." Strange as it seems, it is most often the juror who is a heavy drinker who is most critical of a plaintiff who has a beer at dinner, just as the most critical juror reflecting on plaintiff's failure to file an income tax return for two years is the juror who is a tax evader.

D. THE "NECESSARY SHELTER AND PROTECTION THEME" IN PERSONAL INJURY AND WRONGFUL DEATH CASES

Always be cognizant of the necessary shelter and protection theme. Although this may have been created or developed over the decades by many a trial lawyer, it was more recently articulated by Attorney Mark Mandell of Providence, Rhode Island. Paraphrasing, it goes as follows:

> "*All people, including jurors, need and want to be protected; from birth on, our need for protection is universal and reaches to our core. We also feel a strong need to protect our loved ones and those close to us. Any argument we make to a jury must stress that the plaintiff needed and deserved protection by the defendant, wasn't provided that protection, and, as a direct result, was harmed. Jurors share the same need for protection. They are unconsciously attempting to protect themselves when they adversely judge our clients. We need to reframe this use of self-protection so that jurors see that by protecting plaintiffs, they are protecting themselves. We need to point out to jurors that our client only needs protection now because the defendant didn't protect him or her before. Juries must understand that they need to protect an infant plaintiff whose mother died so young because the defendant didn't provide that protection during surgery or in*

product research and development. The jury needs to protect the family of the deceased plaintiff because the defendant didn't protect the plaintiff when he or she should have. This theory is as much about the jurors' need for protection as it is about the plaintiff's. We must always try to bring the jury into the equation – into whatever we are trying to prove. The "need for protection" argument provides a jury with a reason to identify with and help the plaintiff. Jurors are indeed afraid of cancer, of death, of being paralyzed. They need the protection that the plaintiff didn't get. Protection works because people generally feel vulnerable and without real power. It is important that while we are speaking of the defendant's wrongful conduct, we also stress the importance of the need for protection from that conduct. Protection and prevention can be used in tandem to create a powerful identification between jurors and plaintiffs. The concept of prevention is closely related to the need for protection, yet it is different. Prevention is more abstract. Prevention relates to an event in the future that we don't want to believe will ever happen to us, since it will mean injury or death or some other tragedy has occurred. The need for protection, on the other hand, is a direct and palpably real feeling that we experience all the time. It is present tense and runs deep inside all of us. During trial, we need to speak about our role as protectors of our clients, of our system of justice, and, indeed, of our juries. We need to talk about our role of equalizing power and leveling the playing field. We need to institutionalize our role as protectors – it will justifiably elevate us in the minds and hearts of jurors. One relevant question for the defendant on cross-examination that can invoke the concept of the need for protection is 'would you do it all over again?' If the answer is 'no,' the negative implications to the defendant are evident. If the answer is 'yes,' that creates a strong need to protect against that wrongful conduct ever happening again."

E. MYTHS ABOUT JURORS

Richard Gabriel, of Decision Analysis, Inc., teaches us that many attorneys are still using a demographic model when selecting a jury basing their "cause" and "peremptory" challenges on age-old assumptions about age, gender, education, race, etc….while current research, according to Gabriel, shows that these demographic characteristics are perhaps the poorest predictors of jurors' decisions. According to Gabriel, an individual's life experience and belief systems are much better predictors because they accurately portray a juror's predisposition towards case issues, and predisposition is the best predictor of behavior…(such as the case of a juror who has been fired from a job in a particularly demeaning way would probably not be the best juror for the defendant in a wrongful termination case).

Consider these principles or guidelines (developed by Gabriel) when preparing for and conducting voir dire:

(1) Jurors' beliefs, attitudes, experiences, and personalities are better indicators of their issue and party orientation than are their demographic characteristics.

(2) A juror's cultural and socio-economic situation provides more information about his/her attitude than does his/her race.

(3) Intelligence is more important than is education unless the juror is specifically educated on an issue in the case.

(4) All jurors have biases and prejudices that they selectively apply to the trial issues in a case. While attempting to be open-minded and to wait until the end of the case before making a decision, jurors make many "mini-decisions" during the course of the trial.

(5) Rather than apply the law as instructed by the judge and understood by those with legal education, jurors interpret and apply the law to the case facts according to their "common sense."

F. "KNOWLEDGE STRUCTURES" AND "INFERENTIAL HEURISTICS"

People intuitively use two general classes of mental tools to make judgmental decisions about fault or responsibility:

(1) "Knowledge structures." People define and interpret information in terms of knowledge structures. Without knowledge structures to organize one's perceptions, memories, and expectations, thought would be nearly inconceivable, one's mental life would be anarchic and unintelligible. People perceive, store, and retrieve what they know using knowledge structures, such as theories, schemas, scripts, and cultural models, that describe how the world is and how it works.

(2) "Inferential Heuristics." People use judgmental heuristics to make inferences from what they know to what they do not know. This assists them in learning in order to classify, predict, or attribute responsibility. People resort to shortcuts. Two of the most important are that people (a) tend to rely on the information that comes most readily to mind, and (b) tend to categorize things on the basis of the perceived resemblance between what they think they know of the target information and what they think they know of the relevant category.

G. THE THEORY OF "MONOCAUSALITY"

People tend to prefer simple explanations for events or behaviors to complex ones. People tend to be content to rely upon what first strikes them as plausible as the sufficient cause for an event, guided consciously by simple schemas for "how things go" or unconsciously by the mere availability of causal data. The preference for simple causal explanations is derived from the need to conserve scarce, cognitive capacity, and it is also traced to the need for "closure." The stronger the need for closure, the more inclined a person will be to choose a monocausal account.

H. CULPABLE CAUSATION

"Mock jurors attribute greater causal significance to acts, and greater responsibility to those who perform them, the more morally blameworthy those acts are, even though the relative degree of perceived moral blameworthiness is causally irrelevant to the result. In one experiment, for instance, participants more often identified a driver's speeding as the cause of an accident and held the driver more responsible for the accident when the driver was rushing home to hide a vial of cocaine from his parents than when he was rushing home to hide an anniversary present he had bought for them. A possible explanation for these results is that participants react with greater negative effect to those who act in a morally objectionable fashion, 'staining' the actor's character, and then seek to validate that stain by attributing to the actor greater responsibility for the negative outcome." Feigenson, Legal Blame – How Jurors Think and Talk About Accidents (American Psychological Association, 2000).

I. THE CONCEPT OF "FUNDAMENTAL ATTRIBUTION ERROR"

"Every human behavior is situated in its surrounding circumstances and so is *a priori* attributable to both the actor and the situation. Yet people tend to attribute the behavior of others to the others' corresponding personality traits or dispositions, rather than to situational constraints, even where the circumstances explain the behavior quite adequately. Psychologists call this habit of thought the fundamental attribution error (or correspondence bias)."

[In one experiment, basketball players randomly assigned to shoot free throws in poorly-lit gyms were judged as less capable than were players randomly assigned to shoot free throws in well-lit gyms. Observers chalked up the relatively poor shooting to the players ("can't shoot") rather than to the situation (bad lighting) – these and many other examples illustrate attributions of behavior to the actor's traits rather than to the circumstances are often erroneous because there is in fact much less correlation between dispositions and behavior across markedly different situations than commonly believed.]

Fundamental attribution error reflects both the availability and representativeness heuristics. It derives from availability because, in social settings, actors tend to appear more salient and, hence, are more available than situational elements and are less more likely to be seen as causal agents.

The fundamental attribution error suggests two implications for jurors' decisions in accident cases at least for those cases in which the plaintiff argues negligence as a theory of recovery. First, jurors are likely to assume that accidents do not happen unless someone was negligent. Second, they are likely to attribute causation (and, hence, fault and responsibility) on the basis of the parties' personal dispositions to decide that the plaintiff or defendant acted as he did because "he's that kind of guy."

J. HINDSIGHT BIAS

Hindsight bias is the tendency to overestimate the probability of a known outcome and the ability of decision-makers to have foreseen it. In other words, when informed of the outcome

of a series of events, people are prone to think that, "I knew it would happen." The hindsight bias is one of the most consistently replicated effects in the cognitive psychology literature and has proved fairly resistant to attempts to reduce its impact. Another way of putting it is that it is awfully difficult to "de-bias" someone.

Once people know the outcome of a sequence of events, they assimilate the outcome and the prior events into a coherent whole and, in making sense of that whole, they tend to attribute greater causal significance to some of those events than those events seem to warrant in foresight. In addition, several researchers have identified a connection between the counter-factual thinking that underlies norm theory and the hindsight bias. Counter-factual thinking enhances the hindsight bias by providing the observer with an explanation for why things occurred as they did, which hardens the observer's certainty that things were bound to have occurred as they did.

K. SEVERITY EFFECT

Information about the extent of an accident victim's injuries may affect judgments about causality and responsibility. In one experiment (Walster – 1966) – two groups of participants were presented with nearly identical scenarios. In each, a man left his car parked on a hill and after he left the car, the car rolled down the hill. The first group was told that the car hit a tree stump. The second group was told that the car struck and injured a person. The second group found the car owner far more responsible for the accident than did the first group. This is known as "severity effect" or "outcome severity effect."

L. ANCHORING AND ADJUSTMENT

"People who have to make a numerical estimate on the basis of uncertain or incomplete information – such as jurors who award damages – may select a reference point or initial estimate, 'anchor,' and then "adjust" the initial figure up or down to reach their judgment. The anchoring and adjustment bias leads people to give undue weight to irrelevant and even arbitrary anchors, insufficiently adjusting them to reach the final estimate."

"The obvious application of anchoring and adjustment to accident cases is in the determination of damages, especially pain and suffering damages and punitive damages, as to the determination of which the judge provides jurors with little, if any, meaningful guidance. A number of studies have indeed shown that when mock jurors are provided with an anchor in the form of the ad damnum or amount requested by the plaintiff's attorney, their damage awards are biased towards that anchor." Additionally, other studies have found that expert testimony on damages can exert an anchoring effect on jurors' awards – such as when the plaintiff's expert specifies an amount representing plaintiff's lost wages.

Other studies also found that anchoring had a "cross-modality effect," such that anchors on damage awards influence jurors' judgments about whether the defendant caused the plaintiff's harm and causal anchors affect damage awards.

M. DECISION FRAMING

People make choices regarding uncertain outcomes depending upon how those choices are posed to them or how they are "framed." People are generally risk-adverse when a choice is framed as a potential gain and risk-preferring when the mathematically identical choice is framed as a potential loss. Feigenson sets it forth in his book on legal blame as follows:

> *"In Tversky and Kahneman's (1981) classic experiment, participants were told that the outbreak of an unusual disease threatened to kill 600 people in the United States and they were presented with a choice between two programs to combat the disease. One program would certainly save 200 people; the other presented a one-in-three chance of saving 600 and a two-in-three chance of saving no one. Nearly three-quarters of participants preferred the first program. In the next phase, other participants were presented with the same threatening disease scenario, but a choice between two other programs. One would certainly result in 400 people dying; the other, a one-in-three chance that no one would die and a two-in-three chance that 600 would die. More than three-quarters of these participants selected the second program. It is clear that the sets of programs in the two phases of the experiment are identical mathematically. The only difference is that the first pair of programs is framed in terms of lives saved, whereas the second pair is framed in terms of lives lost."*
>
> *"A related anomaly in people's reasoning about valuing gains and losses is the 'endowment effect': people often demand more to give up an object than they are willing to pay to acquire it."*
>
> *"Decision framing is relevant to judgments of both liability and compensation for accidents. If people see incurring a risk as a loss from the status quo rather than seeing avoiding the risk as a gain, they are more likely to fear the risk and believe steps should be (or have been) taken to avoid it."*
>
> *"When pain and suffering damages are framed as to the amount plaintiff needs to be made whole once the injury has already occurred (the ex post perspective), awards are significantly lower than when they are framed as the amount the plaintiff would have to have been paid to suffer the injury in the first place (the ex ante perspective)."*

N. BIASES IN COMPREHENSION OF STATISTICS

When estimating likelihood or frequency, people tend not to understand basic principles of probability and statistics and to violate those principles in systematic ways.

[At this juncture in the paper, I must strongly, strongly recommend that you purchase a copy of Neal Feigenson's book**,** Legal Blame – How Jurors Think and Talk About Accidents. This book is vital to understanding the concept of "blame" and how jurors think and perceive about evidence on both issues of liability and damages. I have utilized and referred to excerpts from

the book throughout this paper, as I believe the information from the book is of such significant importance to this subject. The author of the book, Neal Feigenson, deserves 100% of the credit, as these are his ideas and thoughts and based upon his research and work.]

O. JURORS AND EMOTIONS

We are all emotional. Jurors are emotional. Emotion does indeed affect the way jurors think and perceive evidence. This is true whether we are talking about "sympathy" or "anger" or "fear" or "love."

In 1997, Neal Feigenson conducted an experiment further evidencing that jurors' sympathy for accident plaintiffs, if any, may be overridden by an anti-plaintiff bias. They asked participants to be mock jurors and read accounts of four cases of accidental injury. They created eight different versions of each story manipulating the severity of the plaintiff's injury and the degree of the plaintiff's blameworthiness. After reading about each accident, participants completed a questionnaire in which, among other things, they registered their emotional responses to the case. They also completed each of the three steps involved in a comparative negligence decision: they apportioned fault between the parties; they assessed gross damages, the amount they believe necessary to compensate the plaintiff fully; and they computed adjusted or "discounted" damages, gross damages reduced by the proportion to which they believed the plaintiff's own fault contributed to the accident. There were three principal findings:

(1) The severity of the outcome affected participants' apportionments of fault: the more severe the accident, the more fault they attributed to the plaintiff (yes – that's right – the plaintiff).

(2) The plaintiff's blameworthiness affected gross damage awards as well as apportionment of fault: participants reduced gross damages when the plaintiff was highly blameworthy, thus, "double-discounting" the plaintiff's recovery.

(3) Outcome severity affected the rate at which gross damages were adjusted: the more severe the accident, the greater the rate at which participants discounted the damage award.

Now, we have to look at the reason behind this "anti-plaintiff bias." The jurors did feel sympathy and they felt more sympathy the more seriously the victim was injured, but less sympathy the more the victim was to blame. Something else overcame the expected effects of the sympathy and that had to do with other emotions – anger and anxiety (or fear). Anger motivates one who feels it to attack the source of the anger or, if that is not possible, to displace the attack onto another object. In the context of jurors making a decision, the tendency to attack may take the form of an urge to punish a criminal or civil defendant. However, if on the other hand the object of anger is against an accident victim, then the tendency – relying upon a theory of emotional response to suffering – is to ignore the sufferer.

People who are angry tend to blame more!

Increasing the plaintiff's blameworthiness makes jurors angrier at the plaintiff which, in turn, leads them to apportion more fault as against the plaintiff. Anger may be elicited by the perception of blameworthy behavior and it may, in turn, influence attributions of responsibility – to both the plaintiff and the defendant in accident cases in which both may be plausibly blamed.

When dealing with anxiety and the defensive attribution theory, the more seriously injured the accident victim, the more anxious jurors become about the prospect of suffering such a terrible fate themselves; as a consequence, they more readily blame the victim for the accident, to preserve their belief that they can avoid similar misfortune. Thus, it is this defensive attribution theory which may help to explain some of the anti-plaintiff effect or bias with jurors.

P. UNDERSTANDING "THE BLAME FACTOR"

The "blame factor" is something which has been a part of mankind since the beginning of time. At the center of so many issues – stress, alcohol abuse, drug use, mismanagement, employer-employee disputes, and much more – is the blame factor. Throughout history, whether we were going to war, enslaving peoples, or burning witches at the stake, it has all been to fulfill our base instinct to blame someone or something. We believe by blaming others, it makes our life better. This daily phenomenon is often referred to as the "blame factor."

In jury trials, the concept of blame is vital – vital in the sense that we must understand it, or we are at a disadvantage in terms of how we use our persuasive skills as trial advocates. The more blameworthy a person is the more jurors desire to hang the responsibility for what went wrong on that person or organization. Thus, understanding blameworthiness and how to attach blame to a given person or organization – in a legitimate, truthful, and ethical manner – is crucial to the handling of any trial.

Q. THE PSYCHOLOGY OF BLAME

People have a tendency to find someone to blame when bad things happen. Although there is some empirical data tending to explain why people blame others, most of the understanding in this area of research is based simply upon theory and speculation.

"Blame prediction" is based upon several situational and personal characteristics:

(1) The presence of another at the time of the event increases the probability of that person being blamed.

(2) The perceived knowledge or authority of the other person – i.e., individuals who are knowledgeable are expected to anticipate negative outcomes and avoid them – further affects the likelihood that "other-blame" will occur.

(3) The extent to which the other person is known to the victim is an important factor in blame – i.e., if the victim knows the other person well, blame is less likely to result.

(4) The more severe the outcome of the event, the more likely someone will be blamed.

Additionally, there are two personal factors related to the likelihood that "other-blame" will occur:

(1) The person's ability to find the good or benefit in a bad situation (such as "perhaps this is a blessing in disguise");

(2) The person's attributional style – some people just tend to find fault with others in many given situations regardless of the circumstances. [Every teacher has run across at least one such parent; no matter how illogical the rationale, some people cling to the need to blame others for everything bad that happens; other people have an attributional style which leads to a tendency to blame themselves no matter how obviously blameworthy someone else might be.]

In any given situation, an analysis of the interplay of the above factors can lead to a better understanding of when and why other-blame takes place.

[The above concepts and thoughts have been taken from Tennen, H. and Affleck, G. (1990); "Blaming Others for Threatening Events"; Psychological Bulletin, 108(2), 209-232.]

R. ARTICLE – "WHY AMERICANS CAN'T STOP PLAYING THE BLAME GAME"

In the Thursday, September 15, 2005, edition of *The Wall Street Journal*, Jeffrey Zaslow authored an interesting article on blame. He refers to blame as "an innate human impulse dating back a million years or more." According to Zaslow, blame is "…an impulse that travels through our bodies to our fingertips, as we all saw in the frenzied finger-pointing over Hurricane Katrina."

"The human impulse to blame grows out of the evolutionary need to avert harm," according to Ohio University Professor Mark Alicke, who is a researcher on "the psychology of blame." According to the article – where Zaslow refers to Alicke – "If a group of early humans thought their survival was threatened because a member wasn't carrying his load – hunting, gathering, whatever – they'd point fingers, throw rocks, even commit murder."

Think of it – even the Bible is filled with blame and finger-pointers. After Eve ate the forbidden fruit, she told God that the serpent was to blame, as he had deceived her. Adam then not only blamed Eve, but went further and blamed God for giving him Eve.

In a series of papers by Joshua Knobe and Thomas Nadelhoffer, they seem to demonstrate how morality plays into blame – i.e., moral considerations. Their data suggest that people are more likely to judge that a morally negative action or side effect was brought about intentionally than they are to judge that a structurally similar non-moral action or side effect was brought about intentionally. So, for instance, if two individuals – A and B – place a single bullet in a six-shooter, spin the chamber, aim the gun, and pull the trigger, but A shoots a person and B shoots a target, people are more likely to say that A shot the person intentionally than they are to

say that B shot the target intentionally – even though their respective chances of success and their control over the outcome are identical in both instances. Think of how jurors judge a person who fails to wear a seat belt, drinks before driving, etc.

S. THE EFFECTS OF MOOD/EMOTIONS ON JUDGING OTHER PEOPLE

Here are a few broad guidelines:

(1) Perception of Other People – Those in a more positive mood spend more time examining the positive aspects of another person, while individuals in a negative mood dwell more on the negative aspects of the person being judged.

(2) Memory – People in a positive mood more easily recall positive material – people tend to remember more information when their particular emotion at recall matches their emotion when they learned the information.

(3) Evaluation – People's social judgments tend to be biased toward their prevailing mood – people's moods tend to shape the ways in which they categorize objects and events, including social situations and other people, and these categorizations can in turn shape legal judgments concerning the conduct of other people.

(4) Processing Information – People in a positive mood tend to think more creatively and to be better at drawing associations and inductive reasoning, while people in a moderately negative mood tend to be somewhat better at analytical and deductive reasoning – people in happy moods tend to engage in looser, less systematic, less detailed, and less effortful thinking strategies than do people in negative moods whose cognitive style is characterized by tightening up – positive affect signals that a person's world is generally safe and secure, reducing the motivation to engage in cognitive effort unless required by the person's other goals, while negative affect motivates the person to change something about his or her world which inspires a more careful assessment of present conditions and their causal links and a more deliberate consideration of ways to change those conditions.

[Referring again to Feigenson]

T. CONCLUSION

Understanding blame is a vital part of being prepared for every aspect of your case, whether it be depositions, the filing of a response to a motion, picking a jury, cross-examining a witness at trial, or giving a summation. Blame and blameworthiness are at the central core of every civil and criminal trial.