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THE ANATOMY OF A MEDICAL MALPRACTICE VERDICT

Thomas M. O'Toole,* Bruce A. Boyd, and Theodore O. Prosise*****

I. INTRODUCTION

A commonly cited study conducted by the National Academy of Sciences Institute of Medicine in 1999 estimates that between 44,000 and 98,000 Americans die each year due to medical errors in hospitals.[1] The same study estimates that over 300,000 injuries are caused by medical errors each year.[2] A separate study conducted by HealthGrades, Inc., which rates hospitals for insurers and health plans, determined the figures proposed by the National Academy of Sciences Institute of Medicine were far too low, proposing instead that there are more likely around 195,000 annual deaths resulting from medical errors each year.[3] Despite frequent disputes regarding the accuracy of the figures, one can hardly question the fact that an impressive number of injuries and deaths are caused by medical errors in our country each year. Surprisingly, only a fraction of these errors result in claims against healthcare providers and, of those claims that make it to trial, less than one-third result in a plaintiff's verdict.[4]

In light of these statistics, why is there a need for an article focusing on the development of trial strategies for medical malpractice defendants? Despite the surprising success rate of defendants, defense attorneys still face

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1. Linda T. Kohn, Janet M. Corrigan & Molla S. Donaldson, *To Err is Human: Building a Safer Health System*, Natl. Acad. of Sci. Inst. of Med. Stud. 1, 1 (Natl. Acad. Press D.C., Nov. 2000).

2. *Id.*

3. Sen. Comm on Health, Educ., Lab. & Pens., *Medical Liability: New Ideas for Making the System Work Better for Patients*, 109th Cong. 5 (June 22, 2006). This 2004 study of Medicare records included all 50 states' records from years 2000–2002.

4. *Id.* at 6, 8.

an array of confounding factors that further complicate what are already emotional and opinion-laden issues.

First, medical malpractice litigation is a controversial issue, a frequent topic of public debate, involving strong opinions and emotions that can affect the strategies of both plaintiffs and defendants. Between constant media coverage and congressional initiatives aimed at tort reform, a significant portion of the population has formulated opinions on these issues, making it a very unique subset of tort claims.

Second, although the success rate of medical malpractice is half that of plaintiffs in other tort trials,[5] the median award in medical malpractice cases is nearly 16 times greater than that in other tort trials,[6] creating a total annual cost for defendant healthcare providers exceeding $500,000,000.[7] Many of the psychological factors discussed in this article speak to the manner in which jurors award damages.

Third, the majority of medical malpractice claims that result in payments include cases of significant or permanent injury, or death.[8] Human perception of, and reaction to, traumatic injuries is unique. The unexpected and seemingly random nature of traumatic injuries resulting from medical error places the injuries outside the realm of one's perceived control of the events surrounding him or her. The field of psychology has consistently shown that a perceived lack of individual control often causes the individual to scramble to make sense of an otherwise senseless event, often resulting in the use of one of the many cognitive heuristics discussed in this article.[9] For example, victim-blaming by the trier-of-fact often occurs as a function of the need to differentiate oneself from the victim to attain the psychological satisfaction that such an event "would never happen to me." As a result of the overwhelming psychological need of the trier-of-fact to calm herself into believing such an event would not happen to her, victim-blaming can occur even when the victim deserves no such blame.

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5. Thomas H. Cohen, *Medical Malpractice Trials and Verdicts in Large Counties, 2001*, Bureau of J. Statistics, U.S. Dept. of J., NCJ 203098 1, 1 (Apr. 2004).

6. *Id.* at 1.

7. *Id.* at 2 (estimated cost in 2001: $596,329,000).

8. Seth Oldmixon, *The Great Medical Malpractice Hoax: NPDB Data Continue to Show Medical Liability System Produces Rational Outcomes* 3, 3 (Laura MacCleery, Linda Andros & Barry Boughton eds., Pub. Citizen's Cong. Watch 2007).

9. *See* Elaine Walster, *Assignment of Responsibility for an Accident*, 14 J. Personality & Soc. Psychol. 73, 73 (1966); Kelly G. Shaver, *Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident*, 14 J. of Personality & Soc. Psychol. 101, 101 (1970); Neil Vidmar & Linda D. Crinklaw, *Attributing Responsibility for an Accident: A Methodological and Conceptual Critique* 6 Can. J. Behavioral Sci. 1112, 1112–1130 (1974); Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 Personality & Soc. Psychol. Bull. 563, 563 (1998); Claire Andre & Manuel Valesquez, *The Just World Theory*, Issues in Ethics (published by Markkula Ctr. for Applied Ethics) 2, 2–3 (Spring 1990).

Practically speaking, this need to make sense of the senseless introduces a host of psychological factors that function as filters for case facts in a manner that influences the final verdict. Consequently, the trial attorney may face a variety of "extra-legal" factors, factors outside the scope of the law, or case facts that influence the jury's decision-making process.[10] Although initially one might claim such factors introduce elements of "randomness," justifying many of the complaints espoused by tort reformers, this research and years of litigation-consulting experience point to numerous strategies for coping with such issues, and will thus lend a greater degree of predictability and control to trial outcomes.

Finally, academia has produced a wealth of literature that can inform trial strategies in the area of medical malpractice. However, practicing attorneys have difficulty staying abreast of such research, because these academic journals rarely target attorneys. This article seeks to combine the psychological and communicative research from the academic realm—which is often neglected as a result of the gap between the academic and legal fields—with the practical perspective of jury consultants to offer strategic advice previously unpublished.

This article seeks to shed light on the common beliefs and experiences that jurors bring to the table in medical malpractice cases, which influence their willingness and ability to embrace one party's case theory over the other. A study conducted by the National Law Journal revealed that 75% of jury-eligible citizens indicated they would act on their own beliefs as a jury regardless of the jury instructions and law.[11] It would be wise for any successful defense strategy to take this into consideration.

This article proceeds in several sections. First, the authors address some of the fundamental theories of jury decision-making. Next, the authors discuss what have been deemed "core issues" prevalent across an array of medical malpractice claims. These include: (1) the public perceptions and expectations of healthcare providers and of their relationships to patients, (2) a physician's testimony as a defendant, (3) an expert witness's testimony, (4) the perceptions of negligence and adverse outcomes, (5) comparative negligence, (6) the perceptions of injuries, and (7) damage awards. In presenting this information, the authors have relied upon extensive research conducted and published over the last 50 years, anecdotal experiences, and the time-tested, fundamental tenets of advocacy, persuasion, and communication that guide decision-making.

10. J. H. Davis, *Psychology and Law: The Last Fifteen Years*, 19 J. App. Soc. Psychol. 199, 199 (1989).

11. Will Lester, *Jurors Say They Follow Beliefs, Not Instructions*, Chi. Sun Times 37 (Oct. 24, 1998).

II. Three Key Theories of Juror Decision-Making and Courtroom Communication

In order to understand the issues addressed in this article, it is important to first understand the broader framework within which jurors make sense of a case and are persuaded by facts, testimony, and argument. The following three theories are advanced as fundamental building blocks upon which a successful trial strategy may be built.

A. *Audience-Based Communication*

Before jumping into the particulars of medical malpractice litigation, the first theory we address will lay the foundation for the latter two. At its simplest, perspectives on communication fall into one of two categories: a sender-based approach or an audience-based approach.[12] Sender-based communication focuses on the experience, knowledge, and beliefs of the sender and involves an implicit expectation that the audience will adapt to the sender in an effort to understand the message.[13] Audience-based communication, on the other hand, focuses more on the experience, knowledge, and beliefs of the audience,[14] inviting an organized effort on the part of the sender to adapt the message to the audience's needs to maximize comprehension and persuasiveness.[15]

Effective communication intended to persuade begins with an audience-centered approach. It is all too common for most of us, including lawyers, to fall into the trap of a sender-based communication perspective. The pitfalls of sender-based communication are exemplified in a study conducted by Elizabeth Newton in 1990.[16] In an experiment, Newton divided participants into two groups: tappers and listeners. Each tapper was instructed to choose a song and tap out the rhythm on the table to a listener. The listener was asked to guess the song based upon the rhythm. The experiment was conducted with 120 songs being tapped out. Listeners correctly guessed the song just under 3% of the time. However, when asked to predict the listeners' success rate before the tapping began, the tappers predicted the listeners would correctly guess the song 50% of the time. In short, the tappers effectively communicated their message one out of every 40 times.[17]

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12. Steven A. Beebe & Susan J. Beebe, *Public Speaking: An Audience Centered Approach* 1, 86 (5th ed., Allyn & Bacon 2005).

13. *Id.* at xvii.

14. *Id.* at 86.

15. *Id.*

16. Chip Heath & Dan Heath, *Made to Stick: Why Some Ideas Survive and Others Die* 1, 19 (Random H. Inc. 2007).

17. *Id.*

This experiment demonstrates a common problem with sender-based communication. The tappers are hearing the song in their own head as they tap, which is leading them to overestimate the ease with which listeners should be able to identify the song.

Similar problems arise at trial. By the time a case reaches a jury, the trial team is waist-deep in depositions, evidence, and briefs, which have been collected over a course of months or even years. The attorneys have thought through a plethora of conceivable issues that could arise at trial and have formulated responses. The case is engrained in their minds and, consequently, they can overestimate the ease with which jurors will understand their case. Attorneys have the benefit and the limitation of knowing too much about the case and the law, often resulting in too many layers of assumptions and presumptions about the messages sent to jurors.

So what tools do jurors use to evaluate cases, given the importance of an audience-based communication perspective? We advance two considerations. The first focuses on the role of narrative rationality. The second focuses on a social-scientific model of persuasion known as the Elaboration Likelihood Model.

B. The Narrative Model

In a recent mock trial, our clients were surprised to learn that mock jurors found two emails more persuasive than a statistically significant academic study, even though the emails and the study provided contrary conclusions.[18] One might think scientifically based evidence would be more compelling. But that was not the case. Why was the anecdotal evidence more persuasive than the scientific evidence?

A vast difference exists between technical or scientific reasoning and everyday, practical reasoning. And while there have been a multitude of theories of juror decision-making proposed by the various disciplines, it is commonly accepted, and empirically supported, that jurors make sense of case facts by employing narrative filters, known as the "story model."[19] Stories are part of our most basic and natural communication process, providing a principal way in which we learn and comprehend new ideas and information.[20] They are a basic tool of human reasoning and a means to

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18. Tsongas Litigation Consulting, *Northwest Juror Attitude Survey* (2003) [hereinafter *Juror Attitude Survey*]. Some observations cited in this article stem from mock jury and shadow research conducted for and during actual trials. For reasons of confidentiality, Tsongas Litigation Consulting, Inc. is unable to disclose the details of mock trials and shadow jury projects.

19. Nancy Pennington, *The Story Model for Juror Decision Making*, Inside the Juror: The Psychology of Juror Decision Making 192, 192–221 (Reid Hastie ed., Cambridge U. Press 1994).

20. *Id.*

arrive at a moral judgment.[21] A story provides a mechanism for jurors to make sense of complicated issues presented at trial.[22]

How does this account for the preference for anecdotal over statistical evidence? In short, emails may be compelling because ordinary people have more direct and concrete experiences with them, whereas, in general, they have little to no experience with scientific studies. The anecdotes are not complete stories, but they fit with jurors' cognitive schema for assessing information and make the evidence more accessible. The emails are easily translated into jurors' own experiences, which include their pre-existing personal stories. On the other hand, the relative dismissal of scientific evidence is consistent with a cultural narrative that one can "prove" anything with experts or statistics.

Because large amounts of information can overwhelm people, they are, in a sense, forced to attend to some information and screen out other information. While attorneys have been in the trenches dealing with boxes of evidence, facts, and case minutia for months or even years, jurors have limited time to consume, comprehend, and act on their perceptions. Jurors will try to sort through complex and confusing facts using basic narrative schemes.[23] It is important to provide a strong and compelling story to help jurors comprehend, organize, prioritize the details, and deem certain evidence more or less salient than other evidence. This is crucial to help them understand your case in the way that you want them to and allows them to articulate it to other jurors.

In very general terms, jurors assess stories, and thus themes and particular evidence, in terms of narrative probability and fidelity.[24] Probability refers to the likelihood of accuracy and believability of an event, account, evidence, or witness.[25] For example, is a witness's characterization of another person consistent with the observable behaviors of that person (e.g., his or her behavior on the stand)? Is a witness's account of why they took a particular action consistent with a juror's own experience in the same or similar circumstances? Is the characterization of a person consistent with case evidence of his or her behavior?

People also assess stories based on fidelity. Jurors use their attitudes and experiences to assess the case story. Will the case story "ring true" for jurors? Will the story align with jurors' experiences, attitudes, and values? If not, the case could lack credibility in their minds. When stories appear

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21. *Id.*

22. *Id.*

23. *Id.*

24. Walter Fisher, *Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action* 1, 47 (U. of S.C. Press 1987).

25. *Id.*

suspect, jurors often fall back on their pre-existing attitudes and biases. Quite often, in our mock trial deliberations, jurors make sense of a party's actions based on information not presented by either party. What they are doing is relating the credibility of an account to their own experience. They compare witnesses' actions to what they would do themselves, what they typically see others do, and what they believe should be done. Crafting a story that rings true to jurors establishes a connection with them. If people tend to seek out and pay attention to information that confirms who they are and what they believe, the converse may also be true. People will avoid and potentially dismiss information that is contrary to their values and beliefs.

An attorney must tell a story, whether or not he or she recognizes it. The question becomes, is the attorney a good and effective storyteller? If an attorney fails to provide a coherent and compelling story to the jurors, the jurors may invent their own—or worse, they may use the opposition's story to frame their understanding of the case and render their judgment. The goal is to capture the narrative imaginations of the jurors to provide and therefore control the framework within which the evidence will be organized in the jurors' minds and in deliberations.

Considerable care must be taken to craft a believable and compelling story. It is an inherently creative process. All cases have strengths and weaknesses. Compelling stories utilize the case's strengths and account for its weaknesses. The story-development effort should begin early in the litigation process, since having a good idea of the best story can help direct discovery and assist in the ongoing assessment of information. It can also help you successfully defend depositions. In other words, having a strong and compelling story from the start makes subsequent elements of the litigation process more efficient and even easier. Now that we have discussed the role of story-telling in jurors' decision-making process, we will turn our attention to a social-scientific theory that assesses how and why people attend to particular information intended to persuade them.

C. *Elaboration Likelihood Model*

The Elaboration Likelihood Model (ELM), a popular theory of persuasion, promises a useful framework for understanding how persuasion occurs within the courtroom. ELM suggests that individuals process messages through one of two cognitive routes: central or peripheral.[26] Each route affects the manner of change in one's attitude toward a message.

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26. Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 Advs. Experimental Soc. Psychol. 1, 123 (1986).

The central route refers to a process in which the individual engages the core message and evaluates the merits of it. Applied to the trial setting, this means a juror who cognitively processes information using the central route engages and evaluates the evidence against the applicable laws as dictated by the court, the attorneys, and the jury instructions.

On the other hand, the peripheral route refers to attitude changes based on a variety of low-effort processes.[27] This route focuses on cues other than the message itself as a means to evaluate the message.[28] Applying this again to the trial setting, a juror who cognitively processes information using the peripheral route draws on peripheral cues, possibly including extralegal factors, which exert undue influence during the formation of that individual's beliefs and attitudes towards the case.

At the heart of ELM lies the issue of motivating factors for cognitive processing routes. ELM researchers believe the route through which the information is processed by an individual is largely determined by that individual's motivation or ability to process the message.[29] Individuals who are both motivated and able to process a message will use the central route while others will rely upon peripheral cues to guide the formation of their attitudes.[30]

ELM research has consistently shown that the strength and longevity of attitudes resulting from central processing are significantly more prevalent than attitudes resulting from peripheral processing.[31] A natural extension of this finding is that jurors who are motivated and able to process information at trial in a way that favors the trial team will be more inclined to exert greater influence in the deliberation room.

The first issue the trial team must address is the motivation to process the message. Regardless of whether or not a juror is able to elaborate information at trial, he or she will not be your advocate in the deliberation room unless the motivation exists to do so. This places the burden on the trial team to establish psychologically satisfying outcomes that favor their client. In other words, what can the jury feel good about if a verdict is rendered in favor of the client? Why is the verdict meaningful to them?

The second issue to address is the jurors' ability to process the message. Research over the past few decades has shown that when message comprehensibility is low, peripheral cues play a significantly greater role in

27. *Id.* at 41–72.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

the formation of attitudes towards the message in question.[32] As the complexity of the message increases, adding to the complexity of comprehension, peripheral routes become more useful to jurors.

Credibility may be the key factor.[33] A likeable physician on the witness stand may steer jurors toward a verdict for the defense. In this case, jurors might find it difficult to render a verdict against a physician they believe is a good person. An unlikable physician may offer an easy route to a verdict for the plaintiff, regardless of the standard of care provided.

Additionally, when evidence and witness testimony is not accessible to the jury, they will look elsewhere for guidance in interpreting the case issues. This is where extra-legal factors tend to exert undue influence in the decision-making process, and potentially where the jury begins to embrace the other side's story.

Recently, an attorney in a medical malpractice trial—one with a very distinguished career representing defendants in medical malpractice litigation—rigorously examined the expert witnesses covering all the minute details of the case. Although it was quite an impressive display of his medical knowledge, the information was communicated in a manner that made it inaccessible to the jurors. During the post-trial interviews, jurors commented frequently on how impressed they were with the attorney's knowledge on the medical issues. However, despite their awe, they were unable to adequately understand the complex medical issues that were being discussed. Jurors consistently exclaimed their regret that the attorney had not asked the experts to explain the complex medical issues in simple terms. Unfortunately in these situations, if jurors do not adequately understand the case issues, they are not equipped to argue your case in the deliberation room.

Motivation and the ability to process are crucial components of persuasion.[34] Consequently, both are vital aspects of an audience-based view of courtroom communication. However, because a jury is made up of several individuals, as opposed to just one, there is an additional component that must be addressed. Once a juror is motivated to embrace a case theory, she must possess the means to be your advocate. Successful trial strategies are those that put a juror in a position to persuade other jurors in the deliberation room. This requires that the juror be provided with the language and explanations to effectively argue the case to others. The natural human tendency—when lacking the confidence to articulate an opinion—is to re-

32. S. Ratneshwar & Shelly Chaiken, *Comprehension's Role in Persuasion: The Case of Its Moderating Effect on the Persuasive Impact of Source Cues*, 18 J. Consumer Research 52, 60 (1991).

33. *Id.*

34. Petty & Cacioppo, *supra* n. 26.

main relatively silent. Silent advocates do not often lead to favorable verdicts.

D. Summary of Theories

Understanding and embracing these three basic theoretical perspectives offers medical malpractice attorneys the essential foundation for developing an audience-centered case narrative. An organized narrative motivates and arms jurors to understand and process critical case information in a manner more favorable to the defense.

One final note should be made before we proceed to a discussion of specific issues involved in medical malpractice litigation. Much has been said regarding the competence of today's juries. The media, aided by tort reformers and industry lobbyists, often casts jurors as irrational, emotional beings, not competent enough to make important decisions.[35] Such claims typically rely on anecdotes that involve incomplete or inaccurate summaries of seemingly outlandish lawsuits (e.g., the "McDonald's coffee" case).[36]

Setting aside the research that shows little variance in how jurors assess cases as opposed to attorneys, experts, or judges,[37] in literature about juror competence, we fail to see questions about attorney performance. Far from an effort to attack lawyers, this is simply a recognition that a more productive model of litigation communication and strategy is one that places the burden on the attorney to recognize and adapt to the jurors—to consider the nature of the communication process. This article is not intended as an indictment of juror competence. Instead, it is meant to shed light on some of the ways in which jurors cognitively filter information as persuasion occurs. Indeed, in many ways these processes are no different from those human communication processes employed by judges, mediators, arbitrators, and other experts in the field. Our experience is that jurors work hard to render fair verdicts and that they are collectively competent enough to render reasonable decisions on complex matters. What jurors need from attorneys are cognitive devices that help them filter, emphasize, and de-emphasize the tremendous amount of information that bom-

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35. Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues?: Some Data from Medical Malpractice*, 43 Emory L.J. 885, 887 (1994).

36. In 1992, an elderly woman suffered third-degree burns from coffee purchased at a McDonald's restaurant. Common stories portrayed the lawsuit as frivolous, often describing it as a case of a woman who spilled coffee on herself. To the contrary, the temperature of the coffee was so hot, that the coffee disintegrated the styrofoam cup it was served in, causing injuries to the woman that resulted in an eight-day stay at the hospital. *See Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994).

37. Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, 76 Judicature 118, 118–119 (1992); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 Annals of Internal Med. 780, 780 (1992).

bards them over the course of the trial. This will help jurors participate meaningfully in deliberations.

III. Perceptions and Expectations of Doctors, Hospitals, and Healthcare Providers

Juror perceptions and expectations of doctors, hospitals, and healthcare providers are some of the most important factors jurors use to arrive at a verdict. As noted earlier, jurors assess case narratives in terms of fidelity.[38] A key feature of this process involves determining to what extent the attorney's narratives conform to jurors' own experiences and expectations. Consequently, it is important to understand the expectations and experiences jurors bring into the courtroom. While much of this should be addressed through jury selection, there are some broader societal expectations one can anticipate as he or she crafts the case narrative. The following section draws upon years of jury research as well as prior industry research.

A. *General Attitudes About Healthcare Providers*

In 2003, Tsongas Litigation Consulting, Inc. conducted a survey of jurors from the Northwest.[39] Over 600 jury-eligible citizens from six states (Alaska, Washington, Oregon, Idaho, Utah, and Montana) participated in the survey. Participants were questioned on a variety of topics, including medical malpractice.

When asked to rate the quality of care provided by our nation's healthcare system, approximately 22% rated the quality of care as poor while over 75% rated it as fair, good, or excellent.[40] However, when asked whether "the quality of care provided by our nation's healthcare system has gotten better, gotten worse, or stayed the same in the past five years," over 40% of the survey respondents indicated a belief that the quality of care has gotten worse.[41]

Research has shown attitude formation derives, in part, from personal experience.[42] Consequently, these changing public attitudes and experiences could pose hurdles for defendants in medical malpractice litigation, as plaintiff narratives typically adopt themes that appeal to the negative experiences and subsequent stereotypes about particular healthcare provid-

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38. Fisher, *supra* n. 24, at 47.
39. *Juror Attitude Survey*, *supra* n. 18.
40. *Id.*
41. *Id.*
42. Murray G. Millar & Karen U. Millar, *The Effects of Direct and Indirect Experience on Affective and Cognitive Responses and the Attitude-Behavior Relation*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 561, 561 (1996).

ers. When successful, this can allow the plaintiff to have the "simple story." When a plaintiff has the "simple story," the defense typically faces a higher educational burden of the technical issues, which demands greater motivation on the part of the jurors to both comprehend the details of the case and filter them in a manner that allows them to function as articulate defense jurors in the deliberation room.

Finally, when asked which side they would tend to lean toward at the start of the trial, 38% of the respondents indicated they would favor the plaintiff, while only 28% indicated the defendant doctor.[43] While some of these troublesome attitudes can be resolved within the confines of jury selection, defense attorneys should be conscious of these public attitudes because they reveal some of the hurdles faced in the development of the defense narrative.

B. *The Identity and Reputation of the Healthcare Provider*

Juror attitudes toward healthcare providers vary according to the identity of the provider. The 2003 Tsongas Northwest Juror Attitude Survey asked jurors to indicate how caring different types of healthcare providers are towards their patients' health and well-being.[44] Almost 90% of the respondents rated doctors as "somewhat caring" or "very caring" while close to 95% placed nurses in those two categories.[45]

The picture changed, however, when it was broadened to organizational entities. The percentage of respondents selecting "somewhat caring" or "very caring" decreased to 83% when asked about hospitals, 37% for health-insurance companies, and 31% for HMOs.[46] When asked to rate the level of ethical standards within the healthcare industry, over 30% of the respondents indicated "somewhat unethical" or "very unethical."[47] These statistics support the author's own anecdotal experiences and focus group research on specific malpractice matters.

These statistics should be of concern to defendant hospitals, especially HMOs and health cooperatives. A variety of explanations for the difference in public attitudes exists. First, it is easier to place blame on a faceless organization than it is on an individual. After all, many have a common public attitude that a corporate entity stands to gain the most financially by "cutting corners." Second, research shows that juries award higher damages when the defendant is a corporation than when it is an individual—a

43. *Juror Attitude Survey*, *supra* n. 18.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

finding attributed to the perception that a corporation has "deep pockets" and can afford to compensate the plaintiff.[48] Where this attitude prevails, sympathy for the plaintiff becomes easier and therefore more significant in deliberations.

Because most medical malpractice claims are litigated within the community in which the healthcare provider is located, many jurors will have knowledge of and have formed attitudes about the defendant based upon personal experiences, stories from friends and family, and local media accounts related to the provider. Since a key aspect of a persuasive case is narrative fidelity—or how well the plaintiff or defense narrative fits within the jurors' personal experiences and prior knowledge—a defendant healthcare provider should understand its unique reputation within the community. Common attitudes and experiences have the potential to make plaintiff or defense narratives more compelling. For example, a history of backlogged waiting rooms in emergency care departments makes it more believable that a plaintiff suffered injuries as a result of neglect, and consequently malpractice, while waiting to receive urgent care.

Organizations such as hospitals and rehabilitation centers should first assess the degree of community awareness of their purpose and services. Most jurors will likely have some knowledge and experience with large hospitals. However, fewer jurors will have knowledge of smaller, specialized healthcare providers such as rehabilitation centers and eye-care clinics. In either case, most jurors will not be acquainted with specific individual doctors and nurses, whether the organization is large or small. However, these jurors may draw conclusions about them based upon their organizational associations. For example, a juror with a negative personal experience at a county hospital may draw critical conclusions about a doctor who practices at that county hospital despite the lack of any direct experience with the doctor in question.

Other issues to consider are the amount of media coverage, the nature (positive or negative) of such coverage, and commonly communicated personal experiences of community members. Such issues can be assessed through a community-attitude survey, which should be brought to bear on the development of the case narrative.

48. Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 Judicature 242, 243 (1996); Valerie P. Hans & M. David Ermann, *Responses To Corporate Versus Individual Wrongdoing*, 13 L. & Hum. Behav. 151, 153 (1989); *see generally* Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 L. & Socy. Rev. 121, 121 (1996).

C. *Get Them In and Out the Door (But Make Sure They Wait!)*

While it is certainly difficult to model the "typical" patient experience, there are several "typical" experiences that perpetuate commonly held stereotypes about the quality of healthcare, and particularly, emergency care. These stereotypes, in turn, influence jurors' willingness to accept or reject particular narratives in medical malpractice litigation. A close look at these experiences and stereotypes can aid defense attorneys in overcoming barriers to a successful defense narrative.

A recent study found a 4% increase from 1997 to 2004 in patient waiting time for emergency care.[49] The study indicated an average waiting time for emergency care of 30 minutes in 2004 compared to 22 minutes in 1997.[50] For patients experiencing heart attacks, the average waiting time in 2004 was 20 minutes, up 12 minutes from 1997.[51] While these statistics may seem sensible to the average emergency-room worker, the figures are shocking to the average person placed in such circumstances. It is a well-documented fact that waiting time only increases the likelihood of death.[52] The resulting stereotypes are compounded by the emotions involved in scenarios where a loved one is seemingly being denied critical care—or worse yet, neglected.

These attitudes regularly manifest themselves in our mock-jury research. The stereotypes only worsen when the healthcare provider is an HMO or cooperative, both of which are commonly perceived as having greater backlog than the average hospital.

Finally, one of the most commonly reported negative experiences with healthcare providers is the lack of attention provided to the patient.[53] Specifically, many patients complain that healthcare providers quickly push them in and out the door at great expense. This is perpetuated by the fact that healthcare providers are businesses that seek to maintain a positive profit margin by admitting more and more patients. This is particularly true with HMOs and health cooperatives, which are often perceived as over-

49. Miranda Hitti, *Emergency Room Waits Getting Longer: Crowded Emergency Departments Part of the Problem, Study Shows*, CBS News (Jan. 15, 2008), http://www.cbsnews.com/stories/2008/01/15/health/webmd/main3717410.shtml.

50. *Id.*

51. *Id.*

52. *Recognizing Heart Attack Symptoms Early and Calling 911 Increases Survival Rate*, Med. News Today, http://www.medicalnewstoday.com/articles/22201.php (Apr. 3, 2005).

53. Allen D. Spiegel & Florence Kavaler, *Better Patient Communication Mean Lower Liability Exposure*, http://www.managedcaremag.com/archives/9708/9708.reducerisks.html (last accessed Aug. 1, 1997).

crowded, resulting in strained resources and limited interactions with the actual physicians.[54]

D. The "Magic Bullet"

One of the most prevalent and overarching issues a defense attorney must deal with in medical malpractice litigation is the "magic bullet" expectation. We use this phrase to refer to a general public expectation that one must simply make it to the hospital where the cure to the medical emergency is all but assured. In 2000, the then-president of the American College of Physicians commented on such unrealistic expectations, attributing them primarily to media portrayals of the medical profession, along with "slick" radio and television advertising for medical institutions, which often suggest that a simple visit to their facilities can lead to a cure.[55]

Several studies have identified the media as the most significant source of health information for the general public.[56] A poll of Americans conducted by the National Health Council in 1997 found that people obtain more health information from television than from their own physicians.[57] While there are positive aspects to these findings, problems arise when the public attempts to reconcile reality with media portrayals of healthcare.

Recent media research has reported a common phenomenon where the general public confuses media representations for actual reality.[58] Unfortunately, the gap between the media representation and reality widens when it comes to healthcare.[59] As with most news items, health reports and stories are often selected by a news program based upon their sensationalism. Furthermore, the reporting often fails to include important details that would aid the general public's understanding of the issue.

Popular medical dramas such as *ER*, *House*, and *Grey's Anatomy* further complicate the issue by portraying extraordinary tales of heroism and

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54. Kaiser Public Opinion Spotlight, *The Public, Managed Care, and Consumer Protections*, http://www.kff.org/spotlight/managedcare/upload/Spotlight_Jan06_ManagedCare.pdf (last updated Jan. 2006).

55. Whitney W. Addington, *What We Can Do to Help Patients Keep Their Expectations Realistic*, http://www.acponline.org/journals/news/jan2000/realistic.htm (last accessed Mar. 4, 2008).

56. *See* Megan MacDonald & Laurie Hoffman-Goetz, *Cancer Coverage* in *Newspapers Serving Large and Small Communities in Ontario*, 92 Can. J. Pub. Health 372 (2001); Maria Carlsson, *Cancer Patients Seeking Information from Sources Outside the Healthcare System*, 8 Supportive Care in Cancer 453 (2000).

57. National Health Council, *Americans Talk about Science and Medical News: The National Health Council Report* (Roper Starch Worldwide 1997).

58. C. Wright Mills, *The Cultural Apparatus*, in *Power, Politics, and People: The Collected Essays of C. Wright Mills* 407, 407 (Irving Louis Horowitz ed., Oxford U. Press 1963); Gabriel Weimann, *Communicating Unreality: Modern Media and the Reconstruction of Reality* 1, 15 (Sage Publications 2000).

59. Gabriel Weimann & Eimi Lev, *Mass-Mediated Medicine*, 8 Isr. Med. Assn. J. 757, 758 (2006).

rare failure in emergency rooms, which often conflict with the reality of most medical scenarios.[60] For example, an often-cited study in the New England Journal of Medicine found that television portrayals of cardiopulmonary resuscitation suggest a survival-to-discharge rate of 77%.[61] However, actual survival rates are closer to 40%.[62]

These factors pose significant hurdles for defense attorneys assigned with the task of providing jurors with adequate and compelling explanations that otherwise violate the jury's expectations produced by popular media portrayals. The trial setting further complicates this issue by introducing the element of hindsight bias,[63] coupled with the testimony of plaintiff experts who demonstrate with great ease how most care-providers would have traversed the pitfalls of the medical emergency in order to achieve a successful outcome.

Another dimension of the public's heightened expectations of healthcare providers relates to advancements in medical technology over the past 50 years. Researchers from the University of California argue that "the socio-cultural landscape that features enormous faith in bio-scientific advances and medical breakthroughs" focuses the expectations of plaintiffs and their families on the "best-case scenario of what is clinically possible."[64] In this research, they found older Americans often have a "presumption that emerging therapies and medical technologies can and will make their lives longer and better into an indefinite future."[65]

IV. The Patient-Doctor Relationship: Would I Want Them as My Healthcare Provider?

One of the most import aspects of the patient-doctor relationship is communication. Research has repeatedly shown that adequate and effective communication between the healthcare provider and the patient can significantly reduce the likelihood of a malpractice claim.[66]

Trial lawyers must seek physicians that effectively communicate in a competent and caring manner. As a juror evaluates a defendant physician, a

60. Susan J. Diem, John D. Lantos & James A. Tulsky, *Cardiopulmonary Resuscitation on Television: Miracles and Misinformation*, 334 New Eng. J. of Med. 1578, 1578–1579 (1996).

61. *Id.*

62. *Id.*

63. Neal Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* 62, 62–63 (Am. Psychol. Assn. 2000).

64. Janet K. Shim, Ann J. Russ & Sharon R. Kaufman, *Clinical Life: Expectation and the Double Edge of Medical Promise*, 11 Health: An Interdisciplinary J. for the Soc. Study of Health, Illness and Med. 245, 260 (2007).

65. *Id.*

66. Wendy Levinson et al., *Physician-Patient Communication: The Relationship with Malpractice Claims Among Primary Care Physicians and Surgeons*, 277 JAMA 558, 558 (1997).

key question considered is the likelihood the juror would want the defendant physician as his or her own. Consequently, jurors will apply their expectations to the healthcare provider on the stand, making judgments about his competence and the quality of care provided by the defendant.

Practically speaking, this means a defendant physician must come across as caring, considerate, patient, and one who takes time to help their patients understand. This image is best established on the witness stand. However, jurors will also watch the behavior of the defendant at the defense table. This latter point is particularly important as it can often be difficult for defendant physicians to control their emotions and reactions throughout an entire trial, while opposing counsel parades through expert after expert indicting the competence and character of the defendant.

V. Physicians as Defendants and Expert Witness Testimony

A. *Message Complexity*

The nature of information surrounding questions of medical malpractice can seem complicated and highly technical to most jurors. Issues of liability, negligence, proximate cause, etc., tend to involve legal standards and language that makes it difficult for a layperson to immediately grasp. Additionally, jurors are asked to sort through and contrast complex medical concepts and terminology offered by competing expert witnesses.

Research has shown the use of technical or complex language often lowers the message comprehension rate among an audience. These findings are not surprising: as the unfamiliarity of language increases, the ability to understand the message decreases. Consequently, as message comprehension among an audience decreases, persuasion or attitude changes are likely the product of an over-reliance on peripheral cues and routes.[67]

This should send an important message to defense attorneys as they work with their expert witnesses and defendant physicians. The ELM model presented at the beginning of this article indicates that, when jurors fail to understand the message being conveyed by an expert witness, they will revert to peripheral sources of persuasion.[68] One study found that when a message has low comprehensibility, participants tended to cite the credibility of the source as a primary reason for the acceptance of the message.[69] However, when the message had high comprehensibility, the mes-

67. Ratneshwar, *supra* n. 32, at 60.

68. *Id.*

69. *Id.*

sage itself was cited as a primary reason for the participants' acceptance of the message.[70]

This fact can benefit the defense, if the defense has highly qualified experts. We would not, however, recommend that a defense attorney rely solely on credentials, as jurors might focus on other peripheral cues such as the "simple story" set forth by the plaintiff.

An attorney can employ several strategies to improve persuasiveness when preparing expert witnesses and defendant physicians. First, the witness should evoke the image of a caring and patient, but firm educator. This means that the witness should take time to carefully walk jurors through the testimony, without being overly aggressive or defensive. Rather than insisting outright that the assumptions embedded within the questions of the plaintiff's counsel are wrong, the witness should be understanding of the ease with which such erroneous assumptions can occur, explain to the jurors why they are incorrect, and patiently explain why the opposing counsel is "misunderstanding" or "oversimplifying" an issue.

Some of the best physician or expert testimony occurs when these witnesses interact with visual aids. It is a widely accepted and empirically supported maxim that visual presentation of information combined with oral presentation increases information and message recall.[71] This becomes important in litigation where the goal is to arm jurors with a thorough understanding of the information that allows them to rearticulate and advocate for the client in the deliberation room. Additionally, the complexity of expert medical testimony, visual aids, and the witness's interaction with them can keep jurors interested and alert throughout the testimony.

B. Credentials and Competing Experts

As noted in the previous section, the credentials of experts certainly matter. However, each side often presents experts with equally impressive credentials. Parity among experts can make it difficult to draw distinctions in credibility based upon credentials alone. Additionally, research shows that jurors are well aware of the nature of the adversarial system, where each side attempts to find highly-qualified experts who will support its position.[72] How then do jurors sort through the expert testimony in these scenarios?

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70. *Id.* at 53, 59.

71. *See generally* L. Oppenheim, C. Kydd & V. P. Carroll, *A Study on the Effects of the Use of Overhead Transparencies on Business Meetings* (Ctr. Applied Research 1981) [hereinafter *Transparency Study*]; Douglas R. Vogel, Gary W. Dickson & John A. Lehman, Persuasion and the Role of Visual Presentation Support: The UM/3M Study (Mgt. Info Sys. Research Ctr. 1986) [herinafter *UM/3M Study*].

72. Vidmar, *supra* n. 37, at 126.

Our experience with "shadow" jury projects—research projects where eligible citizens from the venue are hired to watch the entire proceedings of the actual trial to provide attorneys with the jurors' perspective in daily debriefings—reveals some of the ways in which jurors sort through competing testimony. The first approach in dealing with competing expert testimony is to judge it by its simplicity and fidelity.[73] We have previously mentioned fidelity in the sense that jurors are persuaded by messages that conform to their own life experiences.[74] From this, we can conclude that when an expert's testimony is consistent with a juror's personal experiences, the jurors will be more inclined to accept that expert's testimony over the testimony presented by the other side.

Medical malpractice litigation, however, often contains expert testimony that involves issues outside most jurors' experience. Another factor particularly relied upon in these situations is the simplicity of the testimony and the ease with which it is understood.[75] Jurors will opt for the testimony that seems to make the most sense. In other words, the testimony that requires the least effort to grasp and fits within that side's overarching narrative will be adopted as the likely explanation for what occurred.

A final factor that jurors often evaluate when sorting through competing expert testimony is one that has not been addressed in prior research. Often shadow jurors express a desire for the testimony of experts who are "in the trenches."[76] For example, in the instance of fetal monitoring strips, many jurors will prefer the testimony of a local OB-GYN who reads strips everyday over that of a Harvard faculty member whose work is primarily confined to the academic realm.[77]

VI. Negligence, the Standard of Care, and Adverse Outcomes

In our experience, we have found that the standard of care is perhaps the most difficult aspect of medical malpractice litigation for jurors to understand. This should concern attorneys because standard of care lies at the heart of these claims. As Vidmar has suggested, "[T]he determination of professional liability is not easily made by laymen."[78] This is further compounded by the fact that most experts fail to reach agreement in medical malpractice litigation.

73. Fisher, *supra* n. 24, at 47.

74. *Id.*

75. Ratneshwar, *supra* n. 32, at 60.

76. *Juror Attitude Survey*, *supra* n. 18.

77. *Id.*

78. Vidmar, *supra* n. 35, at 889.

Public expectations of medicine are high for a variety of reasons.[79] This can prove problematic when considering the standard of care. In our experience, juror expectations often exceed what is professionally and legally considered to be the standard of care. This disconnect between expectations and the actual standard of care can be attributed to hindsight bias,[80] a lack of juror appreciation for the availability of resources, as well as a general belief that any and every possibility should be explored when one is dealing with a serious medical condition.

It becomes particularly challenging to prove a defendant healthcare provider met the standard of care in instances where an injury or death could have been prevented by taking measures beyond the standard of care. This presents an interesting trap for defense attorneys as jurors easily get caught up in the question of what would or could have prevented the injury as opposed to whether or not the physician practiced with the appropriate standard of care.[81] Put simply, as the "Magic Bullet" theory suggests, jurors want to believe medicine is a perfect science. Therefore, it can become difficult for them to accept that the standard of care only requires a physician to provide "average" or "reasonable" care.

Another aspect of the standard of care is the recognition that medical errors and adverse outcomes are part of the practice.[82] Medical error, as opposed to negligence, is one of the most difficult types of medical malpractice to defend.[83] It is extraordinarily difficult for jurors to understand that a physician can commit an error that causes injury but can still meet the standard of care.[84] A well-known study conducted at the University of Missouri revealed a 31% error rate in interpreting radiology reports, regardless of the experience of the radiologist.[85] These findings were not unique to this study. There have been numerous studies published since the Missouri study affirming the findings.[86] Put simply, radiologist error is an accepted possibility within the field of radiology. Reasonable, competent radiolo-

79. Addington, *supra* n. 55.

80. Douglas Zickafoose & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 No. 5 L. & Human Behavior 577, 580 (1999).

81. D. Kahneman & D. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 No. 2 Psychol. Rev. 137, 137 (1986) (where the authors address the general issue of how individuals determine the cause of accidents by retroactively deconstructing an accident to discover alternative courses that would have prevented an adverse outcome).

82. Leonard Berlin, *Defending the "Missed" Radiographic Diagnosis*, 176 Am. J. Roentgenology 317, 320 (Feb. 2001).

83. *Id.* at 320, 322.

84. *Id.* at 320.

85. J.L. Lehr et al., *Direct Measurement of the Effect of Film Miniaturization on Diagnostic Accuracy*, 118 Radiology 257, 257 (1998).

86. *Id.*

gists can differ on the significance of shadows and structures revealed on the film.

Unfortunately, what is accepted in the field of medicine is not commonly accepted by the public, making instances of medical error or adverse outcomes particularly difficult to defend. In our experience, the most successful strategies—with respect to these cases—focus on the consent form and require the defense to carry a tremendous educational burden.

VII. Comparative Negligence and the Plaintiff

Issues of comparative negligence and contributory fault are fairly uncommon in medical malpractice when compared to other types of litigation. Nonetheless, jurors in medical malpractice cases commonly consider how the plaintiff may have contributed to his or her own injuries. The driving assumption behind such considerations is that one's health tends to be the product of one's own life choices. Consequently, jurors tend to be more critical of medical malpractice plaintiffs who make poor or unhealthy choices.[87] For example, an obese smoker might face greater scrutiny by jurors than a thin, non-smoker. However, these considerations need not be confined simply to the physical characteristics of the plaintiff.

The past 20 years has brought about a revolution in the relationship between the healthcare provider and the patient. Specifically, patients have taken a more active role in their own care.[88] With this change, societal expectations for the role played by the patient have also evolved to incorporate the patient as an active participant in the healthcare process.[89]

The following section highlights two ways in which comparative negligence can impact the plaintiff's claims in medical malpractice litigation.

A. *Elective Procedures*

Elective procedures are initiated at the request of the patient. In that respect, the procedures are quite different than the typical circumstances warranting medical care, where the patient has a reduced level of personal control. Within the context of malpractice litigation, this introduces a host of unique factors that may change the dynamics of how jurors assign responsibility for the outcome.

87. Thomas Michael O'Toole, *An Analysis of Factors Associated with Responsibility Attribution in Incidents of Medical Malpractice* (unpublished dissertation, U. Kan., 2007).

88. Sharon W. Murphy, *Contributory Negligence in Medical Malpractice: Are the Standards Changing to Reflect Society's Growing Healthcare Consumerism*? 17 U. Dayton L. Rev. 151, 151–152 (1991–1992).

89. *Id.*

Research shows the degree of responsibility for the injuries sustained in a medical procedure attributed to the physician is significantly lower in instances where the patient had some perceived control over the procedure.[90] This research focused on a scenario in which a physician—who later admitted to the error—damaged a facial nerve of a patient by improperly implanting a needle while attempting to inject a local anesthetic. It found that, as participants' perceptions of the electiveness of a medical procedure increased, the amount of responsibility attributed to the physician performing the surgery decreased.[91] In instances where the procedure was perceived as elective, the participants indicated the patient who opted for the elective surgery should shoulder some of the responsibility for the resulting injuries.[92]

What is particularly interesting about this research is that it involved a scenario in which the physician admitted error. One possible explanation for this phenomenon may be that it was the product of "counterfactual thinking." Neal Feigenson described counterfactual thinking as instances where "people trying to identify the cause or causes of some outcome imagine scenarios other than the one that actually occurred by 'undoing' or 'mutating' one or more of the events that preceded the outcome. They imagine: 'if only x had been different, the outcome would have been different.'"[93] Feigenson noted that the more readily identifiable the alternative scenario, the more likely people will focus on the varying factor when allocating responsibility.[94] In instances of elective procedures, the decision to undergo an "unnecessary" surgery is an obvious, and therefore, easily identifiable focal point. Additionally, the element of electiveness, as related to the outcome of the trial, offers jurors an opportunity to distinguish themselves from the plaintiff, allowing for "victim-blaming."[95]

The practical implication is that defense attorneys should look for instances in which the plaintiff made choices that contributed to the outcome. A delicate balance needs to be maintained as defense attorneys seek to avoid juror backlash from overly aggressive efforts to blame the plaintiff. However, focusing on plaintiff choices such as engagement in unhealthy behaviors, can provide avenues for either reducing the liability of the defendant or the damages awarded to the plaintiff.

90. *Id.*

91. *Id.*

92. *Id.*

93. Ratneshwar, *supra* n. 32, at 53.

94. *Id.*

95. Walster, *supra* n. 9, at 73–74.

B. The Impact of Comparative Negligence

While the issue of damages will be discussed in much greater detail towards the end of this article, some discussion is warranted within the context of comparative fault. Research has identified a phenomenon called "double-dipping."[96] "Double-dipping" refers to instances where jurors decrease the overall damage awards by determining that the plaintiff was comparatively at fault.[97] Zickafoose and Bornstein constructed a study where jurors were asked to award damages to a plaintiff who was the victim of medical malpractice. Liability was predetermined and three scenarios represented varying levels of the plaintiff's contributory negligence (0%, 20%, and 40%).[98] The study found that the overall damage awards decreased as the plaintiff's contributory negligence increased.[99] This study also highlights an earlier point: that a contributory negligence question does not have to be present on the verdict form for perceived negligence by the plaintiff to influence a jury's verdict.[100] In these instances, if defense attorneys can successfully weave narratives that imply fault on the part of the plaintiff, it may lead to reduced damages on the verdict form. Again, attorneys should be warned of the risks of juror backlash from overly aggressive attempts to cast blame on the plaintiff. It is critical for a defense attorney to carefully consider whether or not he or she has "earned the right" to point the finger at the plaintiff over the course of the trial.

VIII. INJURIES

A. The Psychology of Traumatic Injuries

Research contends that medical malpractice cases exist as distinct phenomena because they involve a lesser degree of control over situational elements.[101] Consequently, because of the specialized knowledge required to make decisions concerning medical recommendations or procedures, patients frequently perceive themselves as ceding control to their physicians. Research suggests that situational similarity may also be at work in separating medical malpractice cases from matters such as automobile accidents.[102] Specifically, the research argues that "because nearly everyone has at some point made a mistake behind the wheel, jurors plausibly also

96. Zickafoose & Bornstein, *supra* n. 80, at 578.
97. *Id.*
98. *Id.* at 582.
99. *Id.*
100. *Id.* at 586.
101. Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 L. and Contemp. Probs. 31, 33 (1991).
102. *Id.* at 31, 33.

empathize more with defendant drivers than with defendant doctors."[103] In summary, unfamiliarity and a lack of control are often two key characteristics in medical scenarios. This is significant because, as jurors sort through the case issues in an attempt to make sense of the facts and assertions, they often place themselves in the shoes of the plaintiff. This can have significant implications for a defendant healthcare provider.

A commonly accepted approach to understanding human behavior is the self-regulation theory.[104] This theory suggests:

> [T]o the extent that people are driven by internal goals concerned with the exercise of control over their environment, they will seek to reassert control in conditions of chaos, uncertainty, or stress. Failing genuine control, one coping strategy will be to fall back on defensive attributions of control—leading to illusions of control.[105]

Self-regulation theory offers important insight into jurors' reactions to cases involving traumatic injuries. For example, if a juror finds significant positive relationship between the severity of injuries sustained in accidents and the amount of responsibility or blame associated with the victim, "defensive attribution" may occur.[106] Defensive attribution occurs when an individual feels inclined to differentiate himself or herself from the victims of medical malpractice and accidents in general. The individual reasons that, as injury severity increases, it becomes more and more unpleasant to acknowledge that such accidents could also happen to him or her.[107] Sometimes this translates to the phenomenon referred to before as "victim-blaming."[108] It functions as a defensive mechanism, offering the observers a certain degree of comfort to know that because they are different from the victim in question, the same accident is unlikely to occur to them.[109]

In 1970, Shaver tested the underlying assumptions of the theory of defensive attribution.[110] Shaver failed to replicate Walster's findings concerning the relationship between outcome severity and attribution of responsibility.[111] The research did, however, reveal a significant relationship between perceived personal similarity to the victim and attributions of responsibility.[112] Specifically, Shaver found that greater perceptions of similarity between the victim of the accident and the observer led the observer

103. *Id.* at 33, n. 108.

104. Mark Fenton-O'Creevy et al., *Trading on Illusions: Unrealistic Perceptions of Control and Trading Performance*, 76 J. of Occ. and Org. Psychol. 53, 55–56 (2003).

105. *Id.* at 65.

106. Walster, *supra* n. 9, at 73–74.

107. *Id.*

108. *Id.*

109. *Id.*

110. Shaver, *supra* n. 9, at 101.

111. *Id.* at 102.

112. *Id.* at 101.

to become more lenient in allocating responsibility.[113] These findings are consistent with the theory of defensive attribution, suggesting that when an observer relates to the victim, he or she is less willing to attribute fault to the victim.

The reason for such an occurrence is straightforward: "People need to believe that serious accidents could never happen to them, or if they could, that no one would ever blame them for the consequences."[114] This would lead us to believe that in instances where there are perceived similarities between the victim of an accident and the observer, the observer is more likely to attribute fault to someone other than the victim.

B. *Severity Effects and Juror Sympathy*

Research has shown a strong relationship between the severity of injuries sustained in an accident and the amount of responsibility one attributes to the parties involved in the accident.[115] Specifically, as the severity of injuries increases, so too does the amount of responsibility assigned to those involved.[116] While there have been few attempts to examine the influence of severity within the context of medical malpractice litigation, the anecdotal evidence suggests it does exist.

Some of the reasons for this phenomenon were identified in the discussion regarding the psychology of traumatic injuries (defensive attribution, etc.).[117] Contrary to the theory of victim-blaming, Bornstein found a greater tendency to find for the victim as injury severity increases.[118] In an effort to explain this relationship, Bornstein draws upon general psychological theories of emotional responses to suffering.[119] Research has indicated humans tend to respond to the suffering and emotional distress of others with a desire to help them.[120] In other words, jurors generally experience sympathy for the plaintiff.

An important component of this relationship is jurors' desire to help the plaintiff.[121] Jurors need to feel it is within their power to help the plaintiff.[122] For example, in a case involving a plaintiff who has suffered a trau-

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113. *Id.* at 102.

114. Vidmar & Crinklaw, *supra* n. 9, at 114.

115. Shaver, *supra* n. 9, at 109 (discussing personality and social psychology).

116. *Id.*

117. Walster, *supra* n. 9, at 74.

118. Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. of Applied Soc. Psychol. 1477, 1479 (1998).

119. *Id.*

120. D.D. Batson, J. Fultz & P.A. Schoenrade, *Adults' Emotional Reactions to the Distress of Others in Empathy and Its Development* 1, 163 (N. Eisenberg & J. Strayer eds., Cambridge U. Press 1987).

121. *Id.*

122. *Id.*

matic brain injury as a result of a medical procedure, jurors will be more inclined to award damages if the plaintiff has shown progress with rehabilitation efforts. Individual progress sends the message that more money translates into more rehabilitation, which will make the person better in the end. When such a scenario exists, a plaintiff verdict becomes the psychologically satisfying outcome of the trial as an injured person is given an opportunity to heal.[123]

C. *Hindsight Bias*

Hindsight bias is a widespread phenomenon that attorneys face in a broad array of litigation types, but is especially pertinent in medical malpractice litigation.[124] Hindsight bias is defined as the tendency to overestimate the probability of a known outcome and the ability of the decision-makers to have foreseen it.[125] Feigenson explains hindsight bias by noting that "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 seemed to warrant in foresight."[126]

Hindsight bias can reveal itself in a variety of ways in medical malpractice litigation and is one of the most difficult obstacles to overcome. It finds ready application in missed-diagnoses cases, preferred-treatment disputes, and failure-to-monitor complaints. With knowledge of the ultimate outcome, it becomes particularly easy for jurors to conclude that the correct course should have been obvious to the healthcare provider at the time. This effect is magnified by the fact that medical malpractice litigation often involves matters difficult for jurors to understand. Consequently, in these scenarios, the plaintiff's "if only" story offers a simple way to make sense of the issues.

The effect of hindsight bias is difficult to eliminate. Research has demonstrated great challenges in developing strategies to overcome it.[127] The bulk of such studies, however, has focused on generic strategies, such as jury instructions and attorney efforts to raise hindsight bias awareness in closing statements.[128] A more effective strategy may lie in the particular

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123. *Id.*

124. Ratneshwar, *supra* n. 32, at 53.

125. Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. Experimental Psychol.: Hum. Perception & Perf. 297, 297 (1975).

126. Feigenson, *supra* n. 63, at 63.

127. Merrie Jo Stallard & Debra L. Worthington, *Reducing the Hindsight Bias Utilizing Attorney Closing Argument*, 22 L. & Hum. Behav. 671, 673 (1998).

128. *Id.*

facts of the case. Specifically, attorneys should focus on eliminating the perception of the "no-risk" alternative.

The persuasive effect of hindsight bias largely lies in the perception of ease with which an alternative action could have occurred. For example, post-operative infection cases often suggest that if only the physician would have administered more antibiotics, the infection would not have occurred. The problem with these types of cases is that jurors often perceive the administration of antibiotics as a "no-lose" situation with no apparent downside. Consequently, defense attorneys may gain some headway by identifying the dangers posed by the simple alternative implied in the plaintiff's narrative.

Another aspect of the defense's burden of hindsight bias includes differential diagnoses. Differential diagnoses are often troubling aspects of malpractice litigation, because the condition that led to the injury is also listed as a possible source of symptoms for a number of different conditions. Generally, in this case, many jurors would easily render a plaintiff's verdict. In jurors' minds, the healthcare provider recognized a possible symptom for victim's condition, but failed to act.

This exemplifies another instance in which defense attorneys have a tremendous educational burden. Most jurors, using hindsight, believe the healthcare providers should have identified the correct medical condition immediately, and acted upon it. Consequently, jurors often fail to understand the importance of eliminating alternative, plausible reasons for the symptoms before taking action.

D. Visual Hindsight Bias

In addition to the effects of hindsight bias, medical malpractice litigation often involves the unique phenomenon of "visual hindsight bias."[129] Visual hindsight bias relies on a simple visual cue that creates a difficult burden for defense attorneys in malpractice litigation.[130] Two common examples of visual hindsight bias involve fetal monitoring strips and radiology reports.

The problem arises when a visual depiction of a medical condition, with the benefit of outcome knowledge, purports to offer a simple and clear picture of the condition—one that was not as simple and as clear at the time. But because jurors have outcome knowledge, it becomes tremendously difficult, if not impossible, to place themselves in the position of the

129. Berlin, *supra* n. 82, at 319.

130. Erin M. Harley, Keri A. Carlsen & Geoffrey R. Loftus, *The "Saw-It-All-Along" Effect: Demonstrations of Visual Hindsight Bias*, 30 J. of Experimental Psychol.: Learning, Memory, & Cognition 960, 962 (2004).

healthcare provider at the time of the injury. Empirical research demonstrates that "medical abnormalities are, in fact, more visible when the physician has outcome knowledge."[131]

A great example of this phenomenon is the fetal monitoring strip. Fetal monitoring strips are highly variable and often difficult to interpret.[132] For example, many commonly occurring conditions such as tachycardia, decreased variability, or decelerations, all usually normal, may indicate problems with the fetus.[133] At trial, jurors will already know there was a significant problem with the fetus. Consequently, jurors will filter the evidence (i.e., the fetal monitoring strip) as a clear indication of problems. This becomes especially problematic given the staying power of visual information over oral information.[134]

Unfortunately, there is no perfect solution to the problem of visual hindsight bias. It imposes a greater educational burden on the defense, which requires motivated jurors who want to understand the evidence and defense's explanations. Defense attorneys who find themselves in this scenario should carefully consider how to develop their own visual advocacy to counter or neutralize the effect of one-sided visual advocacy.

E. Damages

Damage awards are perhaps the most controversial and reported aspect of civil litigation. Medical malpractice litigation is no exception. As noted in the introduction, while the success rate for plaintiffs in medical malpractice cases is half that of other areas of litigation, the average damage award is 16 times greater.[135] Fortunately, decades of research have shed light onto many of the common factors jurors consider as they wade through the damages portion of the verdict form, which provides defense attorneys with some ability to predict jurors' thoughts about the case.[136] The final section of this article—while not exhaustive—examines some common factors considered by jurors as they attempt to determine a fair award for a successful plaintiff.

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131. *Id.* at 960.

132. Amir Sweha, Trevor W. Hacker & Jim Nuovo, *Interpretation of the Electronic Fetal Heart Rate During Labor*, 59 Am. Fam. Phys. 2487, 2487 http://www.aafp.org/afp/990501ap/2487.html (May 1, 1999).

133. *Id.*

134. *Transparency Study*, *supra* n. 71; *UM/3M Study*, *supra* n. 73.

135. Cohen, *supra* n. 5, at 1.

136. Edie Greene & Brian H. Bornstein, *Determining Damages: The Psychology of Jury Awards* (Am. Psychol. Assn. 2003).

F. The Process of Determining Damages

A recent study involving actual jurors found that approximately 11% of jurors interviewed indicated they had a specific damage figure in mind at the beginning of deliberations.[137] However, attorneys should be aware that a variety of factors could explain this finding. The order of the verdict form makes it highly unlikely that jurors would discuss damages first.[138] Additionally, some jurors may not wish to admit they already have a figure in mind prior to deliberations. For the 11% of jurors who decided a damage award before deliberations, the liability discussion may simply be a means to the final damages award. This issue should raise concern for any defense attorney, but fortunately, it can be addressed during jury selection.

Once jurors reach deliberations about damages, jurors commonly consider the "anchors" proposed by the plaintiff and defense attorneys.[139] Anchors are essentially the starting points for determining damages. Jurors commonly complain about the lack of instruction on how to determine damage awards. Given the resulting uncertainty, anchors provide jurors with a much-needed, specific starting point.

The damage awards proposed by both plaintiff and defense counsel set a possible range. Our mock-trial research has demonstrated that jurors believe defense counsel would not suggest an amount higher than what he or she believes is adequate. By the same token, jurors believe it is equally unlikely that a plaintiff attorney will ask for less than he or she believes the case is worth.[140] Starting with the anchors, jurors will attempt to negotiate an appropriate damage award for the case in question.[141] Jurors advocating for the plaintiff and jurors advocating for the defendant will argue, each pointing to evidence, testimony, and values that support particular amounts. Research, in line with our own experience, has found that when jurors substantially disagree on an award for damages, they will often submit their individual damage award amounts and simply average them to arrive at a final damage award.[142] They may also simply treat the deliberations as a negotiation amongst themselves, rather than tethering their award to the facts of the case.[143]

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137. Nicole L. Mott, Valerie P. Hans & Lindsay Simpson, *What's Half a Lung Worth? Civil Jurors' Accounts of Their Award Decision Making*, 24 L. & Hum. Beh. 401, 408 (2000).

138. Questions pertaining to damage awards rarely appear as the first question on the verdict form.

139. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring In Personal Injury Verdicts*, 10 Applied Cognitive Pscyhol. 522, 522 (1996); Edie Greene, *On Juries & Damage Awards: The Process of Decision-Making*, 52 L. & Contemp. Probs. 234, 234 (1996).

140. *Id.*

141. Chapman, *supra* n. 139, at 527.

142. J. Guinther, *The Jury in America* 55, 55 (Facts on File Pubs. 1988).

143. *Id.*

The process of averaging individual damage awards may raise some concerns for defense attorneys, as it only takes a few outliers to increase the overall damage award. While such concerns are legitimate, research has shown, even when the averaging technique does not occur, the tendency to "split the baby" still yields a significant value for the final awards.[144] Research has utilized pre-deliberation questionnaires from mock trials and found that the median pre-deliberation damage award was the best predictor of the final jury award.[145]

While theories of anchoring have consistently held true in practice, there are several scenarios where the damage calculations lead to figures that exceed the amount requested by the plaintiff. First, it is not uncommon for jurors to adjust awards upward based upon beliefs about how much the attorneys will receive—commonly, jurors believe that attorneys take between one-third and one-half of the overall damage award.[146] Second, in our mock-trial research, jurors commonly adjust the final damage award based upon the perception that the plaintiff will lose a portion of the award to taxes. Finally, jurors may raise the final damage award based upon the perceived conduct or character of the defendant. For example, if the jury perceives a defendant as unapologetic and insensitive to the plaintiff's injuries—especially if the injuries resulted from seemingly intentional conduct by the defendant—juries will often award an amount well beyond the amount proposed by the plaintiff's attorney.

G. The Injury

Research has shown that damage awards strongly correlate to the injury itself.[147] Both the severity and the duration of the injury play a significant part in the jurors' determination of damages.[148] Our experience with hundreds of mock juries has helped us identify some of the most common factors jurors consider in assessing the plaintiff's injury.

There are several components of injury severity. First, jurors will examine the events that led to the injury, assess the extent to which the plaintiff was a passive victim, and whether the event was traumatic by nature. A

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144. Shari S. Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts and the Civil Jury*, 26 L. & Socy. Rev. 513, 546–547 (1992).

145. *Id.* at 547.

146. Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 L. & Hum. Behav. 385, 392 95th.(1990).

147. Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 L. & Hum. Behav. 243, 253 (1997).

148. Roselle L. Wissler et al., *Explaining 'Pain and Suffering' Awards: The Role of Injury Characteristics and Fault Attributions*, 21 L. & Hum. Behav. 194, 194 (1997); Paul Andrews, Robert G. Meyer, & Edward P. Berla, *Development of the Lost Pleasure of Life Scale*, 20 L. & Hum. Behav. 99, 100 (1996).

previous section addressed the issue of comparative negligence by the plaintiff and concluded that when a plaintiff's choices seemed to lead to injury, the jurors were less likely to award damages.[149] Conversely, the more the jurors perceived the plaintiff as an "innocent bystander," the higher the award.[150] Some of this can be attributed to jurors' empathy: "What if this were me?"[151] Another factor is sympathy, which is often strengthened by the perception that the plaintiff did nothing wrong.

Jurors consider the traumatic nature of the injury. Put simply, the more traumatic an event, the greater the damages. A recent article in *Time* magazine reported studies examining the neurological aspects of fear and dread.[152] Specifically, the study attempted to explain why Americans have tremendous fear of flying on airplanes, yet continue to smoke and engage in unhealthy diets at alarming rates.[153] Scientists reported heightened activity in the part of the brain where humans experience fear and dread in response to the perception of immense pain and suffering.[154] For example, a visualization of falling from the sky in an airplane crash evokes a much greater sense of pain and suffering, and thus dread, than slowly dying of heart disease.[155] Consequently, despite the fact that the outcome in both cases is death, humans associate greater trauma with the airplane crash because of the perceived pain and suffering involved.[156]

A recent case of medical malpractice, settled out of court, demonstrates both of these factors.[157] A female patient went to a hospital for a brain-aneurysm procedure. As she prepared for surgery, she was inadvertently injected with antiseptic skin cleaner instead of contrast dye used to make blood vessels visible on x-rays. The hospital immediately notified the patient and family of the error, noting that the patient would likely die in the following days. The patient remained conscious for two days before slipping into an incoherent state and dying.[158]

This case showcases the two primary factors that can drive damage awards. First, the patient was an innocent bystander who in no way contributed to her demise. Second, she was faced with the trauma of going from

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149. O'Toole, *supra* n. 87, at 56.

150. *Id.*

151. Pennington, *supra* n. 19, 192–221; Walster, *supra* n. 9, at 73–74, 78.

152. Jeffrey Kluger, *Why We Worry About the Things We Shouldn't . . . and Ignore the Things We Should*, 168 Time Mag. 64, 64 (Dec. 4, 2006).

153. *Id.* at 66.

154. *Id.*

155. *Id.*

156. *Id.*

157. Nick Perry & Carol M. Ostrom, *Hospital Details What Went Wrong: Woman Dies from Toxic Injection*, http://community.seattletimes.nwsource.com/archive/?date=20041125&slug=deathfolo25m (accessed Mar. 8, 2008).

158. *Id.*

believing she would recover from her rather routine operation to learning she would only have a short time to live. In this case, the institution acted quickly and in a straight-forward manner. A terrible mistake was made and recognized; responsibility and accountability were taken. Such actions—for cases that go to trial—can play an important element in the jurors' evaluation of the organizational persona of the defendant.

Beyond the pain and suffering associated with the immediate event that led to the injury, jurors will also assess the resulting pain and suffering that the plaintiff must endure over the course of his or her lifetime. Again, the greater the pain and the longer the duration, the higher the damage awards will be. Consequently, permanent and long-lasting injuries tend to lead to higher awards. A fair amount of anecdotal experience from our mock trials and post-trial interviews with actual jurors suggests jurors are inclined to award greater damages to permanent but less painful injuries than for temporary but more acute pain.

Another factor jurors assess is lifelong impact of the injury and resulting daily pain. In other words, is the plaintiff able to do the things they used to do, and if not, how significant were those activities to the plaintiff's lifestyle? For example, is the plaintiff still employable in the area of interest? It is not enough for defense attorneys to simply show that the plaintiff is employable or can participate in recreational activities. Defense attorneys must show that the plaintiff can maintain a personal identity similar to the one before the injury. One of our recent shadow jury projects illustrated this point. The shadow jurors had strong negative reactions when the defense tried to bring the damage award down by arguing that the now-blind and brain-damaged plaintiff could be employed making parts for various machines at a workshop for the disabled. The jurors' reaction was tied to the fact that the plaintiff was a likeable, sociable, and an ambitious person before the injury. The defense's suggestion that the workshop job could somehow help restore the plaintiff's identity and sense of self-worth was viewed in a negative light.

Finally, jurors will assess whether or not the injury to the plaintiff resulted in any sort of social stigma.[159] Goffman defines a stigma as "a mark or sign of some sort that is seen as disqualifying individuals from the full social acceptance of society."[160] Common injuries that result in social stigma are quadriplegia, facial distortions, and traumatic brain injuries. Each of these resulted in difficulties affecting the plaintiff's ability to live a

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159. Wissler, *supra* n. 148, at 199.

160. Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* 1, 3 (Prentice-Hall 1963).

normal, happy social life—which consequently led to higher damage awards.[161]

H. The Story of Hope

As we have noted on several occasions throughout this article, a key contributing factor to any verdict—whether it pertains to liability or damages—is a juror's motivation to favor a particular side.[162] One of the primary influences on a juror's motivation is the recognition of a psychologically satisfying verdict. In other words, jurors often want to feel good about their verdicts at the end of the day.

Research has indicated that most humans respond to the suffering or emotional distress of others with a desire to help them.[163] Bornstein has linked jurors' knowledge of injury severity to a desire to help the victim by drawing upon a theory of action readiness.[164] This theory suggests that individuals are motivated by their actual ability to render aid to a person who needs it.[165] In litigation, action readiness may be an essential element, because it links experience to behavior.

Bornstein conducted a study in which he found that the positive relationship between injury severity and responsibility attribution is mediated by the jurors' ability to award damages.[166] Additionally, he suggested, without this capacity, the inability to relieve emotional distress or suffering will counteract a desire to find for the victim.[167] In light of these findings, one easy way for plaintiffs to maximize their damage awards is to generate a narrative of hope. Jurors are compelled by stories of hope. A defining characteristic of human nature is that we enjoy happy endings. Consequently, plaintiffs are at an advantage when they can highlight specific ways in which compensation will help the plaintiff, as opposed to simply placing a value on an injury. The shadow jury project of the blind and severely brain-damaged plaintiff mentioned above highlights this phenomenon. As one might expect, in this trial, the plaintiff's attorney attempted to cast a picture of a bleak future for a blind and severely brain-damaged plaintiff. The defense naturally contended that the plaintiff was much better off than opposing counsel had led the jurors to believe. Additionally, the

161. Wissler, *supra* n. 148, at 199.

162. Petty & Cacioppo, *supra* n. 26, at 123.

163. C.D. Batson, J. Fultz & P.A. Schoenrade, *Adults' Emotional Reactions to the Distress of Others*, Empathy and its Development 1, 163–184 (Nancy Eisenberg et al. eds., Cambridge U. Press 1987).

164. Bornstein, *supra* n. 118, at 1479.

165. Nico H. Frijda, Peter Kuipers & Elisabeth ter Schure, *Relations Among Emotion, Appraisal, and Emotional Action Readiness*, 57 J. Personality & Soc. Pysch. 225, 225 (1989).

166. Bornstein, *supra* n. 118, at 1479.

167. *Id.*

defense identified a variety of rehabilitation centers where the defense believed the plaintiff could thrive and recover.

When the plaintiff finally testified—the plaintiff was not present at trial except for the day she testified—the shadow jurors were surprised to discover that, while she undoubtedly suffered significant injuries, her outward appearance and presentation suggested she had made significant progress in her recovery. The defense was elated. However, interviews with the trial monitors suggested this created a much worse situation for the defense. Now the shadow jurors, facing a plaintiff who was exceeding recovery expectations, wanted to give her whatever she needed to ensure continued recovery. It became a matter of "if it might help, we should provide compensation."

I. The Behavior of the Defendant

The behavior of a defendant also influences a jury's damage award. Regardless of whether or not punitive damages are an option for the jury to consider, our experience supports the notion that jurors will continue considering the conduct and character of the defendant.

In these instances, the primary question for the jurors is, "Does a message need to be sent?" In considering this question, jurors will assess the conduct of the defendant, determine its egregiousness, and consider the identity of the defendant to determine the amount of money it will take to send that message.

Specifically, the jurors will examine the defendant's character and actions. First, they will attempt to determine the defendant's intentions with regard to the events that led to the injury. In our experience, one of the most commonly perceived intentions is economic gain. For example, returning to the low approval ratings of HMOs, jurors will often attribute a poor quality of care or a lack of appropriate care to an HMOs' efforts to maximize profit. Often, the common perception that an institution values profits over people leads to significantly higher damage awards.

The second factor jurors will assess is whether or not the defendant recognizes and admits the cause of the problem.[168] Research has shown that perceived remorse on the part of the defendant leads to more favorable

168. Kevin R. Boully, *"Mea Culpa" in the Courtroom: Juror Perceptions of Defendant Apology at Trial* 1, 1 (unpublished Ph.D. dissertation, U. Kan. 2005); B.W. Darby & B.R. Schlenker, *Children's Reactions to Transgression: Effects of the Actor's Apology, Reputation, and Remorse*, 28 Brit. J. Soc. Psych. 742, 742 (1989); Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 Personality & Soc. Psych. Bull. 564, 564 (1998); Ken-ichi Ohbuchi, Masuyo Kameda & Nariyuki Agarie, *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. Personality & Soc. Pysch. 221, 221 (1989).

views of that defendant.[169] The perception of a defendant in denial or the perception that "nothing has changed" often leads to punitively motivated damage awards under the guise of pain and suffering.[170]

Attorneys are often concerned about introducing evidence of subsequent remedial efforts at trial. This is an issue that should be closely examined in light of the severity of the incident in question. If the conduct that led to the incident is especially egregious, it may benefit the defense to provide evidence indicating a change in the defendant's conduct. Otherwise, the jurors might conclude that a large damage award is the only way to send a message that the defendant's conduct should change. There may be more subtle ways to indicate to a jury that the defendant takes the issue seriously and has a heightened awareness or sensitivity to the issues raised by the plaintiff.

Finally, some research has suggested jurors levy higher damages against businesses or corporate defendants than against individual defendants.[171] However, this could likely be the product of jurors associating ill intentions and a lack of remorse with corporations, which is a common stereotype.

IX. Conclusion

This article, while by no means exhaustive, sheds light onto many common factors which influence jury decisions in a wide variety of medical malpractice cases. We began with a declaration that, contrary to popular belief, juries are quite rational in arriving at their decisions. After reading this article, one might conclude that juries are irrational given that so many extra-legal considerations can influence a verdict. But the underlying principle is that attorneys must reconsider how they evaluate the respective roles of each trial participant. Jurors are successful triers-of-fact only when attorneys provide them with the proper tools to comprehend and assess the relevant evidence. To provide jurors with the proper tools, an attorney needs to adopt an audience-centered approach to courtroom communication that acknowledges the fundamental reasoning processes adopted not only by jurors, but also by judges, arbitrators, mediators, and the broad majority of the population.

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169. *Id.*

170. Boully, *supra* n. 168 at 99.

171. Hans, *supra* n. 48, at 243; Hans & Ermann, *supra* n. 48, at 157.