



# The psychology of jurors' decision-making

It's your job to know how they think, what persuades and what puts them off

By SONIA CHOPRA

Jurors make decisions just like other human beings do, but they do so in an environment that is different from everyday individual decision-making. The conditions of trial and the group setting create some demanding characteristics that can lead to the use of cognitive shortcuts or unconscious biases influencing decision-making, and group dynamics can also play a role. What is *not* true is the belief that jurors are not intelligent enough to make decisions in complex cases, that their decisions are arbitrary and baseless, or that passion drives every verdict. Going into trial with that view of the jury pool will impact the way you present your case, to your detriment.

If the jurors don't understand the case or don't base their decision on the relevant evidence, that is in part your fault. It is your job as attorneys to know your audience, to know how they think, what is persuasive to them and what is off-putting. It is your job to make your case interesting, understandable, and compelling. To do that, it is useful to become familiar with the way human beings make decisions generally, and how the trial setting and case themes interact with those processes.

We'll start with discussing cognitive psychology concepts known as cognitive biases. While we usually use the word "bias" to refer to an undesirable or negative trait, cognitive biases help human beings survive in a high-information world. We all have these cognitive biases; we all use them. Learning about these biases

and how they may influence your case presentation will help you become better advocates for your clients.

## Confirmation bias

Confirmation bias, also known as "my side" bias, is the tendency to seek out, attend to, and better recall information, for example, evidence and arguments, that confirms one's preexisting attitudes and beliefs while at the same time discounting or ignoring information that is contrary to one's preformed opinions.<sup>1</sup> When evidence is ambiguous – as it often is in cases that make it to trial, it is interpreted in a way that confirms the initial belief.

Confirmation bias is strongest concerning issues that are emotionally charged, and beliefs that we think form the basis of our own self-identity. Politics is the prime example. Conservatives listen to news outlets that support their views; Liberals do the same. We purge our Facebook pages of people whose opinions are different than ours.

Confirmation bias plays a significant role in decision-making and therefore it underscores the importance of jury selection. Every human being engages in confirmation bias. Intelligence, station in life, age, race, gender – none of it matters. Confirmation bias is why 12 people can hear the exact same case and come to vastly different interpretations of what happened, who was at fault, and what the damages should be. You will not change the mind of someone with strong views against essential elements of your case – not in jury selection and not during the trial.

What you must do instead is identify those whose personal life experiences – the most influential factor in shaping attitudes and beliefs – are problematic for your case. This is not accomplished by asking the jurors if they can be fair and follow the law. It is not accomplished by asking questions that begin with "Do you understand..." or "The judge will explain that the law is..." It is not accomplished by "asking" jurors hypothetical questions that only seek to advance themes or gain meaningless commitments. And in fact, asking some of these types of questions, which jurors may see as having little to nothing to do with the facts of the case, can cause them to think poorly of you.<sup>2</sup>

## The stereotypes

Confirmation bias also affects the decisions attorneys make in jury selection. There are long established stereotypes based on demographics like race, gender, age and education about who makes a "good" defense juror and who makes a good plaintiffs juror. There is a belief that higher status, higher educated, more intelligent, higher income, white male jurors are defense jurors because they will decide things more rationally, and base their decisions only on "evidence" and "logic" instead of "emotion." There is the belief that lower-educated, lower-status, minority jurors and females will be pro-plaintiff because they will be more emotional and more empathetic, and that they will award more damages because they don't understand the numbers. Preservation of these stereotypes in deciding who to



strike and who to keep (even in the face of contradictory evidence) is not only illegal per *Batson v. Kentucky*<sup>3</sup>, but making demographic-based jury selection decisions can also be seriously detrimental to the outcome of your case. Stereotypical thinking along demographic lines will lead you to keep bad jurors and strike good ones.

For the last 20 years I have encountered this stereotypical thinking, even amongst some of the best trial lawyers in the country. I see attorneys ignoring dangerous statements coming from the juror's own mouth about experiences, attitudes and beliefs that would affect their impartiality, all because of the potential juror's demographics. Every human being has confirmation biases, and attorneys are no exception. Be cognizant of your own biases when selecting jurors. Ask yourself if you would feel the same way about the answer a juror has given if it was someone of a different demographic profile who said it. If the answer is no, pay attention to the words and the sentiment and react accordingly. Every juror is prone to confirmation bias, regardless of their intelligence, education level, or socioeconomic background. If they are telling you that they have pre-formed beliefs or strong views about relevant case issues that are detrimental to your case, confirmation bias will make it very difficult to change their mind.

If everyone has confirmation bias, how can we ever select jurors who will be impartial? There is some evidence to suggest that making people aware of the tendency for confirmation bias can reduce their tendency to fall victim to it. Talking to jurors about how the process works and asking them to be aware of the potential for it to happen to them may result in them actively working to keep an open mind to the evidence and arguments presented.<sup>4</sup>

Research has also demonstrated that people with high confidence levels are less susceptible to confirmation bias because they are open to and actively seek

out contradictory information when forming arguments.<sup>5</sup> Their self-identity is less tied to the preservation of their beliefs.

### **Fundamental attribution error/defensive attribution**

The role of jurors in a civil trial requires them to make attributions about causality and responsibility. Psychologists have developed a distinction between two types of attributions for behavior; 1) internal or dispositional attribution, which focuses on characteristics of the person, or 2) external or situational attribution, where the focus is on the situation or circumstances.<sup>6</sup>

When making decisions about the cause of negative events that happened to others we are most likely to form internal attributions, meaning that we are more likely to scrutinize the behavior of the individuals involved as opposed to the circumstances. On the contrary, we are more likely to place blame for our own misfortunes on circumstances, or the situation. This is what is known as the Fundamental Attribution Error.<sup>7</sup>

A subset of the fundamental attribution error is Defensive Attribution.<sup>8</sup> This is a cognitive bias we use to protect ourselves from the fear that a negative event that happened to someone else could happen to us. When we hear about a tragic outcome, we want to psychologically distance ourselves from the belief that we could befall a similar fate. How do we do that? We focus on the actions, motivations, and behavior of the victim as opposed to the circumstances. We say, "If I were in that situation I would have checked my mirrors, crossed the street, notified HR, etc." The more similar we are to the person who has experienced the bad event, or the more likely it is that we could find ourselves in similar circumstances, the more likely we are to engage in defensive attribution. Plaintiffs' attorneys must be constantly looking for ways in which potential jurors might be personally threatened by what happened to the client and therefore

seek to distance themselves psychologically from a similar fate by focusing on what he or she did to cause or contribute to the situation.

Attribution Theory is another important construct to be aware of in jury selection. Are jurors similar to your client likely to be more empathetic and favorable? Or not? There is a sizable body of literature examining the impact of litigant/juror similarity in terms of both demographics and personality variables on verdicts.<sup>9</sup> The belief behind the early research was that similarity results in attraction, so similarity would also result in more favorable treatment of a similar party. That certainly seemed to be the case in some studies, and many trial attorneys hold the belief that a juror who can "identify" with the client is a good one.

There is, however, a flip side to similarity: that is, similarity and rejection, as opposed to liking. This phenomenon, known as the "black sheep effect" can occur when a similar other either has negative attributes or has suffered negative consequences or outcomes.<sup>10</sup> This causes other "in group" members to want to distance themselves from the offending party. This results in harsher treatment by similar others than by those who are dissimilar to the target person. This is often the result of the psychologically protective mechanism of defensive attribution. We don't want to believe the same thing could happen to us, so we denigrate the similar other, thus differentiating him or her from ourselves.

### **How does defensive attribution play out in trials?**

A juror with similarity to a litigant is always a risk. She can be great for you, or she can be your most dangerous juror. On the one hand, similarity to a litigant, for example the plaintiff, can lead to empathy. Having undergone a similar situation, the juror knows how hard it was, how awful it was, how painful it was, etc. Or, in the case of the defendant, maybe



the juror's family was sued for something she felt was unfair, or maybe she has a small business and is overly concerned with litigation, resulting in empathy to the defendant's situation.

Identification can also, however, lead to rejection. Someone who was harmed in an accident, or lost their job because of unfair treatment and didn't receive any compensation for it can be bitter and judgmental. Even though their claim was just, this person obviously brought this upon themselves. Similarity-rejection can happen to civil defendants too. Someone who works in the same industry may compare how things work at their company as opposed to the defendant and say, "We would never have done XYZ," or, "Where were the written policies?" "Why wasn't HR contacted?"

Lastly, similarity can also result in denial. Someone who has experienced a similar situation as a plaintiff can downplay the impact it would have on someone (because they chose not to sue, or didn't get sued), or downplay the need for compensation. For example, "I have a bad back, but that's just part of getting old." "Even if she weren't in that car accident she could have suffered from memory loss." This type of juror might become an "expert" on the jury, telling others the real extent of the pain, insinuating that the plaintiff is exaggerating.

### **Cognitive dissonance**

Cognitive Dissonance is the state of being uncomfortable when our actions don't comply with our beliefs. To reduce this state of mental discomfort we either change the underlying belief (less likely) or justify our actions through rationalization, minimization, or discounting.<sup>11</sup> You can manage cognitive dissonance in jurors when you let them believe they are coming to a decision on their own instead of doing something that you tell them they should do. We are more motivated to act based on things we think are our own ideas instead of those coming from someone we believe is actively trying to persuade us.

### **Hindsight bias**

Hindsight Bias is also known as the "I knew it all along" effect or "Monday morning quarterbacking." This refers to our tendency to, after all information is known about an event, perceive it as having been foreseeable and/or preventable, regardless of the surrounding circumstances.<sup>12</sup> This cognitive bias can play a significant role in jury decision-making. Knowing what we all know now, after the event, actions that could have prevented or mitigated the outcome are apparent.

After an auto accident, we can all think of what we would have done differently and how that would change an outcome.

A doctor whose care resulted in an adverse outcome "should have known" that their choices would result in an adverse outcome. Hindsight bias is most detrimental to the party that is perceived as having the ability to prevent the bad outcome.

Hindsight bias can be reduced by using counterfactuals and putting the juror at the beginning, in a position of foresight.<sup>13</sup> Counterfactuals cause decision makers to think about alternative outcomes based on what was known at the time that a choice was made. The use of "If only" statements are effective in countering hindsight bias. For example, "If only the driver had chosen to drive the speed limit," "if only the company had installed the low-cost part," "if only the manager had done a proper investigation," etc.

### **Trial presentation and jury decision-making: The story model**

Why is the Story Model effective in trials? Because we all use stories to make sense of the world. It is how we best learn and categorize information. A story creates a "schema" or narrative of what we believe happened, and then through other cognitive biases, we tend to filter the evidence and arguments through this schema.<sup>14</sup> Jurors come to trial wanting to know what happened. A good story

answers this question in the way that is most beneficial to your client but also fits the evidence most succinctly. Each element of the story is important to think of when preparing your case. If there are holes in the narrative, jurors will fill them in on their own.<sup>15</sup> The story has a setting. It has a beginning or the initiating events; characters, each of whom has motivations to act; actions or turning points; consequences and outcomes of actions; and a conclusion, which the jury ultimately decides.

The story structure also improves comprehension and memory and makes sense in terms of determining cause and effect, which is what jurors are mostly tasked with.<sup>16</sup> It is familiar. An engaging story draws people in and makes them care about what happens. It is less like attending a lecture and more like watching a film or reading a book. A legally strong case may fail at trial if there is not a viable, compelling human story that shapes the case presentation. This is not to say jurors don't follow the law; they work hard and for the most part do the best they can with the limitations imposed on them by arcane jury instructions. But jury instructions, like much within the trial setting, can be ambiguous and open to interpretation. The story that jurors form about what happened and why is what drives the verdict, not the instructions.

The law and the instructions become a part of the story during closing arguments. More recent research has found that both sides do better employing a legal expository structure for closing as opposed to a strict narrative.<sup>17</sup> What does this mean?

The Legal Expository Structure is a point/counterpoint structure that is often employed by the defense. This involves comparing plaintiff arguments/evidence to defense argument/evidence point by point, structured around the instructions and legal elements as opposed to only chronological order.<sup>18</sup> This works well for both sides in closing because it gives context to the evidence within the rules for



decision-making and focuses jurors on evidence that supports their side, based on those rules.

Defendants typically use the legal expository structure for both opening and closing and research has found that this works for them even better than a pure narrative structure.<sup>19</sup> Why might this be? One theory is that because of primacy effects, the jurors will develop a schema or story of what happened based on the plaintiffs' opening. The defense, rather than simply retelling the story from their point of view, challenges or reinterprets the story that plaintiffs have told.

A mixed structure is likely best for both sides.<sup>20</sup> Plaintiffs should anticipate and counter defense arguments in their openings, and defendants need to make jurors see their clients as being part of a coherent, human story. Without story elements like setting and goals a narrative seems incomplete and therefore less persuasive. In closing arguments put the story in the context of the law and instructions. Be sure to tell them how to vote to side with you!

When telling your story, the initial focus should *not* be on your client. The focus should be on the other side and their motivations, poor choices, and actions. Why? Because trials occur when there was a negative outcome for someone. Both the fundamental attribution error and defensive attribution teach us that people want to blame the actors for bad things that befall them, and credit the situation for good things that occur.

They will begin the case by looking to see who was at fault. The plaintiff's case must be about the defendant's conduct. This is where you want the jury's attention. The idea is that the defendant's actions set up a situation that could have harmed anyone – your client just happened to be the one who suffered this time.

For example, let's say you have a case involving allegations of a dangerous roadway condition that resulted in a fatal accident. One approach from the plaintiff

perspective is to begin like this: "On Monday morning October 4, 2016, James Smith left his house to go to his job of 20 years at the Bank of America where he worked as an accounts' manager. He was driving along Broadway, his usual route, going the speed limit. He needed to make a left-hand turn at Green Street but he had a difficult time determining if there was oncoming traffic because the roadway was designed in a way that made it hard to see, and there was overgrown brush on the side of the road. He waited until he thought it was clear and then turned. He was struck by an oncoming vehicle and was severely injured."

What are you focused on at this point – the roadway or the actions of Mr. Smith? Mr. Smith.

### Attorney presentation style

Don't tell the jurors what to do or what to think. Persuasion is much more effective when you lay out the pieces and lead them to conclude on their own. When jurors come up with themes and analogies and decisions about the behavior of the parties, it is much more powerful than when you tell it to them.

Two things jurors hate most of all are the perception that their time is being wasted and the belief that the attorneys are being manipulative, slick, or condescending. In a recent jury selection the attorneys made mini openings before the jurors completed a questionnaire. One juror wrote on her questionnaire in response to a reason she couldn't be fair and impartial: "I felt like the defense attorney addressed the room as if we are children. I saw through his attempt to humanize his client. I'm not a huge fan of his technique so far. If it continues, he may swing me the other way."

I'm often asked about how important it is for an attorney to be "likeable." Liking the attorney does not necessarily result in a favorable verdict. But dislike for an attorney based on demeanor, trial tactics, and presentation style has an impact. This is especially true if the behavior coincides with attributes/traits of the

case and the underlying participants. If the plaintiff is portraying a defendant as being evasive, hiding evidence or being less than forthcoming in testimony, then lawyers who do not appear open and honest will solidify that perception. If a plaintiff's attorney comes across as not caring for the client that they represent, or unknowledgeable about their client's personal information, then they fall into the stereotype and frequent defense theme that this is attorney-driven litigation.

Do not talk down to jurors. Do not go into trial thinking they are not as smart as you or will never understand the nuances of your case. If they don't understand, it is because you are not doing your job correctly. There is a difference between simplifying a story and using real-world analogies to illustrate difficult concepts and being condescending; jurors are smart enough to notice.

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## Endnotes:

- <sup>1</sup> Raymond S. Nickerson, (1998) *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*. 2(2) REV. OF GENERAL PSYCH, 175-220.
- <sup>2</sup> For example, in a recent case a seated juror who was listening to jury selection of alternates told the bailiff that she had been offended by the questions the defense attorney had asked and that she now believed she may be biased against him. When questioned, it was revealed that the offending question was one of those questions attorneys ask that are hypothetical or "trick" questions designed to prove a point. He had asked her if she enjoyed television and movies and then if she a) understood the difference between television and reality and whether she preferred one over the other. Arguably his goal was to get the jurors prepared for the fact that some testimony would be presented only through video. The form of the question, however, was the wrong way to go about inquiring on this issue. The juror went on to explain that she felt embarrassed that she was the only juror asked this question, and had concluded that the attorney must think that she is stupid because he didn't ask her about any of the issues in the case that other jurors had been speaking about. She said, "I was hoping to talk about my views on the issues, but you only asked me this question and you didn't ask anyone else and I was offended by that. Why did you do that?"
- <sup>3</sup> *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

- <sup>4</sup> Keith Stanovich, Richard West, & Maggie Toplak (2013). *Myside Bias, Rational Thinking and Intelligence*. 22(4) CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 259-64.
- <sup>5</sup> *Id.*
- <sup>6</sup> Fritz Heider (1958). *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS*. New York: Wiley; Harold Kelley (1967). *Attribution Theory in Social Psychology*. In D. Levine (ed.), NEBRASKA SYMPOSIUM ON MOTIVATION (Vol. 155, 192-238). Lincoln: University of Nebraska Press.
- <sup>7</sup> Lee Ross (1977). *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*. In L. Berkowitz, *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY*. (Vol. 10, 173-220). New York: Academic Press.
- <sup>8</sup> Kelley Shaver (1970). *Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident*. 14(2) *Journal of Personality and Social Psychology*, 101-113; Jerry Burger (1981). *Motivational Biases in the Attribution of Responsibility for an Accident: A Meta-Analysis of the Defensive Attribution Hypothesis*, 90(3) *PSYCHOLOGICAL BULLETIN*, 496-512.
- <sup>9</sup> James Davis, Robert Bray & Robert Holt (1977). *The Empirical Study of Decision Processes in Juries: A Critical Review*. In. J. Tapp & F. Levine (Eds.) *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY* 326-361. New York: Holt.
- <sup>10</sup> Jose Marques (1990). *The Black Sheep Effect: Out Group Homogeneity in Social Comparison Settings*. In D. Abrams & M.A. Hogg (Eds.), *SOCIAL IDENTITY THEORY: CONSTRUCTIVE AND CRITICAL ADVANCES* 131-151. London: Harvester Wheatsheaf.

- <sup>11</sup> Leon Festinger (1957) *A THEORY OF COGNITIVE DISSONANCE*. California: Stanford University Press.
- <sup>12</sup> Baruch Fischhoff & Ruth. Beyth (1975) *I Knew it Would Happen: Remembered Probabilities of Once-Future Things*. 13 *ORGANIZATIONAL BEHAVIOUR AND HUMAN PERFORMANCE* 1-16.
- <sup>13</sup> Merrie Jo Stallard & Debra Worthington (1998). *Reducing the Hindsight Bias Utilizing Attorney Closing Arguments*. 22(6) *Law and Human Behavior* 671-683.
- <sup>14</sup> Nancy Pennington & Reid Hastie (1992). *Explaining the Evidence: Tests of the Story Model for Juror Decision-Making*. 62(2) *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 189-206.
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.*
- <sup>17</sup> Shelley Spiecker & Debra Worthington (2003). *The Influence of Opening Statement/Closing Argument Organizational Strategy on Juror Verdict and Damage Awards*. 27(4) *LAW AND HUMAN BEHAVIOR*, 437-456.
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*