NEUROPERSUASION: EMOTION TRUMPS LOGIC

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INTRODUCTION

In the time it takes you to read this sentence, you will have been bombarded by 11 million bits of information. But your brain is only capable of attending to 40 bits and can process only seven. Research tells us the attention span of the average North American juror is seven seconds. So how do you grab and maintain the attention of the jury in the age of Google, Twitter, Facebook, and Instagram? The Chinese philosopher Confucius said "Tell me and I will forget. Show me and I might remember. Involve me and I will understand." Technology and demonstrative evidence can grab the jury's attention but the most effective way to involve the jury is to tell a story. Why? Because storytelling is encoded in our genes.[2] An ancient part of the brain responsible for decision making will instinctively sit up and pay attention if it thinks it is going to listen to a story. In *Lawyers, Liars, and the Art of Storytelling*, Jonathan Shapiro writes "first year law school is designed to bleach away the stories."[3] But neuroscience tells us that emotion trumps logic and storytelling is the best way to emotionalize your listeners to get them to act in your favor. You must first touch the heart of your listeners before you can reach their minds and the path to the heart runs through the brain.[4] This is what storytelling does and why Mr. Justice Laskin of the Ontario Court of Appeal says "the best advocates…are the best storytellers. … So think of yourself first as an expert storyteller rather than an expert litigator."[5]

JURORS ASK LAWYERS TO TELL THEM STORIES

A focus juror told us," I would want to know how the accident happened but told in a very emotional way so that the people listening are affected as if it happened to them. Storytelling, the story has to be told with an emotional core to it so that when you get to the before and after it will have that much more resonance".

In over 40 years of criminal and civil trial experience I found that only two things are required to win a case. First, get the judge or jury to want to decide in your favor. Second, show them how. We know from our focus groups that jurors do not make decisions based on the evidence or the judge's review of the law. That is because law appeals to the conscious logical side of the brain. But it is the unconscious emotional side of the brain where the decisions are made. According to Mr. Justice Laskin, even judges are influenced by an appeal which engages the emotional side of the brain, "Ninety percent of any

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[2] Ball, D., (2013). *David Ball on Damages 3* (3rd ed.). Portland, OR: Trial Guides, LLC. See also Ball, D. (2005). *David Ball on Damages, the Essential Update: A Plaintiff's Attorney Guide for Personal Injury and Wrongful Death Cases*. Louisville, CO: NITA; See also Perdue, J.M., (2006). *Winning With Stories*. USA: State Bar of Texas.

[3] Shapiro, J. (2015). *Lawyers, Liars, and the Art of Storytelling: Using Stories to Advocate, Influence, and Persuade.* Chicago, IL: ABA Publishing.

[4] Gallo, C. (2016). *The Storyteller's Secret.* New York, NY: St. Martin's Press.

[5] Laskin, J. (2004). What Persuades (or, What's Going on Inside the Judge's Mind). *The Advocate's Society Journal*, June 2004.

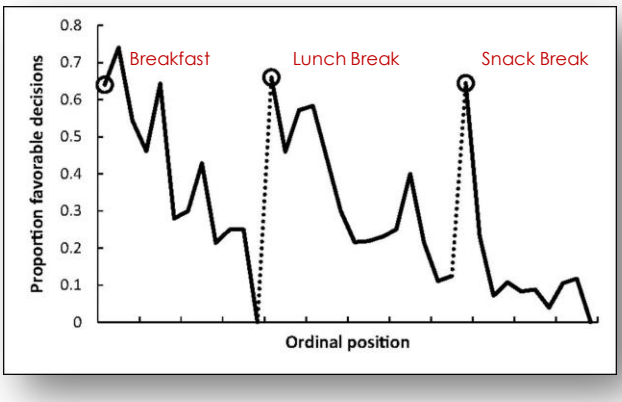
decision is emotional. The rational part of us supplies the reasons for supporting our predilections. … Emotion has the power to move hearts and minds, even the hearts and minds of judges."[6]

We are part of an evolutionary process that traces back over 100,000 years. To ensure our survival, the primitive reptilian part of our brain has been programmed to make decisions at a subconscious or unconscious level. When the tiger chases you, run! When the spear is thrown at you, duck! When the defendant's conduct threatens you, punish! The words you use, the visuals you show, the stories you tell must first engage, then activate the subconscious mind of the listener. Only then can you persuade. Legal warriors like Gerry Spence were instinctive persuaders who knew how to reach the emotional core of the listener. Not all of us can be a Gerry Spence. But the persuasion techniques that came naturally to Spence are now being revealed by the emerging new field of NeuroPersuasion which applies principles of Neuroscience to study the decision making process of the brain.[7, 8]

THE BASIS FOR A NEW WAY OF PERSUADING

Decision Making is Not Rational

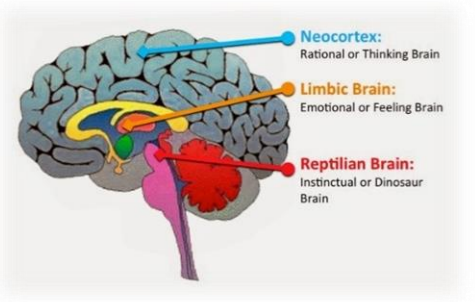
There is no such thing as a decision made purely by rational thought. All decisions are influenced by physiological and emotional factors, and their influence exerted upon our decision making faculties is greater than we would like to admit. Take, for example, a study[9] reported by Nobel Prize-winner Daniel Khaneman in his book *Thinking, Fast and Slow*[10]. In the study, a number of judges were monitored for the frequency of favourable parole rulings granted. These judges were found to make fewer favourable parole rulings in proportion to the length of time since their last meal break.



Just after breakfast, parole was granted approximately 65% of the time. As the hearings progressed, the judge becomes more and more tired and hungry until just before the lunch break the number of paroles granted approaches 0%. Upon returning from lunch, favourable rulings are back to 65%.

[6] Laskin, *Ibid*.
[7] Fortin, J. (2009). NeuoPersuasion: *The Ten Biggest Persuasion Mistakes That Most People Make!* Retrieved from https://www.scribd.com/document/98042535/The-10-Biggest-Persuasion-Mistakes-That-Keeps-Top-Sales-Professionals-From-Making-SERIOUS-Money.
[8] Small, G. and Vorgan, G. (2009). *iBrain: Surviving the Technological Alteration of the Modern Mind.* New York, NY: HarperCollins.
[9] Danziger, S., Levav, J., Avnaim-Pesso, L. (2011). Extraneous Factors in Judicial Decisions. *Proceedings of the National Academy of Sciences*, *108*, 6889-92.
[10] Kahneman, D. (2011). *Thinking, Fast and Slow*. New York: Farrar.

The Reptilian Brain and NeuroPersuasion



The human brain evolved in stages, much like living organisms evolved in stages from the single-cell bacterium to a complex mammalian species. Recent work in neuroscience shows that different parts of the brain developed at different stages of our evolutionary history. The first part of the brain to develop was the brain stem and the cerebellum. It is referred to as the reptilian or croc brain because it is identical to the brain of a reptile and is focused on the mechanisms necessary to survive, such as autonomic responses, breathing, heart rate, and the fight or flight response. Next was the limbic brain or midbrain responsible for regulating emotions. Last is the neocortex which forms 76% of the human brain. It is responsible for higher level functions including conscious thought and language.

THE CROC BRAIN AT WORK

"First, given the limited focus and capacity of the croc brain, up to 90 percent of your message is discarded before it's passed on up to the midbrain and then on to the neocortex. The crocodile brain just doesn't process details well, and it only passes along big, obvious chunks of concrete data.

Second, unless your message is presented in such a way that the crocodile brain views it to be new and exciting—it is going to be ignored.

Third, if your pitch is complicated—if it contains abstract language and lacks visual cues—then it is perceived as a threat. Not a threat in the sense that the person listening to your pitch fears he is going to be attacked, but a threat because without cues and context, the croc brain concludes that your pitch has the potential to absorb massive amounts of brain power to comprehend. And that is a major threat because there just isn't enough brain power to handle survival needs, the problems of day-to-day life, and existing work problems plus whatever unclear thing you are asking it to do." **Oren Klaff**

The reptilian brain is the first to engage. Its only concern is survival. It will ignore anything that is not a danger. Anything new will be sent up to higher levels for review. Because of the limited capacity of the primitive brain, it can't process details and will only pass up a small percentage of the information it receives.

Are we using what we know about the brain to persuade our jurors? As Oren Klaff explains in his book *Pitch Anything*[11], we craft our messages using the neocortex, making them reasoned, logical, and complex. By contrast, our listeners receive messages in the reptilian part of the brain where all of our complex reasoning is completely ignored.

The contrast between how different levels of our brain process information and make decisions is similar to the well-known left brain/right brain theory: the left or logical side of the brain operates on a conscious level while the right emotional side of the brain operates at a subconscious level. To be effective in persuading, you must realize that communication is not the same as persuasion. While communication skills move the analytical conscious part of the brain, persuasion skills

[11] Klaff, O. (2011). *Pitch anything: An innovative method for presenting, persuading and winning the deal*. New York: McGraw-Hill.

move the emotional unconscious part of the brain that makes decisions before the conscious mind is even aware that a decision is being made.

Facts, figures, numbers, and statistics, appeal to the conscious mind whereas the unconscious mind stores your long term memory of everything you have ever sensed, smelled, heard, seen, tasted, and felt. You need to tap into these powerful memories and get them working for you. Since the unconscious brain does not know the difference between real and imagined, the more you engage the imagination, the more likely you are to persuade.

The Reptile[12] Only Cares About Survival

The sole concern of the Reptile is its own survival. If it had a voice, it would ask, "Does this threaten or enhance my chances of survival?" If our reptilian brain perceives a threat, it influences our decision making process. Imagine that your friend invited you to catch up over coffee. You have no prior commitments at the suggested time, your friend is an agreeable person, and the location is convenient for both of you. Would you attend? Now, imagine the same scenario except, when asking you out for coffee, your friend adds that they have a very bad case of the flu. Would you still attend?

Threats to the survival of the Reptile can be minor, as in the case of the flu, or life threatening such as the threat of bodily injury or death. The Reptile is also influenced by the promise of enhanced survival. We find ourselves drawn towards products marketed to improve or guarantee our safety. Our interest in being liked socially is an example of the Reptile seeking to increase the likelihood of survival. In our ancient past, when we were liked by our peer group we were more likely to receive or share in food and shelter, thus enhancing our chances of survival.[13]

In sales, one of the most effective techniques in persuading a customer to make a purchase

CONFIRMATION BIAS

If you've ever bought a new car, then you have probably had the thought cross your mind: "hey, there goes my car!" Of course buying a VW Beetle doesn't cause other people to buy more Beetles. But we notice a particular make and model of car more if we are owners of that same car. The reason for this is because all of us are subject to confirmation bias: our tendency to notice, like, and relate to things that we already know, and to discount or ignore evidence to the contrary. The Reptile loves what is familiar and despises what is different. Familiar is safe, different is threatening.

Financial advisors, diet and exercise "gurus", economists, and political forecasters are all susceptible to the tendency to discount evidence to the contrary. The investment advisor claims his shrewd investment skill is responsible for his past success generating a 7% per annum return for his clients. The fact that the market has increased 7% per year for the last five years is dismissed as a mere coincidence.†

[12] David Ball and Don Keenan have labeled the primitive or reptilian brain the "Reptile" which I will borrow to describe the reptilian brain.

[13] For a discussion of social factors that influence decision making with explanations of their evolutionary basis, see Robert Cialdini's book, Cialdini, R. B. (2007). *Influence: The psychology of persuasion.* New York: Collins.

† Dobelli, R. (2013). *The art of thinking clearly*. New York: Harper at 19, 22. The confirmation bias is just one of dozens if not hundreds of biases that all human beings are susceptible to, many of which are described in this book.

is to cause the customer to feel liked. This feeling of being liked pleases the Reptile, and encourages the person to go along with the salesperson's ideas. An average car salesman sells about 10 cars per month. But Joe Girard sold about 80 per month, every month, over his 15-year career. Joe attributed his success to his practice of sending a personal card to everyone he sold a car to with just one message: "I like you."

Confusion threatens the Reptile. Storytelling enhances its survival.

The Reptile dislikes being confused. What the Reptile does not understand, it perceives as a threat. Therefore, when information is presented in a way that is incoherent, complicated, overly complex, or overlong, the Reptile will activate to defend itself against that information. Rodney Jew is a leading litigation strategist. He created his Purple Box as a warning to plaintiff lawyers. Never enter the Purple Box, says Rodney. It is full of complexity, confusion, and ambiguity. It is where the defence resides. It is where they are strong. It is where they will want to fight you. As he says, "It will never be about describing what happened. It will be about proving why your plaintiff was harmed."[14]

Peter Guber is the former head of Columbia and Sony Pictures. His producing credits include 50 Academy Award nominations for movies like Rain Man, Batman, Philadelphia, Sleepless in Seattle, and Awakenings. But what he wanted to know was why some of his movies were successful and why some were flops at the box office. What he discovered was movies that told a great story were the ones that were successful. In his book *Tell to Win, Connect, Persuade, and Triumph with the Hidden Power of Story,* the title of chapter one is "It's the Story, Stupid." What Guber also discovered was that every story needs a hero. But the hero may not be who you think. Rain Man is about an autistic savant, Raymond, played by Dustin Hoffmann and his manipulative arrogant car salesman brother, Charlie, played by Tom Cruise. Guber thought the story was about the extraordinary life of an autistic savant but he went through three directors - none of them could tell the story. Director Barry Levinson looked at the script and realized that the story needed a purpose beyond just a movie about an autistic savant. The story was about how Charlie tried to manipulate and take advantage of Raymond but eventually came to appreciate his autistic brother. The hero is the character in the story who undergoes a transformation. Charlie transformed himself and in doing so he changed Raymond's life forever. Tom Cruise's Charlie was the hero of the story and the movie was responsible for changing the way people viewed persons with disabilities. Rain Man won the Academy Award in for best picture in 1989.[15]

[14] Jew, R. (2012). *Reinvent: A New Vision for Your Litigation Strategies.*
[15] Guber, P. (2011). *Tell to Win: Connect, Persuade, and Triumph with the Hidden Power of Story.* New York, NY: The Crown Publishing Group.

Why is storytelling an effective way to involve and persuade your audience? We have been using the art of storytelling for as long as the written record has been in existence, and probably much longer than that. Stories are used as a means to disseminate information in our societies and between our generations. Our brains are prewired to understand and process stories in a way unlike raw information and data. The story pleases the Reptile by providing it with information in a format that it can understand, store, and repeat in order to ensure its own survival. If you paid attention around the prehistoric campfire you learned what you needed to know to survive and the storytelling gene survived. If you didn't listen to the stories being told, you died.

The Reptile expects information to be delivered to it in a visual manner since 90% of the information it receives is delivered through the eyes. Our prehistoric ancestors passed on their survival skills by illustrating their stories. Good teachers deliver their lectures by showing their students information on a board or screen.

Good visuals are less complicated than the equivalent expressed in words. When describing the scene of an accident, it might take a dozen or more paragraphs to establish what could be shown in a single image and understood with a single glance. When done well, visual communication can have a dramatic impact on how your case is perceived by improving the clarity and persuasiveness of your message.

Let's see how NeuroPersuasion and the power of storytelling can be combined with the use of visual imagery to help influence the reptilian part of your audience's brain.

TOOLS FOR PERSUASION

1. **Focus on how the outcome of your case affects your audience.**

Remember, the Reptile only cares about its own survival. To be persuasive, you need to show how going with your interpretation of the events and award of damages helps the members of your audience. And you need to show the harms that will occur if your audience doesn't side with you. For example, in a product liability case, show the jury how an award of damages against a negligent manufacturer of faulty goods will deter harmful corporate behaviour. Then show that if the award is not made, corporations will be sloppy in their manufacturing, putting the public at risk, including jurors and their families. All jurors are tuned into only one radio station, WIIFM, What's In It For Me? You have to give them a reason to keep listening. Remember the focus juror who said "I would want to know how the accident happened but told in a very emotional way so that the people listening are affected as if it happened to them."

2. **Use short words, short sentences, and short paragraphs.**

The Reptile distrusts complexity. Messages that take the least amount of effort to understand are the most likely to be absorbed. The average attention span of a juror is just seven seconds, and once attention is lost, it is much harder to regain. Instead of saying "the plaintiff's ambulatory capacity is diminished" say, "the plaintiff can't walk." Practice simplicity and brevity in both your oral and written

communication. If jurors hear a word they don't understand they will be upset with you and ignore what you have to say. In a recent case a judge used the word "lacuna". I couldn't ignore him so I had to look it up creating an unfilled space or gap in my appreciation of what the judge was trying to say.[16] If you need to say something more, repeat an important point you already made. Repetition reinforces your message.

3. Be aware of the key "codes" in your case.

Every case deals with certain key concepts. In a medical negligence case, these concepts are often the "physician" and the "hospital". And a key concept in most cases is the "health" of the injured person. Each of these concepts has a well-known definition, but they are also "code" for more powerful associations.[17]

For many people, a "hospital" is code for "processing plant" – long lines, intolerable wait times, uniformed employees, standardized service, an uncaring and corporate feel, with patients treated like numbers. If you are suing a hospital, you must show how the hospital exhibited the characteristics of a processing plant.

The code for health is "mobility". This strikes a chord with the Reptile because in evolutionary terms, lack of mobility meant death. Lack of mobility elicits more fear than pain because in evolutionary terms pain helps us survive by avoiding danger. Survival is possible with pain, but not with lack of mobility. If you can't move with the herd they leave you to die. Jurors can relate how an injury can affect mobility resulting in loneliness and isolation, a modern day rejection by the herd.

LACK OF MOBILITY TRUMPS PAIN

We usually feel sorry for other people's physical pain, but we never actually feel their pain. In contrast, we often share the specific feeling of someone's impaired ability (can't get home or escape danger, for example) or loneliness (a lover leaves or dies, the good guy becomes a social outcast, or someone faces the rest of his or her life alone). Shared feeling is immeasurably stronger than feeling sorry, and the two derive from very different parts of the brain.††

Not everyone has the same association for each key concept. In the case of physician, many people think of the physician as the hero – someone who follows a strict code of professional conduct, and takes utmost care in performing their duties to improve health and save lives. Other people, especially those who have had bad experiences with physicians, think of them as assembly line workers – uncaring, unwilling to be moved by patient concerns, and unable to dedicate the time required to help them. If you are trying to prove that the physician acted negligently to those who have stored the code "hero", you must show how the physician was "off-code", that is, how they failed to display the characteristics of the hero. For the audience who

†† Ball, D (2009) Damages and the Reptilian Brain. *Trial, volume 45(9) at 25.*

[16] The definition of *lacuna* is "an unfilled space or interval, a gap."

[17] Ball, D. and Keenan, D. (2009). *Reptile*: *The 2009 Manual of the Plaintiff's Revolution*. New York, NY: Balloon Press at 75. See also Rapaille, C. (2006). *The Culture Code: An Ingenious Way to Understand Why People Around the World Live and Buy as They Do.* New York, NY: The Crown Publishing Group.

thinks of the physician as an assembly line worker, you must show how the physician acted in precisely the manner that they expect. In both cases, you are catering your message to your audience's preconceived "code" for the key concepts in your case.

If you attempt to show that your audience's code is wrong – you lose. Instead, show how the parties in your story were either off-code or on-code.

4. Tell your case in the form of a story.

Stories make information easier to understand, digest, and recall by the reptilian brain. Wrapping your case in a story adds credibility, generates interest, and keeps attention. Hollywood filmmakers like Peter Guber are master storytellers. Every good Hollywood film follows the same basic structure[18], and you can use this method to turn your case into a persuasive story.

Every story has three acts, corresponding to the beginning, middle and end – each of which is broken down in to four or five scenes. The first act sets up the story by establishing the who, what, where, when, why, and how of the story. The first scene of Act I establishes the setting. As soon as you begin your story, your audience is wondering, *where* is this taking place, and *when* did it happen? It does not need to be an exact geographical location, but can be a state of affairs that forms the theme of your case. For example, it could be *injuries caused by distracted driving are reaching new records every day*. The next scenes establish the characters of your story[19], followed by the imbalance that has been created. The imbalance is the wrongful conduct of the party you are suing and the harms and losses that conduct has caused. At this point, do not go into detail about harms and losses. Instead, you simply give a snapshot of the story that introduces the imbalance which your audience is going to solve.

Act II fleshes out the story and develops the action. While Act I established the problem for your audience to solve, Act II gives your audience the means and interest to resolve it in your client's favor.

Establish three or four main points that answer the question of *why* the issues should be resolved in favor of your client. These issues will usually be liability and damages. Always spend the same amount of time on damages as you do on liability. You can then add three supporting points for each main issue. These supporting points answer the question of *how* your audience can resolve the issues. You can consider adding additional main issues, but keep in mind that with simpler and fewer issues, the Reptile will find it easier to understand and agree with you.

Remember to show not only how the harms and losses affect your client, but also show how, if left unresolved, the wrongful conduct affects the lives of your audience.

The final act of every story presents a resolution. Act III frames the resolution so that your audience is the protagonist of the story and are persuaded to decide in favour of the recommendations you made in Act II. Start by restating the imbalance or crisis of Act I, then offer the solution recommended in Act II

[18] Atkinson, C. (2011). *Beyond Bullet Points 3rd: Using Microsoft PowerPoint to Create Presentations That Inform, Motivate and Inspire.* New York, NY: Pearson Education.

[19] But do not talk about the actions of your client until you have fully shown the wrongful conduct of the other party. David Ball found that jurors believe that the first party mentioned in a case is the party that is in the wrong, and once this primacy of belief is established, it is very hard to rebut.

(e.g. finding of liability and award of damages), and finally, show how the solution resolves the imbalance. In other words, show how the solution restores your client, makes up for his or her harms and losses, and ensures the safety of your audience.[20]

5. Use the *Rules of the Road* to present your arguments on liability.

In their book, *Rules of the Road*[21], Rick Friedman and Patrick Malone explain the challenge created for plaintiffs' lawyers by the defence tactics designed to get you inside their *Purple Box* of complexity, confusion, and ambiguity. Take for example the use of the word *reasonable* which is often crucial to establishing liability. In most states, the first-party bad faith jury instruction will be similar to the following from Friedman and Malone:

> There is an implied duty of good faith and fair dealing in every insurance policy. The plaintiff claims that the defendant breached this duty.
>
> To prove that the defendant breached the duty of good faith and fair dealing, the plaintiff must prove:
>
> 1. The defendant intentionally [denied the claim] [failed to pay the claim] [delayed payment of the claim] *without a reasonable basis* for such action; and
> 2. The defendant knew that it acted *without a reasonable basis*, or the defendant failed to perform an investigation or evaluation adequate to determine whether its action was supported by a *reasonable basis*.[22]

But what does it mean to be *reasonable*? Any defence lawyer will recognize that the reasonable standard in a bad faith claim case provides a safe harbour for improper insurance company conduct. Why? Because the standard is ambiguous. The concepts of the *reasonable* person in a motor vehicle case and the *reasonable* prudent doctor in a medical malpractice case are similarly ambiguous. When a juror is asked to apply ambiguous standards, two things can happen. First, the juror is going to decide against you because the Reptile dislikes confusion. Second, the juror can invent his or her own standard for what is reasonable. Since the infusion of tort-reform ideas into the mind of the general public, the standard invented by the juror is likely to be filled with anti-plaintiff sentiment. The solution then is to clarify the standard and remove confusion and ambiguity by using the *Rules of the Road* method.

This requires you to state simple rules which should govern the conduct of the defendant, to which everyone agrees, and that the defendant has broken. It is not more complicated than that. Simplicity should be your guiding light. For example, in a medical malpractice case, a rule might be:

> *Rule*: A surgeon should not cut any internal structure without making sure what it is.

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[20] I retained Cliff Atkinson in a case. He storyboarded the script, wrote the script, and visualized the script. This template was then used to build the opening presentation to the jury. For free resources on how to use this method of storytelling, including a fillable template see: http://beyondbulletpoints.com/resources/.

[21] Friedman, R., & Malone, P. (2006). *Rules of the Road.* Portland, OR: Trial Guides LLC.

[22] Friedman and Malone, *ibid* at 8.

A defendant doctor or expert will be unable to argue against this rule without losing credibility. It would be more powerful to use the rhetorical question "Why should a surgeon not cut any internal structure without making sure what it is." Confucius says tell the jurors the rule and they will likely forget. Asking *why* involves them in the process so they will understand why the rule exists.

Friedman and Malone state that the rules can be identified from a number of sources including statutes, case law, policies, ethical codes, common sense, contracts, and perhaps best of all, civil jury instructions as "nothing focuses the mind of a trial lawyer like a set of jury instructions."[23]

An effective rule should have the following five attributes:

1. A requirement the defendant do, or not do, something.
2. Be easy for the jury to understand.
3. A requirement the defence cannot credibly dispute.
4. A requirement the defendant has violated.
5. Be important enough in the context of the case that proof of its violation will significantly increase the chance of a verdict for the plaintiff.[24]

By using a rule with these attributes, you will be able to communicate to the jury that the defendant's violation of the rule is evidence of the defendant's failure to meet the reasonable standard of care, which reduces or eliminates ambiguity and confusion in the mind of the juror.

6. Call a car crash a car crash.

We wouldn't call a plane crash killing hundreds of people a "plane accident", so why do we use the term "car accident"?[25]

This isn't just semantics. Your choice of words matter. Never call a car crash an accident (unless you're on for the defence). By definition, an accident occurs fortuitously, unexpectedly, and without cause. Jurors hearing the word accident will automatically associate one or more definitions that tend to excuse liability and attribute the injury to chance rather than wrongdoing or error.

[23] Friedman and Malone, *ibid* at 39-40.
[24] Friedman and Malone, *ibid* at 22.
[25] Stormberg, J. (2015). We don't say "plane accident." We shouldn't say "car accident" either. *Vox*. Retrieved from http://www.vox.com/2015/7/20/8995151/crash-not-accident.

7. **Avoid the kill shots.**

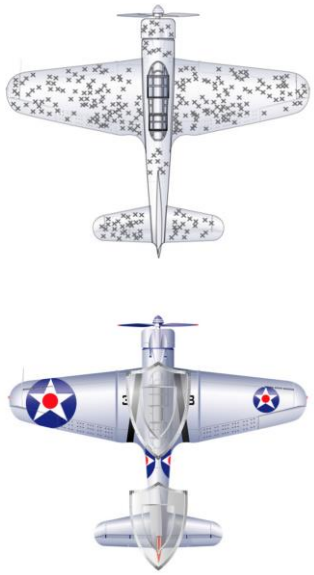
Think about a case you tried and lost recently, a case you feel you should have won but didn't go your way. In the post-mortem did you figure out the *kill shot* you failed to reinforce? If you have run into Rodney Jew you have heard the following story.

In World War II, Allied fighters flew cover for the bombers as they flew over Europe. But the losses were heavy. To reduce the air losses and increase the likelihood of the fighters returning, the military brass decided to reinforce the planes where they had received enemy fire. Yet, it did nothing to reduce the losses. So the Allies hired the mathematician Abraham Wald to figure out where to reinforce the planes. He plotted all the bullet holes on the returning planes and discovered the solution. There were two areas where there were no bullet holes. The cockpit with the adjacent fuel tank and the rear stabilizer. Planes hit in these critical areas (kill shots) did not return. The solution? Examine the returning planes for bullet holes and reinforce everywhere else.

This is an example of the survivorship bias at play: we tend to ignore what we can't see, and as a result our conclusions become biased and faulty.

Remember the case you thought about earlier? Where did it go wrong? Where were the kill shots? Those points are the ones that need reinforcement in your next case.

ELIMINATE THE KILL SHOTS



The lesson for your cases: it's not about patching all the bullet holes that the defense shoots in your case. It's about identifying and eliminating all of the kill shots. **Rodney Jew**

8. **Set expectations for your audience and then meet them.**

People have expectations about almost everything in life, including the lawyer presenting his or her case, and they seek to have those expectations fulfilled. When you meet those expectations, you build trust and credibility for yourself.

The well-known placebo effect is an example of expectations at work. In medical research, people who are given placebo treatments experience significant relief from pain and other symptoms despite the fact that they received no real treatment. But since the patients who receive the placebo treatment are unaware, they have an expectation of relief from their symptoms. And it is this expectation of relief that creates the relief itself.

When you create an expectation about you, your case, or what your audience will hear from your experts, your audience subconsciously seeks to have that expectation fulfilled. When it is fulfilled, you have shown that you are trustworthy and credible, and other expectations that you create are more likely to be true and fulfilled. But if you create an expectation that you fail to meet, you immediately lose credibility in the mind of the jury. This is why you should never oversell your case or the evidence. If your audience finds any inconsistencies between what you tell them they will see and what they actually see, you are creating an opening for a kill shot from which you may not recover.

9. Communicate your case visually.

In their book, *Show the* Story, William and Robert Bailey show the power of visual advocacy and how it affects the Reptile. Our brain is hardwired to learn visually. We understand information better through visuals, and we retain visual information in more detail and for a longer time. The combination of verbal and visual delivery of information is six times as effective as verbal alone.[26] When information is delivered verbally, only 10% is remembered after 3 days. When information is delivered verbally and visually, 60% of it is remembered after 3 days.

The Hollywood storyboard technique effectively employs visuals to tell the story. In a car crash, a picture or graphic showing a person on a cell phone hitting a pedestrian can be used to illustrate the conflict of the story – that distracted drivers are a threat. The setting can be shown by photos of the crash scene. The main character of the story, the plaintiff, can be told through visuals of the plaintiff before and after the crash. A significant advantage of employing visuals is that they are marked as exhibits and are taken into the jury room. Not so with the evidence of witness. All the jurors takes into the jury room is what they can remember.

A copious amount of text on a slide or board distracts your audience. Do not use up any more than about a fifth of the image with words. The words should be simple and to the point, such as “cell phones distract drivers” and no more.

When presenting a textual document, present the document with the important part highlighted and/or blown up so the audience can focus their attention on what you want them to see.

Graphics make problems easier for people to solve. When presenting a complex part of your case, demonstrate it by graphical representation. For example the routes taken by parties involved in a car crash can be represented in a map by using Google Maps, or Google Earth to visualize the scene. And rather than using dots, use memorable graphical symbols, such as a house, a car, or notable landmark to represent the locations of important information on the map.

[26] Bailey, W. S., Bailey, R. W. (2011). *Show the story: the power of visual advocacy*. USA: Trial Guides LLC. See also Ball, D. (2003). *Theater Tips and Strategies for Jury Trials* (3rd ed.). Portland, OR: Trial Guides, LLC and Duarte, N. (2010) *Resonate*. Duarte Press, LLC.

10. Open your case with the David Ball approach.

The opening is your opportunity to tell the judge or jurors the story of what your case is all about. A successful opening will involve the audience in your story and invite them to participate in how the story ends.

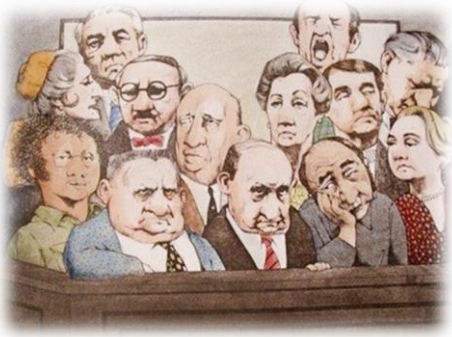
David Ball is an American trial consultant who has worked on hundreds of civil and criminal trials. In his book, *David Ball on Damages*[27], Ball discovered that jurors have developed an unshakable belief as to what the trial is about by the end of the opening. This belief influences everything that follows in the trial: what the jurors pay attention to, what they consider to be important, what they remember, ignore and use, how they weigh each argument, opinion, and piece of evidence, what they think it means, and how they deal with it in arriving at their decision.

Ball says the trial is about harms and losses, and more specifically, what is required to fix, help, and make up for the harms caused by the actions of the defendant. Jurors will pay attention to what you spend your time on, so you must ensure that your opening follows a clear structure. You want to layer in one topic at a time. Do not waste the opening with information that will not be of assistance to jurors in deciding the case. Any suggestion of advocacy must be eliminated during the opening. Why? Because insurance companies have successfully compromised the credibility of trial lawyers with jurors. They will not take your word for anything. Everything you say must be related to the evidence of a lay witness or expert. For the opening, Ball provides a seven part structure you can follow with appropriate modifications to suit your case:

Part 1: Rule and consequence

What do jurors want to hear first? When someone introduces you to a new game, what is the first thing you have to know before you can play? The rules. The trial is a new game for the jurors. Telling them the rules tells them how to play the game. It tells jurors what to listen to and what is important to help them make their decisions. This is where you can use the *Rules of the Road* approach for identifying and adopting simple rules.

According to Ball, your opening should begin by stating the rule the defendant broke, but when presenting the rule to the jurors, do not say that the defendant broke the rule. At this point, Ball recommends that you do not mention the defendant at all. Simply state the rule, and what the consequences are for a person who breaks the rule. According to Ball, presenting the jurors with the rule helps them to relax by defining their role in the trial. [28]



[27] Ball, D. (2013). *David Ball on Damages 3.* Portland, OR: Trial Guides, LLC.

[28] Friedman & Malone, *supra* note 21. See difference of opinion between Friedman and Malone at p. 120. Friedman does not like to use the term "Rules" or "Rules of the Road" during the trial. He prefers to use "well recognized standards in the industry" or the "basic principles" approach. Malone says that the advantage of referring to "Rules" is that everyone knows what it means although he cautions that it has the most value when used when referring to "standards" or "basic principles."

Part 2: The story of what the defendant did

After presenting the jurors with the rule, you should tell them the story of what the defendant did. Remember to resist the urge to advocate. This story must be told without implying any blame. How to tell the story is an important part of the Ball approach.[29]

1. Focus on the defendant

Do not introduce the plaintiff to jurors until you have finished describing the actions of the defendant. Why? Because when they enter the courtroom jurors believe their role is to decide who did something wrong. Ball found that jurors will place more emphasis on early information to assign blame. If the plaintiff is part of this early information, the plaintiff will be assigned blame. By focusing on the actions of the defendant you provide the jury with the opportunity to blame the defendant. Once jurors assign blame it is very difficult to overcome. This is what Ball refers to as *primacy of belief*. It is not what the jurors hear first or last that is important, but rather what they first come to believe that guides them in their decision making process.

2. Set the scene

You can set the scene for the story of what happened by saying "Let me take you back to..." You can now tell the story of the choices made by the defendant that eventually caused harm to the plaintiff. By stating the defendant chose to act the way he or she did gives jurors a reason to cast blame on the defendant. When describing the conduct of the defendant, use an active voice to engage the jurors' interest. An active voice keeps jurors listening and interested in what is going to happen next. When telling the story Ball suggests that you follow these guidelines:

- Short sentences – clearer and easier to listen to than long convoluted sentences.
- Present tense – creates immediacy and will register more strongly – use "turns right", not "turned right".
- One action per sentence – moves story forward in time – maintains attention of jurors.
- Avoid exposition – any sentence or phrase that does not move the story forward in time. Jurors pay attention to action not exposition.
- Each sentence is important – ensure an appropriate pause after each sentence to assist in moving the story forward one step at a time.
- Tell jurors only what you can see or hear. If you cannot turn a piece of information into an action done by the defendant, leave it out of the story. The defendant "looks at his cell phone" can be seen and is more memorable and believable than the "defendant failed to look at the road."
- Point no fingers of blame – jurors are not ready for anything adversarial. The story is what the defendant did. After the story comes the blame.

[29] Ball, *supra* note 27 at 124.

- End of story – the story ends with a brief reference to the harm caused by the actions of the defendant.
- The next thing the defendant did – include this if it advances the story, e.g., left the scene of the accident.
- Inevitability – when you state the rule with no accusation, the jurors will not see you as an advocate but they will assume that someone broke the rule and caused the harm. When you tell them about the actions and choices made by the defendant, they will assign blame to the defendant rather than to your client. Once primacy of belief is established it is very difficult to dislodge.[30]

Part 3: Blame (who are we suing and why?)

1. What was the negligent act or choice to omit?

This is where you explain why you are suing the defendant. A driver chooses not to keep his eyes on the road. A contractor chooses not to sand or salt the roadway. A municipality chooses to leave a gap in a protective barrier. Do not say the defendant failed to do something as jurors may forgive failures. Turn the omission into an affirmative act. If the act is not admitted, then say how it is known. Refer to a witness seeing it or the opinion of an expert that it happened that way.

2. What is wrong with the negligent act? How does it foreseeably cause harm?

Tell the jury who or what says that the act is wrong. It may be a breach of a statute or the common law. If you rely on expert evidence, then you must provide the jurors with a brief explanation of how your expert arrived at his or her opinion. It may be an authoritative text or journal or it may be a departure from generally accepted standards in a profession or industry.

3. What should the defendant have done instead? What good would that have done?

Show the jurors how easy it is for the defendant to make the right choice. For example, if a municipality has left a gap in a protective barrier which resulted in an injury to your client, it is likely to have taken steps after the accident to correct the problem. Photographs of the new barrier should be included in the opening to show what the municipality should (and could) have done. If the municipality had followed the rule, it would never have chosen to leave a gap in the barrier and your client would not have been injured.

Part 4: Undermine the case of the defence

You should provide your side of the story for every important defence point. If you don't, the defence will and the jurors will think that you were trying to hide from these points. By raising it first, you can spin it your way. The Ball approach requires that you tell the jurors that you had to consider the evidence in support of the defendant's position before coming to trial. You then tell the jurors why the explanation of the defendant is not accurate. That is why you had no choice but to come to trial. This approach may not be permissible in some jurisdictions including British Columbia. An alternative is to

[30] Ball, D., *supra* note 27 at 111, 130-131.

tell the jurors that the position of the defence will be disclosed in the Response to Civil Claim.[31] For example, if the defense alleges that the plaintiff was speeding or failed to wear a seat belt, you can often show a positive action that you took to investigate whether the defence contention was correct. You can point to the evidence from lay witnesses and experts that will show that your client was not speeding and was wearing a seat belt. This is not argument but simply a reference to the evidence you will be leading at trial.

Part 5: Damages (what are the losses and harms?)

Ball suggests that you should never expect jurors to deal with two things at once. Therefore, when discussing why the defendant is to blame, nothing should be said about the losses and harms suffered by your client. When discussing damages, there should be no reference to blame. Jurors must understand that the case is not just about who did something wrong. It is also about how to best put your client into the position he or she would have been in if he or she was not injured by the actions of the defendant. At the end of your opening, jurors should have a clear idea of what injuries your client has suffered, and how much money will fairly compensate your client for these injuries. Ball organizes the damages portion of the opening into a number of categories:

- Physical damage.
- Primary consequences of the physical damage.
- Nature, extent, and duration of the pain and suffering.
- Tasks of life and work that your client could not or cannot do.
- Safety consequences of the harms.
- Before and after.
- Fixes and helps.
- Make up for.

You must describe the physical mechanism of the injury, whether it is a lower back injury or damage to the brain. Use simple language. Refer to the evidence of the medical professionals, as it is still too early to ask jurors to take your word for anything. Review how the injuries have affected your client. For example, if your client sustained brain damage, explain what the expert will say about frontal lobe damage and deficits in executive functioning. This is accomplished best by giving concrete examples. If your client is suffering from pain, then describe the pain in a way that jurors will appreciate. Make it easy for jurors to identify with the pain by creating a powerful analogy. Provide examples of how the injuries limit your client's activities and specifically how the injuries have affected the mobility of your client resulting in isolation and loneliness. Rather than focus on the specifics of the injuries, focus on the effect the injuries have on your client. You can then move to how the injuries affect your client's ability to earn an income, care for him or herself, maintain personal relationships, and cope with activities of daily living.

Once the jurors have an appreciation of the harms and losses, they will need to know what can be done to help your client fix the problems. Past and future loss of income can be replaced. But how do you

[31] You should only refer to allegations in the Response to Civil Claim that remain in issue at trial.

replace the executive functions of the brain? How do you replace loss of mobility? Future care can be discussed in the context of a "Minimum Life Care Plan." Ball advises that your expert should be instructed to prepare such a plan that provides for the "...minimum humane level of care, comfort, and safety."[32] Your expert can now explain why the plan is not extravagant and can point to all of the things not included in the plan. Jurors will realize that every dollar of the money goes to other people to pay for your client's personal care, treatment, medications, equipment, and rehabilitation.

At the conclusion of the damages section the jurors should be told that a separate area of loss not easily translated into money is non-pecuniary loss, which you tell the jurors is really just a fancy term for non-money losses. This includes pain and suffering and loss of amenities of life. It is what makes life worth living. In a severe case, it will include the total loss of a former lifestyle, the humiliation of having to rely on the goodwill of others for the simplest tasks of daily living, and the loss of self-image. In Canada, there is a limit of approximately $375,000 (which increases with inflation) for non-pecuniary loss in cases of severe and devastating injuries. But there is no limit on the pecuniary heads of damage as long as there is evidence to justify the findings of the jury.

Part 6: The Plaintiff's happy life before the injury

At this point in your opening, you will tell the jury about the plaintiff and what they were like before the defendant injured them. Ball notes stories are usually chronological. However, he also says this part is an important exception. It is important because by letting the jury know the catastrophic outcome *before* the happy parts of the plaintiff's life, the story becomes much more powerful and profound.[33] For example, first show your client in the wheelchair. Then show how active your client was before the accident. Ball also says this is one of the world's oldest and strongest dramatic techniques in storytelling. In describing how the injuries have affected your client, avoid generalities of what he or she used to be like. It is far more powerful to get the message across with a vignette or mini-story to show the impact on your client's life. Photographs and video of your client before the accident can influence the emotional decision making part of the brain.

Part 7: What can the jury do about it?

As mentioned in Part 5, once the jurors have an appreciation of the harms and losses, they need to know what they can do to help your client. Lawyers are reluctant to discuss money in the opening. But Ball says you must talk about money. Jurors want guidance and will complain when lawyers do not specify a figure. Give them exact dollar figures and be sure to specify that they are only permitted to take into account the amount of the harms and losses – nothing else.

[32] For a detailed explanation on the importance of presenting damages to the jury, and the most effective methods of doing so, see Ball, supra note 27 at 149-158.

[33] Ball, *supra* note 27 at 162.

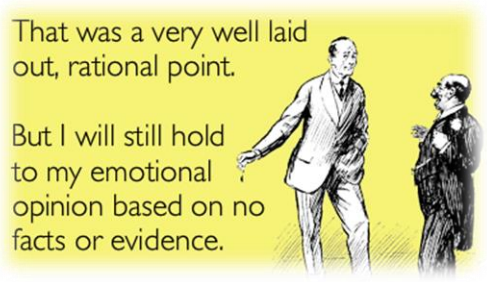
To keep the jurors listening through to the money part of your opening, Ball says you must overcome five bad habits engrained in lawyers from their years in law school:

- Do not use too many words to make each point.
- Do not repeat obvious information.
- At this point, keep things rational, not emotional.
- Do not give speeches.
- Seek crystal clarity in expressing your points, not semi-clarity.

THE FINAL VERDICT

People are not persuaded by reason alone. The trial lawyer must tap into desires and beliefs that are deeply seated in the emotional brain. As Nancy Duarte says in *Resonate*, "you need a small thorn that is sharper than fact to prick their hearts. That thorn is emotion."

Neuroscience teaches us that emotion trumps logic. The words you choose, the imagery you use, the emotions you elicit impact and influence audiences in ways that logic, law and reason cannot. The emerging field of NeuroPersuasion tells us why storytelling is a powerful way to tap into the primitive, irrational, and emotionally-driven part of the brain.



The next time you prepare for trial, remember Mr. Justice Laskin's advice to think of yourself as an expert storyteller rather than expert litigator, because the best advocates are the best storytellers.