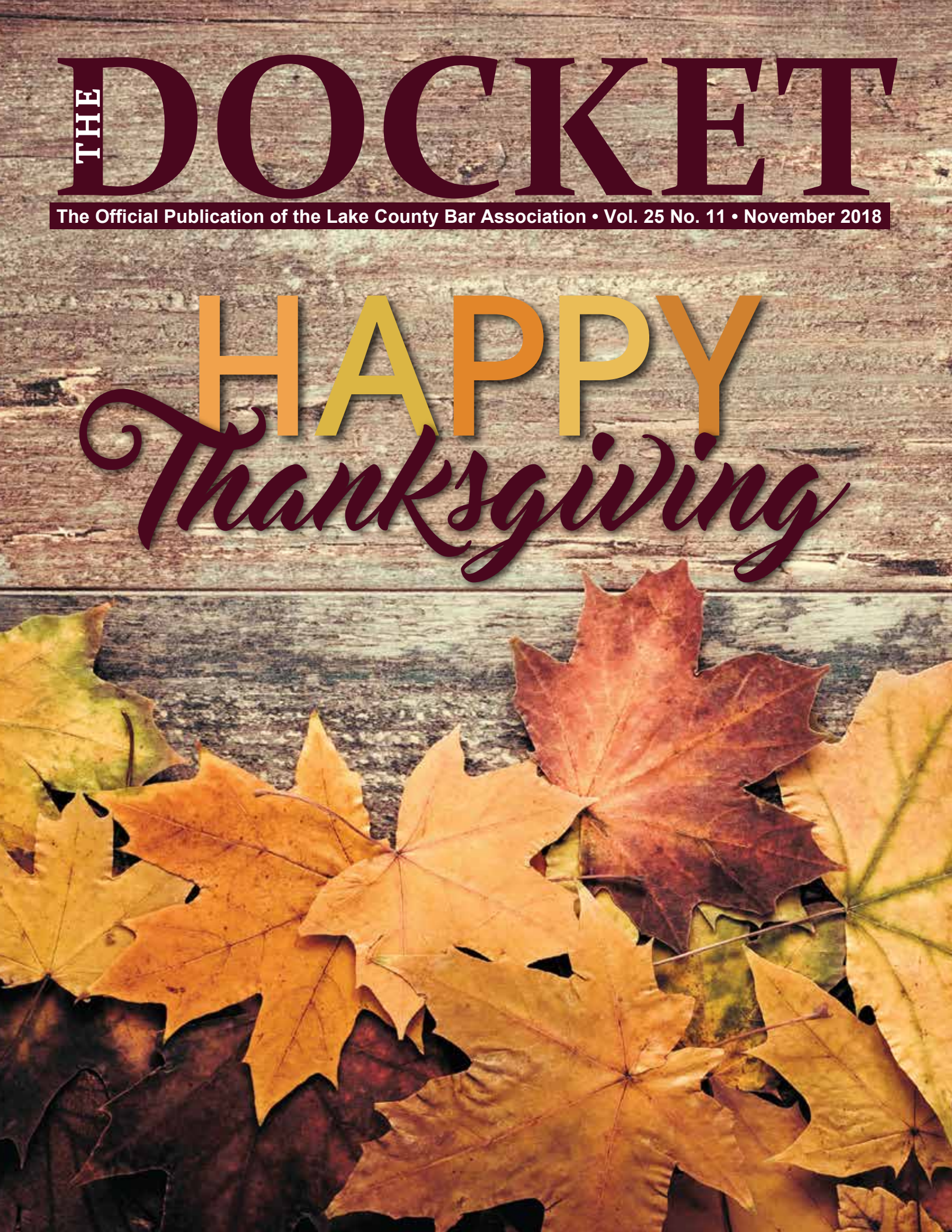
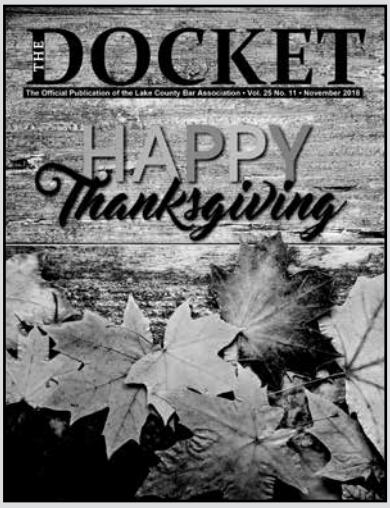
THE DOCKET

The Official Publication of the Lake County Bar Association • Vol. 25 No. 11 • November 2018





A publication of the

LAKE COUNTY BAR ASSOCIATION est. 1912

300 Grand Avenue, Suite A
Waukegan, Illinois 60085
(847) 244-3143 • Fax: (847) 244-8259
www.lakebar.org • info@lakebar.org

Contents

THE DOCKET • Vol. 25, No. 11 • November 2018

FEATURES

COLUMNS

LCBA EVENTS

Advertising Rates

To place an ad or for information on advertising rates, call (847) 244-3143. Submission deadline: first day of month preceding the month of publication. All submissions must be made in electronic format (high resolution PDF or JPG format at a resolution of 300 pixels per inch or more.) See www.lakebar.org/html/docketRates.asp.

The Docket is the official publication of the Lake County Bar Association, 300 Grand Avenue, Suite A, Waukegan, Illinois 60085 (847) 244-3143, and is published monthly. Subscriptions for non-members are $45.00 per year.

All submitted manuscripts are considered by the Editorial Board. All letters to the editor and articles are subject to editing. Publications of advertisements is not to be considered as an endorsement of any product or service advertised unless otherwise stated.

Speaking To Jurors

A $148 million verdict begs the question: Why that number, and how does one succeed at speaking to jurors?

BY STEPHEN J. RICE

Tierney Darden was with her mom and sister at O'Hare on an unusually stormy day in the summer of 2015. The storm was remarkable, but not the type of weather that we recall with singular names e.g., the Plainfield Tornado.[1] The threesome stood at a covered bus shelter at the airport, seeking protection from the elements.

They had actually repositioned themselves behind the shelter itself to avoid the sideways-penetrating rain and hail because winds of around 50 mph were blowing into the shelter's cavity. In this maelstrom, the shelter came unmoored—its rusted brackets and missing securing bolts of no utility—and it tipped over.

The shelter injured several people, but it forever changed Tierney, whose spinal cord was severed.[2] When attorney Pat Salvi, whose firm represented Tierney, describes the injury, he takes his arm and illustrates in a motion what occurred to her spinal cord, transforming a somewhat abstract description of the injury into something more visceral. It is the type of injury we associate with battle trauma, not routine commercial air travel.

Tierney's injury, which caused paraplegia, is one that thousands of Americans suffer annually. Through discovery, however, it became clear that hers had unique and unfortunate characteristics. Due, perhaps, to the method by which her spinal cord was severed, she suffers from neuropathic pain—basically, her brain continues to get pain messages from the nerves that previously served her lower extremities—and this pain can resist treatment and worsen with time. When her case went to trial, much of the testimony focused on whether certain surgical treatments which she might choose to undergo in the future would improve her condition. But stemming against this narrative was the fact that Tierney had already undergone several treatments, which had failed.

In August 2017, a jury award-

Stephen J. Rice is an Assistant State's Attorney in the Civil Division of the Lake County State's Attorney's Office, and the Second Vice President of the Lake County Bar Association.

1 A description of the weather on August 2, 2015, appears at https://www.weather.gov/lot/2August2015, including the EF1 tornado that strafed Lake County from Round Lake to Wildwood.

2 I'll refer to Tierney by her first name in this article because her mother is also a "Ms. Darden."

ed Tierney $148 million in compensatory damages. The award is the largest such award to a single plaintiff in Illinois history. Salvi, Schostok & Pritchard is renowned for its success in such matters, but this is, nevertheless, the type of verdict that makes one ponder *what* causes a jury to reach such an extraordinary result? The law is not a lottery, so it cannot be luck, even if the American jury system imbues the process with some degree of serendipity. While the facts in Tierney's case eventually secured an eight-figure result, $148 million is a multiple of what we would ordinarily expect. So when I sat down to discuss Tierney's case with Pat Salvi, I was interested to discuss how his team of attorneys built its case so that a jury would compensate Tierney to the degree that it ultimately did. How did they leverage the considerable emotional impact of her tragic case with a narrative that would facilitate a jury deliberation that reached this result?

What causes a jury to reach such an extraordinary result?

Separate from my conversation with Salvi, I recently read a book that summarizes decades of research into how the human mind operates. Some lessons from the book supply an interesting lens through which to view Tierney's case.

A. THINKING, FAST AND SLOW.

Psychologist and Nobel Laureate Daniel Kahneman's model of how the human mind works is that the brain operates two distinct systems, which he calls "System 1" and "System 2." System 1 encompasses thinking that is fast, instinctive and emotional (it's been alternately called the "Automatic System"); System 2, by contrast, is slower, more deliberative, and more logical (alternately, the "Reflective System").[3]

Kahneman's book, titled *Thinking, Fast and Slow*, contains many examples of Systems 1 and 2 thinking, but a simple example illustrates how it works.[4] If you are asked to solve the equation 2 + 2, you immediately come to the answer. You naturally—almost instinctively—know that the answer is 4. This is the type of calculation you likely do subconsciously on a daily basis, and it represents System 1 thinking. Now, contrast that to being asked to solve 17 x 24. You can do it, maybe even in your head, but it requires effort. You must deliberate about it, and only then will you come to the answer. That is your "System 2" at work.

Like the synapses of the brain itself, Kahneman's basic system-one and -two paradigm connects with an array of insights about how humans think and behave. His book is not directed to attorneys per se, but because the law is intertwined with the human condition generally—how we think, feel, employ reason, *mis*employ it, and extrapolate our experiences to situations confronting us, etc.—it should likely be a core text in the legal cannon.

This holds especially for trial lawyers. For example, when attorneys present a personal injury case to a jury, both systems of a juror's brain are at play. On the one hand, the story of a person who is seriously injured because of someone's negligent act naturally triggers an instinctive, emotional reaction: A "System 1" response. The facts of Tierney's case almost immediately trigger this response, especially after one learns about the poor condition of the shelter that injured her, which counters the theory that the accident was simply an act-of-God weather event. Tierney was injured and suffers in a way that anyone can understand at a basic level, even without learning of the daily struggles she faces. The emotional reaction we have to Tierney's story—a classic System 1 response—factors with certainty in jurors' decisions about noneconomic damages, such as pain and suffering.

Tierney's case triggers a natural System 1 response, but the American legal system does not allow attorneys to make nakedly emotional appeals to a jury. In fact, in the closing arguments by both sides in Tierney's case, each attorney expressly told the jurors that they should not base their decision on sympathy and emotion. Salvi: "Tierney does not want your sympathy, which I'm sure you have for her. She's had plenty of sympathy."[5] Mark Dombroff, for the city of Chicago: "One thing you can't be guided by is emotion. You can't be guided by sympathy."[6]

These statements reflect the law's command that System-2 thinking predominate: A jury's verdict should reflect deliberativeness and logic, otherwise we could simply poll the jury immediately after closing arguments and forgo deliberations altogether. The baseline rule that admissible evidence must be more probative than prejudicial is perhaps the key bulwark against permitting naked appeals to emotion. Attorneys must engage the deliberative, logical side of jurors' minds—

3 This year's winner of the Nobel Prize in Economics, Richard Thaler, adopts the System-1 and -2 model in his book with Cass Sunstein titled *Nudge*, but uses the descriptors "Automatic System" (System 1) and "Reflective System" (System 2).

4 Daniel Kahneman, *Thinking, Fast and Slow*, Farrar, Strauss and Giroux (New York 2011).

5 Closing transcript at 8:22-24.

6 Closing transcript at 39:24–40:1.

their "System 2," in Kahneman's model.

But as any personal injury attorney knows, a damage award cannot be clearly parsed into a theory as seemingly binary as System 1 and System 2. Kahneman's model provides a baseline for us to understand how human thought works, but he won the Nobel Prize in Economics based on the deeper insights that flow from this model. As it relates to a jury deliberating about a damage award, these "systems" of human thought operate in tandem, and with highly obscured boundaries.

B. ANCHORING.

We humans, especially attorneys, like to think of ourselves as generally rational actors. The guiding theory of economics was once premised upon such an assumption, until scholars, such as Kahneman and this year's Economics Nobel laureate Richard Thaler, ushered in a more nuanced approach to the "dismal science."[7]

7 See, e.g., *Richard Thaler's Work Demonstrates Why Economics is Hard*, The Economist, available at https://www.economist.com/blogs/freeexchange/2017/10/nobel-prize-economic-sciences.

Human thought is, in fact, far from purely rational, because many subconscious factors skew it from any such Platonic ideal. Take the following example of a well-documented experiment: A group of people is asked "How old was Mahatma Gandhi when he died?" Only, before the group is asked that specific question, half of the people are asked "Did he die before or after the age of **9**?" and the other half are asked "Did he die before or after the age of **140**?" After hearing these prefatory questions, they confront the original statement: How old was he?

Both prefatory statements9 or 140pose equally silly questions. Everyone familiar with Gandhi knows that he lived well into adulthood, and that no one achieves such epochal fame by age 9; on the other side, most everyone knows that *no one* has ever lived to 140.

But even though the prefatory questions are absurd, a curious thing happens when you use them before asking the two subgroups to guess how old Gandhi was at his death. In the experiment, which has been conducted many times and using various questions, the answer the people in the "9" group give averages 50 years old; by contrast, the number the "140" group provides averages 67.[8] Psychologists call this the "anchoring effect," and it illustrates something fundamental about how humans think, namely, there is a lot of "noise" that affect our judgments. Thinking is not clearly rational and pure; there is a lot of static involved.

Almost anyone who has sold a home has employed the anchoring effect: The price you set acted as an anchor. So does the price a car dealer sticks on its windshields. And while a home seller or a car dealer can destroy its credibility by setting an objectively ridiculous price, note that in the Gandhi example, even preposterous numbers have some utility in steering the result. (In the Gandhi example, of course, the people questioned were going to continue participating in the experiment, unlike what you might do if a car dealer tried to sell you a Ford Taurus for $500,000.)

To achieve his firm's $148 million verdict, you might now be wondering what "anchor" number Salvi employed. (I should note at this point that Salvi and I did not discuss Tierney's case in the context of the psychological concepts I'm presenting in this article—we just talked about the case.) I'll leave you in suspense only a bit longer. It is first worth noting that he and his team put significant effort into finding the right number. They tested various numbers with three different focus groups, two of which were in person, and one that was conducted online. Also, as the case developed, the facts did not remain static because Tierney's condition did not—to her misfortune—remain static. Rather, it became increasingly clear that complications made her

8 It's irrelevant, but Gandhi was assassinated at age 87.

physical condition worse, and her legal case for damages thus relatively better, which is to say that the facts justified a higher "anchor" as the case progressed.

As to the anchor Salvi employed, he provided it to the jury throughout trial, from jury selection through his closing. In closing, he reminded the jurors of it, stating that "in jury selection, I think we asked each and every one of you: If we prove to you that for the last two years and the next 56 years [that] this is the kind of injury where a verdict of $150 million or more would be fair, could you sign such a verdict—*do you remember that?*"[9] Interestingly, the defense offered no firm counter-anchor,[10] leaving the jurors with one anchor and, of course, all of the testimony they had heard.

Note that, in a Gandhi-type experiment, two groups are given different anchors (9; 140). That is, obviously, not possible in a jury trial where, if two different anchors are given, then they must be given to the same unified group of people. Still, both sides may not employ the anchor principle, as Tierney's case appears to illustrate. Although many factors affect a jury's deliberations, it seems fair to conclude that Tierney's $148 million award was less the product of serendipity than it was of trial strategy.

Anchoring is a simple concept in theory, but its practical application is always a challenge: Recall perhaps the last time you chose the starting number for an item you sought to sell, like a house. As with setting any price, a person must balance objective factors that inform the decision (e.g., what are the comps) with the subjective message that we want the price to convey (*it's expensive, so it must be a nice home*).

In Tierney's case, the concrete damages ("economic" or "special" damages in legal lingo) totaled just under $18 million for the categories past medical, future care, and future lost earnings. So, when choosing an anchor, the attorneys in Tierney's case had that baseline number as a guide, for what it was worth. Salvi noted that the difficulty in selecting a figure—the anchor—is gauging what number you feel a jury will find credible. After testing a variety of numbers, $150 million became the figure ("in excess of" was how they framed it, and their ultimate request was for $174 million). $148 million was the result.

C. CONFIRMATION BIAS.

I once attended a seminar about using focus groups as an aid to trial preparation. One panel consisted of prominent Chicago trial attorneys, one of whom made an interesting, somewhat counterintuitive observation. As a young lawyer, he said, he thought that closing arguments were the most important part of his trials. After all, that's where an attorney gets to use his lawyerly powers of persuasion. But after decades of experience, he continued, he now realized that opening statements were more important.

What led to his shift in opinion? He was reflecting on a segment of the seminar in which the panel discussed how focus groups can be used to test various themes that an attorney might employ. Consider an example outside of the personal injury context. In a case about eminent domain, a property owner's theme might be the fundamental importance of property rights in the American system of justice. Such a theme is broad enough to work in any eminent domain case.

But the theme could alternately be more focused and narrow: In a given case, perhaps the theme is the property's special importance to the homeowner who is being deprived of it. Which theme works better will depend on a host of factors, such as whether there was, in fact, any special importance to the homeowner (if the person was trying to sell his property a year earlier, the "special importance" theme might not work at all). Testing which theme works best—time and money permitting—can be worth the effort.

For the attorney at the seminar, opening statements gained favor because of a different, widely studied psychological principle, which is this: We more readily accept evidence that conforms with our preconceived story of how the world works. This is sometimes referred to as confirmation bias or, more colloquially, "myside bias."[11] The principle is that we more readily accept and absorb information that confirms a narrative that we already believe, or that conforms to our preexisting principles.

Confirmation bias has powerful effects, because "when people believe a conclusion is true, they are also very likely to believe arguments that appear to support it, even when these arguments are unsound."[12] And while some beliefs may be long-held, they need not be for the principle to work. A good, recent narrative can shape how we think, even in timeframes as short as a weeklong trial or shorter. On a daily basis, all of us are presented with a host of narratives that we quickly comprehend based on shortcut rules (heuristics) with which we process information.

Playing on this simple truth, the attorney noted that, if he can win the jurors over to his theory of the case by conveying a gripping narrative in opening statements, he then he creates a group of people that will be much more likely to accept the evidence he presents. Like dry sponges ready to absorb, they will more easily soak up the evidence he provides throughout trial.

In a case like Tierney's, where liability is conceded

9 Closing transcript at 36:5-10.

10 "Maybe it ought to be 25 million. Maybe it ought to be 30 million. Maybe you ought to take the 17 million for the three categories and maybe you should double it and make the whole award 34 million. I don't know what the answer is." Closing transcript at 55:13-18.

11 In fact, often "when people believe a conclusion is true, they are also very likely to believe arguments that appear to support it, even when these arguments are unsound." Kahneman, at 45.

12 Kahneman, at 45.

and only damages are at issue, the parties are forced to trade their ability to leverage a narrative of fault/no-fault (a moral principle) for a different narrative that seeks to put money damages in context. For Tierney, the basic thrust of the plaintiff's narrative was that her *extraordinary* injury warranted *extraordinary* damages. The theme was not simply that the negligently maintained shelter rendered Tierney a paraplegic; rather, the theme was that she was cursed with a type of paraplegia rendering her among a minority of those who suffer the condition, which is one marked by neuropathic pain. Salvi: "Tierney doesn't fit in the tables of paraplegics. She has the worst possible spinal cord injury a paraplegic can have. She's unique in and of herself."[13]

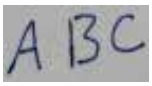
The defense narrative turned on attempting to show hope for Tierney by presenting medical options that exist for her going forward. In light of the facts, this attempt to diminish the likely difficulty of her future was clearly a long row to hoe. Salvi says that when Tierney testified to a packed courtroom at the Daley Center, he has never witnessed a courtroom so quiet.

Her testimony ended with a question about how she would characterize her daily pain, and she responded simply, "Torture." There was no cross. In opening statements, Salvi's team told the jurors to anticipate evidence of an injury on the bad side of worst. If the evidence supported that narrative, he told them, he asked them to contemplate an award in excess of $150 million.

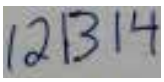
With that mindset, one can imagine how Tierney's testimony must have resonated in that otherwise silent courtroom.

D. FRAMING.

Confirmation bias falls into the rubric of "cognitive biases," and framing is another cognitive bias. It is distinct from confirmation bias, but equally powerful in its effect. Most simply, it can be illustrated with the following tiles, which are from Kahneman's book:



When you read these marks, you naturally understand that they convey three letters. The same applies here:



If you look at them together, you see that although the B/13 is written identically, you understand it differently based on context. As the Supreme Court has written, "a word is known by the company it keeps." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). In a nutshell, that is framing.

The best advocates are artful at how they frame issues. Prior to his elevation to the Supreme Court, Chief Justice John Roberts wrote a brief on behalf of Alaska. The case addressed an EPA enforcement action regarding which technology was "best" for an electric generator that was to be installed at a mining facility.[14] Under the federal Clean Air Act, the State had permitted one technology, but the EPA insisted on another.

Regarding the federal statute, which set forth that the State should consider "energy, environmental, and economic impacts and other costs," Roberts wrote:

> Determining the "best" control technology is like asking different people to pick the "best" car. Mario Andretti may select a Ferrari; a college student may choose a Volkswagen Beetle; a family of six a mini-van. A Minnesotan's choice

13 Closing transcript at 66:7-10.

14 Roberts' Brief is available at http://www.findlawimages.com/efile/supreme/briefs/02-658/02-658.mer.pet.pdf. The case was *Alaska Dept. of Enviro. Conserv. v. EPA*, 540 U.S. 461 (2004).

will doubtless have four-wheel drive; a Floridian's might well be a convertible. The choices would turn on how the decisionmaker weighed competing priorities such as cost, mileage, safety, cargo space, speed, handling, and so on. Substituting one decisionmaker for another may yield a different result, but not in any sense a more "correct" one. So too here.

By using this metaphor, Roberts framed complicated provisions of environmental law in a relatable way. For writing like this, Roberts gained a reputation as one of the best Supreme Court advocates.

Framing can help attorneys to communicate broad themes about their cases, or be used in a more targeted manner to define a crucial issue. In Tierney's case, a crucial issue was her pain and whether future treatment options would mitigate it. One such procedure involved implanting a spinal cord stimulator. The defense presented expert testimony that the stimulator could improve her condition, which was a lynchpin of the defense's overall effort to mitigate the damage award.

Salvi conceded that the device presented some hope, but that is not how he framed it in his closing. Rather, he noted the potential risks involved. One risk was that one in five of the devices fail in trials. Here's how he presented that testimony:

> Let's say you have a diagnosis of cancer and you go into the doctor and you say, well, what are my chances of dying of this cancer?
>
> "Oh, don't worry, only 1 out of 5."
>
> *Can you imagine?*

Here, Salvi employs a well-tested framing device that presents the odds of an event we all fear (death), as opposed to the odds of something we cherish (life). The positive way to frame the same event would be this: "What are my odds of surviving this cancer? Four out of five—you have an 80% chance of surviving."

Framing events in this way is not a Jedi mind trick that works only on the feeble minded; it works on the most intelligent among us. In psychological tests involving doctors, how doctors are polled about cancer survival rates affects how likely they are to recommend surgery over an alternative treatment modality.[15] To wit, if surgeons are told:

> "The one-month survival rate after surgery is 90%"
>
> versus
>
> "There is a 10% mortality in the first month after surgery"

then their likelihood of recommending surgery fluctuates, even though the two statements present *identical* odds and should thus not alter the recommendation. The difference is simply that the first sentence frames the results in positive way (survival) versus in a negative one (death).

Now look at how Salvi communicates the odds to the jurors: it is "chances of dying." By framing the risks in that way, he plays on the human tendency to overestimate a negative result when framed in a way that triggers a negative emotion, as death does. Or pain. Or, for the case in point, of the risk of a device's failure.

This might seem to be a trivial matter; indeed, it was just one lone sentence in Salvi's closing. Only, the defense in Tierney's case turned on the narrative that Tierney's future was not as dire as the plaintiff's witnesses described. Put more simply, the defense was that there was hope for Tierney. While a lone sentence will not counteract that defense in isolation, by framing Tierney's situation in a negative way (and to be fair, that may be the most accurate way to frame it) Salvi puts a gloss on the defense that supported his team's ultimate request for damages that were a multiple of the economic damages she will incur.

E. SUBSTITUTION.

Kahneman describes a further psychological principle, called "substitution," as follows: When a difficult judgment is required, and a related judgment comes easily to mind, the easy judgment is used instead.[16] This occurs unconsciously and automatically, and is thus a function of System 1 thinking.

Commonly, people substitute when they're asked difficult questions for which emotional responses supply an answer. Take these examples from Kahneman's book:

Target Question: →	**Substitution example:**
How much would you contribute to save an endangered species? →	How much emotion do I feel when I think of dying dolphins?
How happy are you with your life these days?	What is my mood right now?
How popular will the president be in six months?	How popular is the president right now?
This woman is running for the primary. How far will she go in politics?	Does this woman look like a political winner?

To the difficult questions in the left column we could add the following, with a corresponding substitution:

How much should we award this person for pain and suffering, and for loss of a normal life?	How sorry do we feel for this person?

Indeed, one could reasonably question whether damages for pain and suffering are anything *but* substitutions. The numbers assignable to noneconomic damages are

15 Kahneman, at 367.

16 Kahneman, at 97.

inherently indeterminate and subjective. Focus groups illustrate that the result in any given situation may often depend on the first juror to speak: does that assertive first person start the bidding at $2M or $8M? Such numbers can function as anchors for the deliberations that ensue.

One way to supply an easy or seemingly logical answer to these damage questions is to take a familiar number and derive the noneconomic damages from it. For example: Economic damages are X? Then noneconomic damages should be 2X. Or 10X. Or some-other-X. Indeed, the defense touched on such an approach: "Maybe you ought to take the 17 million for the three categories [of economic damages] and maybe you should double it and make the whole award 34 million."

For Tierney, Salvi's team used a number that was otherwise of record: 56. Actuarial tables provided that Tierney's life expectancy was 56 years. Some of the economic damages were derived from that number, and Salvi used it to suggest the figures for both pain and suffering and for loss of a normal life. Because almost all of the damages were calculated in millions, that was the basic multiplier, and so Salvi requested $56 million for each of these two categories of damages.

The jury ultimately awarded $56 million for loss of a normal life, and $30 million for pain and suffering. (A postscript to this article discusses the 11 categories of damages sought and awarded.)

F. PSYCHOLOGY MATTERS, BUT FACTS MATTER TOO.

At this point, the reader may well be thinking that while psychological constructs are interesting at the margin, it is the *facts* that truly matter. Facts do matter, and this article does not mean to suggest that a Ph.D. psychologist would outduel Pat Salvi at trial. But the question here has been how do we, given a set of facts, more effectively communicate our narrative to a jury? Perhaps most lawyers could have achieved $15-$30 million out of *Darden v. Chicago*; the question here is how do you achieve $148 million?

But facts matter, and in fact, even the first $10 million in Tierney's case was not a given. Salvi received the case shortly after the accident occurred. At that point, there was a looming "Act of God" defense as a result of the immediately known circumstances: the weather was uncommonly terrible; the modality of injury—a seemingly fixed structure wandering away—extremely unlikely. Then there was immunity to address, because the defendant was a municipal entity clothed with various forms of it.[17] Even as the case developed and the circumstances of the poorly maintained shelters became known, a subsidiary question involved whether the shelter would have collapsed even if it had been properly maintained. Which is to say: maybe the weather really was so bad that the ultimate fault lay with God.

Naturally, the City of Chicago did not concede liability at the start, and in fact did not do so until about five months before trial. So, Salvi's team had to litigate the case as if both liability and damages questions would be tried. They employed a meteorologist to establish what the likely windspeed was at the time of the accident. An airport is obviously a venue where wind is carefully measured and protocolled, but the measuring point at O'Hare is not in the partially subterranean arrival zone of the airport, where the accident occurred. Rather, it is elevated above ground where it captures the wind as an airplane would do, free from nearby building interference. So, the meteorologist had to extrapolate what the maximum windspeed likely was in light of the shelter's particular location. The answer was ≤ 53 mph. At that speed, the shelter was susceptible to collapsing only in its unmoored state—investigations had revealed that none of its seven anchors to the concrete were working. God was not at fault.

Chicago eventually conceded liability, and that trained the focus on damages alone.[18] As noted above,

17 In fact, the most applicable tort immunity in a "premises" type of case like this is not actually an immunity at all, although it is codified under the immunities that apply to local governmental entities. But like the weather, which appeared to favor a defense here, so too did immunity, as it does at the outset of many municipality-involved cases.

18 The damages were all compensatory in nature. In Illinois, no punitive damages are available against a municipal defendant like the City of Chicago.

much of the testimony focused on whether certain surgical treatments, which Tierney might undergo in the future, would improve her condition. But facts matter, and in Tierney's case, they worsened with time. In the two years between accident and trial, Tierney suffered not just the initial surgeries to stabilize her, but then underwent two procedures meant to improve the chronic pain she experienced. Sadly, neither procedure improved her condition. Because her conditions developed as the case progressed, Tierney was deposed twice.

Further surgical treatments held some promise and presented the primary defense. Here, the adage "it's better to be lucky than good" might apply: Tierney's treating neurosurgeon held a patent on the very pain-mitigation device, the spinal cord stimulator, that represents hope for her betterment. Because he could speak with that unique authority on the device's merits and limitations, jurors likely credited his opinion in evaluating her future prospects. He testified that he was "very skeptical" that the device would help her based on the particular type of injury she suffered.

We might question what the defense can possibly do in a case of this magnitude? If a typical catastrophic case is akin to the defense battling crashing waves, the closing arguments in Tierney's case make it seem like the defense was hit by a tsunami. There seemed no defense other than to get out of the way, but that is, of course, not a true defense option. For that reason, honing how you speak to jurors is certainly every bit as important for the defense as it is for the plaintiff.

G. LESSONS ABOUT BUILDING A CASE.

What overall lesson flows from Kahneman's book? One seems to be this: It's interesting to ponder how attorneys typically build their cases: we engage in a lot of heavy, System 2 analysis. Our System 2 focuses on experts: engineers to explain physical phenomena; doctors to explain reasonable conduct and causality; economists to factor likely damages; meteorologists to reconstruct a microclimate-in-time. We urge the jury to "follow the law," meaning we want them focused on the rules—commonly written in the too-lawyerly, logician-like syntax of pattern jury instructions—almost as if a pure application of the rules will lead them to enlightenment.

To be sure, all litigators in complex cases *must* engage in these System 2 gyrations, as Salvi's team did. But psychological principles suggest that litigators who get *too* caught up in System 2 thinking fail to connect with jurors at the much more fundamental System 1 level. Relying on System-2 thinking to convey a convincing narrative can be a Rube Goldberg endeavor: it may get the job done, but used alone, it neglects a more

straightforward approach. It's a bit like ordering a drink at Starbucks by asking for a dark, rich espresso balanced with steamed milk and a light layer of foam—instead of just saying: "latte please."

With regard to a trial lawyer speaking to jurors, Kahneman's book teaches another important lesson about how System 1 and 2 work together. Recall that System 1 thinking is intuitive and requires little effort; System 2, by contrast, requires determined effort. Through many experiments, Kahneman and other psychologists have shown that System 1 is our default setting, and System 2 only "checks in" from time to time. Still, such thinking mechanics suffice in many situations. But framed negatively, it means that people are lazy thinkers; all things being equal, we avoid effort and rely on instincts. (This laziness may have been a hereditary advantage: the caveman who sat around thinking too much about how to avoid the lion—or philosophizing eternally about how to capture it for food—might well have been the first eaten by said lion.)

When lawyers speak to jurors, they should recognize that deluging jurors with one expert after the next may not actually lead to enlightenment. Rather, it may cause a jury to employ an Ockham's razor approach, which is that among competing hypotheses (*e.g.* the plaintiff's and the defense's), the simpler one is the better. Thus, he who creates the compelling, simple narrative has the advantage, like soldiers who take the hill. And although a trial strategy focusing exclusively on a beautiful narrative may fail, one that is overweight in logic, while eschewing emotion and psychology, is unlikely to produce an optimal result at trial.

To return to *Darden v. City of Chicago*: as this long but still cursory article illustrates, the verdict in Tierney's case appears to show what occurs when an attorney does not just talk at jurors, but rather truly speaks to them.[19]

POSTSCRIPT: THE JURY'S DAMAGES AWARD.

No matter how skilled one is at speaking to jurors, there is often still no accounting for ultimate jury results. That too was true in Tierney's case. The jury clearly felt she deserved to be well compensated, awarding just $2 million below the anchor number Salvi's team employed throughout. But the verdict form did not simply adopt all of the numbers Salvi suggested. The following chart summarizes the requests and ultimate results, with highlights showing departures:

	Category	Request:	Award:
1	Past pain & suffering (2 years to trial)	$10,000,000	$10,000,000
2	Pain & suffering future	$56,000,000	$30,000,000
3	Loss of a normal life (past 2 years)	$10,000,000	$5,000,000
4	Loss of a normal life (future)	$56,000,000	$56,000,000
5	Emotional distress	$10,000,000	$6,000,000
6	Disfigurement	$5,000,000	$2,500,000
7	Increased risk of harm	$10,000,000	$3,000,000
8	Shortened life expectancy	$0	$500,000
9	Past medical	$985,411	$985,411
10	Life care plan (future medical)	$14,743,585	$32,000,000
11	Future loss of earnings	$2,205,586	$2,205,586
		$174,934,582	**$148,190,997**

There are several curious aspects to these sums. The jury discounted future pain and suffering, perhaps because it credited the defense argument that future treatment options would help Tierney. But why did the jury discount past loss of a normal life by half, but then go with the full request for future loss ($56M)?

Categories 5-7 in the chart above show somewhat customary percentage departures from plaintiff suggestions, and the category for shortened life expectancy gets a number, though none was requested (and note the lack of a related discount for future lost earnings).

But then there's the real curiosity: in closings, the $14M number for future medical was conceded by the defense.[20] The jury had essentially no decision to make on that line of the verdict form, but it wound up placing a round $32M figure on it, basically nullifying all of the discounts the defense benefitted from in categories 3, 5, 6 and 7 (which is to say: all except the pain-and-suffering discount).

There too may lie a lesson in speaking to jurors.

19 *Stephen J. Rice is an Assistant State's Attorney in the Civil Division of the Lake County State's Attorney's Office. He also serves as the First Vice President of the Lake County Bar Association.*

20 Closing transcript at 51:21-22.