

Section I
Approaches to Studying Civil Juries

What's the story?

Explanations and Narratives in Civil Jury Decisions

Reid Hastie

The Role of Stories in Jurors' Decisions

How do ordinary people make judicial decisions? The answer is sure to be complex: The human mind is a very flexible mechanism, and combined with the complex “cognitive environment” of legal cases, the result is a great diversity of cognitive strategies. Further uncertainty is introduced by the diversity of scientists' opinions about what kind of a descriptive theory would be most useful. Even within psychology (which is only one of the behavioral sciences that aspires to answer the question), there are at least three different approaches to a theory of juror decision making: simple catalogues of general behavioral facts, algebraic process models, and cognitive information-processing models (Pennington & Hastie, 1981). We will focus on the third approach, an application of a cognitive “explanation-based approach” (Hastie & Pennington, 2000).

We call our theory the “Story Model” because we claim the central cognitive process in juror decision making is *story construction*—the creation of a narrative summary of the events under dispute. We call the general approach “explanation-based,” because the juror's story is created to summarize and explain the diverse items of evidence that the juror has accepted as credible and relevant to make a judgment on the case. The first application of the Story Model to *criminal* case judgments identified three component processes: (1) evidence evaluation through story construction, (2) representation of the decision alternatives (verdicts) by learning their attributes or elements, and (3) reaching a decision through the classification of the story into the best fitting verdict category (Pennington & Hastie, 1991).

These latter processes are likely to vary with the demands of different decision tasks. Some tasks involve a classification response, some an estimate

R. Hastie

Professor of Behavioral Science, Graduate School of Business, University of Chicago, 5807 S. Woodlawn Ave., Chicago, IL 60637
e-mail: reid.hastie@chicagogsb.edu

or judgment of a magnitude, and some a projection to future events. For example, the shift from criminal judgments, where categorical verdicts play a prominent role in the final stage of the decision, to civil judgments, where degrees of responsibility play the analogous role, has important effects on the entire sequence of judgment processes. However, our fundamental assumption, supported by the results of many behavioral studies, is that most legal decisions begin with the story construction process. Thus, the central claim of the model is that the story the juror constructs determines the juror's verdict. More generally we claim that causal "situation models" play a central role in many explanation-based decisions in legal, medical, engineering, financial, and everyday circumstances.

Thus, we propose the decision process is divided into three stages: construction of a summary explanation, determination of decision alternatives, and mapping the explanation onto a best-fitting decision alternative. (This subtask framework contrasts with the continuous on-line updating computation hypothesized by the algebraic model approaches.) Furthermore, we diverge sharply from other theoretical approaches in our emphasis on the structure of memory representations as the key determinant of decisions. We also depart from the common assumption that, when causal reasoning is involved in judgment, it can be described by algebraic, stochastic, or logical computations that lead directly to a decision. In our model, causal reasoning plays a subordinate but critical role by guiding inferences in evidence evaluation and construction of the intermediate story or explanation (Pennington & Hastie, 1993).

An illustration of our focus on the role of (narrative) evidence summaries is provided by an interpretation of the dramatic differences between European-American and African-American citizens' reactions to the verdict in the O.J. Simpson murder trial (there even appeared to be racial differences on the jury and within the defense team). We hypothesized that race made a difference in the construction and acceptance of the "defense story" in which a racist police detective (Mark Fuhrman) planted incriminating evidence (Hastie & Pennington, 19xx). African-Americans, compared to European-Americans, have much more beliefs and experiences that support the plausibility of stories of police misconduct and police bigotry (Gates, 1995). Most African-Americans or members of their immediate families have had negative, and possibly racist, encounters with justice system authorities. African-Americans know of many more stories (some apocryphal, some veridical) of police racism and police brutality directed against members of their race, than do European-Americans. This background of experience, beliefs, and relevant stories made it easy for African-Americans to construct a story in which police officers manufactured and planted key incriminating evidence and made the constructed story more plausible to African-American compared to a European-American jurors and citizens (Mixon, Foley, & Orme, 1995; Toobin, 1995).

Review of Behavioral Studies of Juror Decision Processes

Like most research on the psychology of juror decision making, our research on the “Story Model” has focused on mock-jurors’ decisions in criminal cases. Our initial research elicited descriptions of mental representations of evidence and verdict information after mock-jurors had heard the evidence and judge’s instructions. First, we established that evidence summaries constructed by jurors had a narrative story structure (and not other plausible structures, such as a pro versus con argument structure). And, jurors who had rendered different verdicts had constructed different stories (Pennington & Hastie, 1986).

Second, we established that mock-jurors spontaneously constructed causal accounts of the evidence when rendering verdicts in criminal cases. In this study, mock-jurors’ responses to sentences presented in a recognition memory task were used to infer how the mock-jurors’ had represented the trial evidence. Mock-jurors were more likely to “recognize” as having been presented at trial, sentences from the story associated with their verdict than sentences from stories associated with other (rejected) verdicts. Furthermore, centrality in the relevant story and “connectedness” to other evidence items predicted more variance in reaction times and rated importance (Pennington & Hastie, 1988).

A third experiment was conducted to study the effects of variations in the order of evidence presentation on judgments. We predicted stories would be easy to construct when the evidence was presented in a temporal sequence that matched the occurrence of the original events (Story Order); and stories would be difficult to construct when the presentation order did *not* match the sequence of the events in the story. (We created a non-story order based on the sequence of evidence presented by witnesses in the original trial that was the basis of our “stimulus case materials” [Witness Order].) Consistent with our hypothesis, mock-jurors were reliably likelier to convict the defendant when the prosecution evidence was presented in Story Order and the defense evidence was presented in Witness Order and they were least likely to convict when the prosecution evidence was in Witness Order and defense was in Story Order (Pennington & Hastie, 1992).

Subsequent research has addressed some practical questions from the legal trial domain. For example, many criminal cases involve the presentation of only one story, by the prosecution, while the defense tactic is to “raise reasonable doubts” by attacking the plausibility of that story. In these one-sided cases, jurors construct only one story, and confidence in the verdict is determined by coherence and fit of the single story to the verdict category. In this situation, a weak defense story is worse than no story at all; in fact, a weak prosecution story is bolstered and more guilty verdicts are rendered when a weak defense story is presented versus when no defense story is presented (McKenzie, Lee, & Chen, 2002). Another observation that reinforces tactical advice from skilled attorneys is that foreshadowing the story in the opening statement is an effective tactic. The likelihood of obtaining

a verdict consistent with a story is increased when the story is “primed” in the opening statement, all other factors remaining equal.

Recent Behavioral Studies of Civil Juror Decision Making

We have also extended the research program to include civil cases, specifically an application of the explanation-based model to jurors’ reasoning about liability for compensatory and punitive damages (Hastie, Schkade, & Payne, 1998). We presented mock-jurors (citizens sampled from the Denver area) with four experimental cases, each based on an actual case in which the plaintiff sought punitive damages. The cases included fact situations involving four boaters who were drowned after an inadequate recall of the boat model by the manufacturer, an injured seaman who was denied maintenance pay after hiring a lawyer, an employee who was abducted and assaulted in a poorly guarded shopping mall, and thirty-nine seamen who died when molten sulfur carrier sank. The defendants were all large corporations and the plaintiffs were all private citizens. We employed a typical set of instructions on liability for punitive damages:

You may award punitive damages only if you find that the defendant’s conduct

- (1) was malicious; or
- (2) manifested reckless or callous disregard for the rights of others.

Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another.

In order for conduct to be in reckless or callous disregard of the rights of others, four factors must be present. First, a defendant must be subjectively conscious of a particular grave danger or risk of harm, and the danger or risk must be a foreseeable and probable effect of the conduct. Second, the particular danger or risk of which the defendant was subjectively conscious must in fact have eventuated. Third, a defendant must have disregarded the risk in deciding how to act. Fourth, a defendant’s conduct in ignoring the danger or risk must have involved a gross deviation from the level of care which an ordinary person would use, having due regard to all the circumstances.

Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.

Based on these mock-jurors’ written justifications for their verdicts, reinforced by an extensive sample of jurors’ discussion during their deliberations, we developed an interpretation of the jurors’ thought processes in making liability judgments. We present a summary of the form of the most conscientious decision process, but, as our results consistently demonstrated, most mock-jurors did not approach the full level of thoroughness prescribed by this

model. However, when jurors did address one of the stages in this “fully conscientious model,” their reasoning usually took the form we outline below.

In the most general terms, the following stages or events occurred in a modal individual decision process on the issue of liability for punitive damages. First, the mock-juror constructed a summary model of the events described in the case materials in the form of a chronological, causally connected narrative. Since no summary story was presented in the experimental evidence, arguments, or instructions, the story construction process is inference-rich and cognitively demanding. Second, most of the mock-jurors assessed the strength of the causal relationship between the defendant's actions and the injury claimed by the plaintiff. Third, several of the elements of “callous or reckless conduct” were considered to determine whether the defendant did or did not make a conscious choice of action with knowledge or foresight of a serious danger to other persons. Finally, the elements of “gross deviation from an ordinary level of care” and malice were considered. With our case materials, most of these further considerations took stylized forms, revealing substantial between-juror convergence on a few common reasoning strategies.

A follow-up study in which college student mock-jurors were asked to “think aloud” about their verdicts provides additional information about some of these reasoning habits. We asked twenty college students to make the punitive damages liability judgment. Each mock-juror read one case with instructions to “Make a legal decision just like the ones that jurors make in legal trials ... [to] follow the trial judge's instructions to decide on a verdict.” After reading the case materials they were asked to “Think aloud as you make your decision.” They were then asked to respond to specific questions about each of the legal elements mentioned in the judge's instructions. The contents of the open-ended oral reports were scored to assess the extent to which the student mock-jurors considered each of the five elements and the nature of the reasoning that they applied to evaluate the elements that they did consider. Three research assistants coded the contents of the tape-recorded verbal protocols. Reliability was high, with the coders agreeing on the exact code for over 90% of the coded responses. Disagreements between the coders were resolved by accepting the majority (two out of three) interpretation.

As in previous studies, we found that the mock-juror's first step was to construct a narrative summary of the evidence. This summary included the major events from evidence that the juror believed occurred, reported in a temporal sequence. This narrative included causal linkages, many of them inferred, that served as the “glue” holding the story of the credible evidence together. Content analyses showed that, for these cases, the explanations usually took the form of inferences about the defendants' motives. Since the defendants were all corporations, “corporate greed” was the most common motivational ingredient in the explanations for, “Yes, liable for punitive damages,” decisions. We asked research assistants to classify the global “think aloud” protocol into one of three decision making strategy categories: (1) Did the mock-juror rely heavily on a chronological, narrative summary of the

evidence? (2) Or did he or she rely on a pro-versus-con argument summary? (3) Or did he or she organize their thinking in terms of the legal elements of the liability decision? (4) Or something else? Fifteen out of the twenty (75%) student mock-jurors were rated as relying primarily on narrative evidence summaries in their verbal “think aloud” reports; three (15%) responded in terms of the legal elements (the mock-jurors had a copy of the judge’s instructions available when they rendered their verdicts, but not when they answered the open-ended question about their decision process); and two (10%) were not classifiable in terms of three expected strategies.

After constructing an explanatory story, the jurors focused on key actions of the defendant, the actions that were alleged to be the causes of the plaintiffs’ injuries. Although an explicit judgment of causation was not mentioned in the judge’s instructions, twelve mock-jurors (60%) explicitly addressed the issue of the causal contribution of the defendant’s actions. Consistent with the relevant legal conceptions, this assessment of causal importance emphasized the “necessity” of the defendant’s alleged causal action; seven out of the twelve (58%) respondents who considered the issue clearly performed a rough and ready “necessity test” (Hart & Honore, 1959; Spellman, 1997). These mock-jurors “mutated” the candidate causal event and then “counterfactually” inferred the probability that the harmful effect would still have occurred, *if the causal event (defendant’s action) had not occurred* (Roese & Olson, 1995). If there had been additional guards in a shopping mall, would the assault on the plaintiff/victim, have occurred? If there had been an effective product recall program, would the boat have sunk? When the mock-jurors judged there was a large difference in the probability of the effect, as a function of mutating the cause, then they concluded the candidate cause was truly a cause of the effect. This observation is especially interesting because the mock-jurors were relying completely on their personal notions of what form of “causal test” was appropriate. They were not given instructions on necessity or “but for” causal relationships in this study, yet they spontaneously adopted this test when assessing causation.

Most jurors attempted to apply the judge’s instructions on some of the elements of recklessness. We asked the participants to indicate for each of the major elements of the verdict (from the judge’s instructions) if they had thoroughly considered the issue and what aspects of the evidence were most informative on each issue. As in our high-fidelity mock-jury study with citizen participants, our student mock-jurors rarely covered all of the legal elements on which they were instructed. We suspect that the rates at which mock-jurors claimed they had considered legal elements were inflated by our procedure of directly asking them about each element separately. However, the responses are informative about the relative rates at which the elements were considered and do provide qualitative information about the nature of the jurors’ evaluations.

Was the defendant conscious of a foreseeable, probable danger before deciding to act in a manner that resulted in injury to the plaintiff/victims? Eleven

mock-jurors (55%) said they considered this issue. They attended to evidence that there were tangible “warnings” that the situation was risky: Had there been other violent crimes at the mall where an assault occurred? Had other similar boats had problems with seaworthiness?

Almost all of the mock-jurors (84% or seventeen out of twenty) said that they considered the issue of whether, “the particular danger or risk of which the defendant was subjectively conscious” had in fact occurred (“eventuated”). The others acknowledged that they had not considered the issue thoroughly, but they had assumed that the defendant’s action (and the subsequent dangerous event) was the cause of the plaintiff’s injury.

Did the defendant disregard the risk when deciding to take the action that caused the plaintiff’s injury? Eleven mock-jurors (55%) said this element played a significant role in their considerations. They looked for evidence that an explicit choice (an “act of commission”) had been made by the defendant: A security company requested the defendant to hire additional guards. The defendant made a choice between a boat recall campaign or a warning campaign.

Did the defendant’s action exhibit a gross deviation from ordinary care or reasonable conduct? Here the few jurors (30% or six out of twenty) who considered the issue, often reasoned by (counterfactually) imagining themselves in the relevant situation and then inferring what they personally might have done. When their post-diction of their own behavior was highly discrepant from the defendant’s action, they were likely to conclude the defendant’s action was a “gross deviation.”

Mock-jurors in the original study and in the college student sample often “imported” personal beliefs and criteria to justify their judgment that the defendant’s action was reckless (e.g., “The company was greedy; cutting-corners, that’s ‘reckless’ ”; “They weren’t thinking ahead, anyone would’ve known the ship was going to sink”; “Everyone knew it was a dangerous, but they didn’t take proper care, that’s ‘callous disregard’ ”).

In a few cases, mock-jurors asked themselves if malice was an aspect of the defendant’s conduct (six out of twenty, 30%, said this issue played a role in their decision process). Here, since there was no explicit evidence relevant to “ill will or spite” in any of the stimulus case materials, mock-jurors relied on inferences about the defendant’s intent. We could not discern a systematic pattern of reasoning in their responses.

The contents of the mock-jurors’ responses to both the open-ended and element-specific questions were consistent with our summary of the modal decision strategy outlined above. However, only one of the twenty individual mock-jurors fully considered all of the legal elements that were presented, in the judge’s instructions, as necessary conditions to conclude that the defendant was liable for punitive damages. Thus, the model should be viewed as a framework, with typical jurors instantiating some, but not all of its components in their individual decision processes.

Applying the Story Model to Attorney Trial Tactics?

One of the most frequent questions we are asked when we present our research is, “How can the Story Model be used to win at trial?” Here is our best advice on how to apply insights from the Story Model to trial tactics. (Disclaimer: The author has never had the opportunity to consult with a client and to apply the Story Model approach throughout an entire trial, although he has made several piecemeal contributions to clients trying different cases. Therefore, the following commentary must be labeled an untested conjecture based on the theoretical principles outlined in the first half of this paper.)

We’ll consider a hypothetical civil law suit: Mostly-Super-Drugs (MSD) has been marketing a pain-killer for five years, Mercocox, that was withdrawn from the market after several clinical studies demonstrated that it increased the rates of adverse cardiac events in customers who used the drug for several months. Now comes a suit brought by the family of a man who died after taking Mercocox for six months. What would a Story Model consultant advise the plaintiff and defendant in such a case?

Obviously, the most powerful applications of the Story Model will result from studying the specific stories that jurors are likely to construct when judging a particular trial. Of course, any advice must be qualified by considering the elements that must be proved to satisfy the legal conditions for an award. In this illustration, on the compensatory side, elements might include: (i) Did MSD fail to warn physicians and users of Mercocox’s adverse side effects? (ii) Was Mercocox a defective product that could have been better designed? (iii) Was MSD’s negligence responsible for the plaintiff/victim’s death? On the punitive side, the question in such a case is likely to be: Did MSD sell Mercocox with conscious disregard of the substantial known risks of adverse consequences?

Let’s begin with the plaintiff. First, the attorney should decide which elements would be the focus of persuasion. Let us imagine in this case that “failure to warn” and “Mercocox caused the death” are the key elements. Second, the attorney needs to make a first assessment of the types and formats of evidence that will be adduced to prove or persuade on each element. At the same time the attorney needs to construct arguments relating testimony and evidence sources to conclusions (and ultimately to the elements; in many cases diagrammatic methods are useful for this task, Anderson & Twining, 1991). Third, a skeletal presentation of the plaintiff’s case should be constructed and presented to citizens like those who will be impaneled on the jury. Three methodologies should be used (ideally based on oral reports from mock-jurors). First, the attorney or trial consultant should ask mock-jurors to think-aloud as they hear the evidence to report their thoughts following each witness or substantial component of the evidence. Second, after hearing all the evidence, mock-jurors should be asked to provide global ratings on the legal elements and then asked to summarize their

reasons for each rating. Finally, if “stories” have not clearly emerged in the first two data sets, mock-jurors should be asked to summarize all the evidence as best they can recall it.

At this point the attorney would mine these data sets and attempt to construct the major narratives that appear in the self-reports. It is important to keep in mind that a well-formed, memorable, persuasive narrative is usually composed of stylized components and organized according to an almost universal schema. Thus, the extracted narratives should be represented as completely as possible in terms of the general narrative schema. Briefly, a well-formed narrative begins with a setting (protagonist and other actors, physical conditions, knowledge states, etc.) and a problem event; followed by a reaction from the protagonist (that includes emotional states, intentions, and goals); followed by plans to achieve the goals; followed by actions aimed to execute the plans; followed by consequences; concluding with a reaction to those consequences. Note, that narratives may be embedded within narratives, so for example, goals may lead to sub-goals which produce sub-plans and so on. Furthermore, the actions taken to execute a plan may create one or more embedded narratives on their own. For example, the endeavor of securing FDA approval to market the drug might be an embedded narrative with a full narrative schematic structure of its own.

In one narrative, the plaintiff's protagonist would be MSD and the story would begin ten years prior to the trial, when MSD is competing with another major drug company to be the first to market with a painkiller (“problem”). In one likely narrative, MSD's “reaction” is intense motivation to market a drug with (“plans” and “actions”) to push Mercox through FDA approval and onto the market. Sub-goals involve securing FDA approval for Mercox, the actions in that sub-plan involve applications for approval and various activities of MSD's scientists and executives to secure approval (such as rushing the requisite clinical trials tests of Mercox). Another sub-goal is, following FDA approval, to distribute the drug and aggressively to persuade physicians to recommend it to patients. The “outcome” is a poorly tested, improperly labeled drug, being prescribed by ill-informed physicians. The “consequences” are deaths of patients, due to the cardiac side-effects of Mercox. The fate of the victim in the instant case would be a narrative embedded in the “outcome” component of the overarching story of corporate greed.

The plaintiff is likely to present several “embedded narratives” within the larger story of corporate greed, desperation, and misconduct. For example, there might be an embedded story about MSD's efforts to respond to the “problem” of a negative study result, perhaps by suppressing publicity, attempting to mislead physicians about the implications of the study, and obscuring warnings to patients.

Now, consider the defendant. One observation, from years of study of stories at trial, is that the defense perspective is more complicated and usually involves at least two stories: The story of the defendant's activities and a second story to

account for the events that led to the lawsuit (usually claimed to not involve the defendant). For example, in the highly-publicized O.J. Simpson trial, the prosecution told one story about the defendant's activities leading to the death of his ex-wife (Hastie & Pennington, 1986). While the defense told (or alluded to) at least three stories: The story of the defendant's actions on day in question; the story of bigoted police officers framing the defendant; and the story of the actual murder of the ex-wife (by drug dealers). (Of course, in the modal criminal trial, the defense devotes most of its energies to attacking the prosecution story; partly because of lack of evidence and partly because of the asymmetric "beyond reasonable doubt" standard of proof. Civil trials are more likely to involve competing stories.)

In one defense narrative, MSD is again the protagonist but now the "problem" is defined as patients' needs for effective drug therapies. Thus, MSD's goal is to produce useful drugs, while balancing the benefits and costs of any artificial therapy, and behaving in a fiscally responsible manner to preserve reasonable shareholder profits. It would probably be wise to note that profitability means not introducing new drugs heedless of adverse consequences for users, as this destroys profits and the company's ability to make profits. Then, with the focus on the goal of responsible production, plans and actions to produce effective drugs are described in the case of Mercox. This would be the place to emphasize the implementation of multiple trial studies of efficacy and side effects, the quick reaction to signs of adverse consequences, the high volume response by physicians to the warnings and press releases (indicating their efficacy), etc. The defense may also want to tell a second story, this one with the victim/plaintiff as the protagonist. A story that begins with the victim's struggles with ill-health ("problem"), emphasizing the many features of his background, lifestyle, and prior problem-incidents. His "reaction" is to be concerned and to take medication to prevent further health incidents, but a heart attack ("outcome") results from his prior disposition and (ideally for the defense) a precipitating incident.

So what's so novel about the advice to attorneys to present the case in the form of a story? After all, hundreds of sources have already presented this common sense advice on trial tactics. However, we submit that our detailed advice, specifically the procedures for extracting stories from pre-trial mock-juries and the admonition to make sure that each component of a well-formed story is included in the presentations and arguments, is novel and more extreme than the trial tactics folk wisdom. In our experience, when attorneys have applied methods like those described above to pre-trial preparation, the primary value-added has been the discovery of stories that had not been anticipated before the behavioral test. Furthermore in several cases, these methods allowed attorneys to identify the potential weaknesses in the other party's stories and to set-up, with direct and cross-examination, assertions that were made in their own closing arguments about key unproven elements of the other side's stories.

Conclusion

My goal in this chapter has been modest: to provide an illustration of what a computational theory of juror decision making would look like for civil judgments. My primary assertion is that jurors' judgments are based on summaries of the evidence structured as chronological narratives, stories, that are created as a central part of the decision process. The Story Model is a useful prototype of a general model for juror decision making in civil cases. I presented behavioral evidence for the validity of the Story Model in the form of empirical observations from a study of mock-juror decisions on liability for punitive damages. Finally, I derived some implications from the Story Model for trial tactics by attorneys trying a hypothetical civil law suit.

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