By Howard L. Nations

USING TRIAL SCIENCE TO ENHANCE DAMAGES RECOVERY

1. Trial Science: Aristotle to Kahneman

2300 years ago, Aristotle, in his Discourse on Rhetoric launched Trial Science with his brilliant analysis of the principles of persuasion and the fundamentals on how to impact the judgment and decision-making processes of an audience by utilizing four principles:

1. Maximize your salient points.
2. Minimize your weaknesses.
3. Refresh the memory of your audience frequently.
4. Execute the required level of emotion.

The skills required for success include competence, dynamism, and trustworthiness. To achieve the requisite trustworthiness, lawyers must fortify their words currently with hard evidence, and avoid the sins of overtrying the case, overloading with irrelevant rhetoric and evidence, and overreaching on damages. Try the case you have, not the case you wish you had.

Trial Science recognizes the significance of jurors liking the Plaintiff. To this end, the Plaintiff must be projected in a light that reflects empathy and courage rather than sympathy. The damages trial story must be told in a way that causes the jurors to identify and empathize with the plight of the Plaintiff, and that creates admiration for the courageous way the Plaintiff is confronting his devastating injuries. A Plaintiff who shows a jury that he is following doctor's orders, cooperating with health care providers, and making every effort to recover, will gain empathy and a desire to help from jurors. Ideally, the Plaintiff will have his own plan for fighting the daily impact of the disease on his life. Jurors often ask, "what is the Plaintiff doing for himself?" before they consider what they can do to help. A Plaintiff who is implementing his own plan to fight off the ravages of the disease will be well received by jurors who want to help.

The most effective method to inform the jury of the attributes that make the Plaintiff both in need of and worthy of their help is through the telling of a simple and coherent trial story.

In 2011, Daniel Kahneman published his magnum opus on judgment and decision-making, *Thinking, Fast and Slow*, for which he was awarded the Nobel Prize in economics. The book is the long-awaited tome on Trial Science.

The title refers to the two systems that our brain utilizes to process information: System I, the unconscious mind which operates intuitively, automatically, and rapidly, and System 2, the conscious mind, which is reflective, controlled, effortful, and slow. As Kahneman explains "Most of what the conscious mind thinks and does originates in the unconscious mind, but the conscious mind takes over when things get difficult, and it normally has the last word." Attorneys are well advised to acquire the Trial Science skill of communicating with the unconscious mind.

Kahneman's insights on storytelling assist trial lawyers in acquiring the vital trial skill of telling a compelling, explanatory story in simple and coherent terms.

Jurors' narrative fallacies arise from their attempt to make sense of the world. "Making sense" of the complex litigation that jurors confront today is no mean feat. It falls to the lawyers to provide a simple and coherent account of the actions and the people in the narrative. To accomplish this, Kahneman advises to focus on a few striking events that happened, rather than on countless events that did not occur. Also focus on concrete rather than abstract concepts.

Kahneman advises, in creating a simple trial story, to assign a larger role to choice and intent rather than luck or stupidity. Also avoid internal inconsistencies in the narrative which will reduce the ease of thought and the clarity of feelings of the jurors. A clear and simple trial story is more easily accepted and processed by jurors.

When creating trial stories, attorneys should be aware of the hindsight bias, which indicates that jurors reason backwards from the outcome to determine causation of an event. Kahneman recommends that attorneys seek any recent salient event as a candidate to become the kernel of a causative narrative.

2. Modeling the Damages Trial Story

In creating a body of evidence on damages, begin with the Court's charge to be certain that the elements of damages that you are creating is consistent with the recoverable damages on which the Court will instruct the jury.

The trial story on damages will consist primarily of general damages which include physical pain and suffering, mental anguish, physical disability, physical disfigurement, and loss of enjoyment of life, each of which require juror assessment through careful evidentiary analysis. The attorney should create a separate body of evidence on each of those elements that have evidentiary support.

The primary source of damages proof in a consolidation litigation with multiple Plaintiffs suffering from the same disease is a carefully prepared and fully informed attorney who first educates himself on the numerous sources and types of damages proof in the Plaintiffs' cases.

Assume that the Plaintiff is in an MDL where there are numerous Plaintiffs with the same disease, such as the Camp Lejeune litigation, the first task for the lawyer is to do scientific background research on the disease to learn the injuries, symptoms, treatments, surgeries, medications, and therapies that patients with this disease can expect, along with all of the side effects that will be produced. In the scientific search, the attorney must identify the latency period plus each of the applicable confounders, such as smoking, alcohol, drugs, an obesity, and genetics. Data on the required exposure to develop the disease is important as is the Plaintiff's prognosis.

3. Focusing the Disease

The next step in the lawyer's educational process is to focus the disease by holding a group discussion with 6 to 9 clients who have the same disease and accompanying problems as the Plaintiff. Explain that you are building a damages model for this disease which will be beneficial to each of them in their own case. The role of the lawyer is to create an open discussion of the sources and types of physical pain and disability, and numerous other tragic consequences that are suffered by these patients. Inquire about loss of enjoyment of life; assistance required from others to perform daily tasks; use of canes, crutches, wheelchairs to ambulate; bathroom assistance required; and interference with familial relationships. You will get substantial responses from "Talk about your losses" and "Talk about your fears." From the evidentiary viewpoint the broadest spectrum of damages will come from the multiple varieties of mental anguish that impact these patients constantly: frustration, depression, anger, anxiety, and fears, particularly medical fears, financial fears, fear of death, and familial fears, including loss of consortium.

In a three-hour discussion of this type, the lawyer will become fully educated as to the damages story that the jurors need to hear in this case. The information gleaned from these sources should be sufficient to create a list of symptoms, sources and types of physical pain, multiple types of omnipresent mental anguish, after-effects and side effects of surgeries, treatments, and rehabilitative physical therapy that will be useful in every case of this type. The attorney will also learn the permanent damages which will persist for the Plaintiff's lifetime. This generic information may be applied in all cases in which the Plaintiff is suffering from the same disease.

Turning now to creating the damages trial story for the individual Plaintiff, it is most effective to allow the Plaintiff to tell his own trial story in his own words. This gives the attorney the opportunity to assess the depth of his knowledge about his damages and his abilities as a storyteller.

The attorney is now fully prepared to undertake the deep dive interview with the Plaintiff to create the damages model for his individual case. The interview may require two to three sessions with the Plaintiff, but the immediate goal is to gather the information to create the damages trial story. After the trial story is created, the attorney will work with the Plaintiff to prepare him on the details of the story and how to tell the story effectively.

The next step is to present the Plaintiff to a focus group telling his trial story on direct examination, just as he would in court. A group of 9 to 12 focus group members will analyze, criticize, and comment on the merits and the flaws of both the story and the Plaintiff as a storyteller, with special attention to the weaknesses.

The lawyer listens to the jurors' arguments and analysis of every aspect of the story, and their deliberations on damages. There are no arguments made to the focus group members regarding awarding or denying damages. Their information on damages comes from listening to the story of the Plaintiff's testimony on direct.

In deciding on damages, they are instructed to discuss the evidence that supports their award or rejection of damages. They will also discuss the Plaintiff's skills as a storyteller as well as his credibility as a witness. Additionally, jurors will discuss the effect of the confounders on the deliberations and final jury award. After they complete deliberations, they meet with the attorney for detailed discussion of their decisions and what evidence compelled their decisions.

After deliberations and debriefing by the attorney, they will often request to meet again with the Plaintiff to answer additional questions or for the jurors to offer suggestions for what else they would like to have heard discussed in the evidence or to suggest to the Plaintiff methods of improving his storytelling.

In the initial trial story, counsel will include rhetorical devices such as reference points, metaphors, and analogies and listen carefully during deliberations to see if they resonate. Counsel will also listen carefully to the words that juries use, particularly to replace complex words and concepts with more simple terms. This is known as the language of the case and most cases have complex words that need to be simplified.

In direct discussion with focus group members. the lawyer can seek simple words and metaphors by simply asking focus group members. For example, if you have the word "defibrillation" in your trial story, explain what this means and ask the jurors to complete this sentence: defibrillation is just like _____. If the answer is electrocution, you now have a powerful word in your trial story that carries pain directly into the unconscious mind.

After the first focus group, Counsel will review the tapes and work closely with the Plaintiff to review and revise the trial story and the storytelling skills of the Plaintiff based on the multiple comments and suggestions for revision by the focus group members and by co-counsel observing the focus group.

The second focus group is a dress rehearsal of the presentation of the trial story which will test both the structure and content of the story and the presentation skills of the storyteller. Praising the skills of the Plaintiff as a storyteller will build confidence and prepare him for a persuasive presentation on direct examination and lessen his fears of cross-examination.

Through practice of direct examination, rhetorical devices such as rhythm, the rule of three, the echo effect, parallel structure and repetition can give the Plaintiff's testimony a rhythmic flow that resonates with the listeners. Careful word choices that use color and invoke the senses by creating visual word pictures, while understating the case, can create trustworthiness by making a quiet but powerful unconscious mind appeal. Trial concepts that work for the lawyer

resonate even more powerfully for the Plaintiff.

Focus groups are the engines driving Trial Science as they are the testing grounds for Trial Science theories; and their myriad uses in allowing attorneys to test any part of the case make them indispensable in major litigation. Additionally, multiple studies in Trial Science show that the use of Trial Science techniques is equally powerful in a nonjury trial where the judge is the factfinder.

4. Introducing The Trial Story During Primacy

The importance of introducing and persuading jurors to accept Plaintiff's trial story as their own during primacy cannot be overstated as Trial Science teaches that evidence received during primacy has an undue effect on final judgment. It also teaches that more compelling evidence is required to change beliefs than to create them.

Trial Science teaches that the trial story must be introduced and initially supported by hard evidence during the primacy portion of the trial. Primacy begins with the first contact between jurors and principals in the trial. Primacy continues with supplemental juror questionnaires, if permitted, and continues during voir dire examination, if permitted, during which Plaintiff's counsel can begin sowing the seeds of the trial story.

The most significant events of primacy are the opening statement and the first witness. Plaintiff's counsel and the first witness must coordinate to present and sell a simple and compelling trial story, to encourage jurors to adopt Plaintiff's trial story as their own.

Opening statement provides the lawyer the best opportunity to introduce the trial story. In doing so, counsel should emphasize portions of the trial story that can be supported by the first witness with hard evidence. When the jury sees that the statements made by Plaintiff's counsel are immediately supported by hard evidence through the first witness, this will gain the trustworthiness of jurors and help the veracity of Plaintiff's trial story. Jurors will also be motivated to adopt the Plaintiff's trial story as their own, which is the Plaintiff's major goal during primacy.

Trial Science teaches that during the primacy portion of the trial, each juror forms their own trial story about the case. They will use their trial story as a filter for all new evidence that is submitted and when the confirmation bias comes into play, jurors will seek evidence that confirms their trial story and reject evidence that is inconsistent with their model of the case. Compelling evidence that disagrees with their trial story may be rejected or, if sufficiently compelling, they cause the jury to modify the trial story. Obviously, the best thing that can happen for the Plaintiff is for the jurors to adopt the Plaintiff's trial story as their own.

Finally, Dr. Milton Erickson, a leading psychologist, teaches us the importance of synthesis and consistency in communicating the Plaintiff's trial story. We communicate in three ways: verbally, non-verbally and vocally. Of these methods, verbal communication accounts for only 8% of the delivery of our message; vocal communication accounts for 37% of the delivery of our message; and nonverbal communication accounts for 55% of the delivery of our message.

Inconsistencies between the three messages can lead to loss of trustworthiness of the speaker. When training the Plaintiff to function as a storyteller, be certain to ensure that his verbal message, his vocal message, and his nonverbal message are completely consistent with each other. Focus groups are useful in identifying inconsistencies in the message and provide an excellent tool to verify the appearance of veracity of the Plaintiff.

Trial Science is a gift to the trial bar from brilliant scientists such as Dr. Daniel Kahneman, who died recently, and we are fortunate that they share their brilliance with us to use for the benefit of our clients.