



The Jury from NOVEMBER/DECEMBER 2012
Volume 24, Issue 5

EXPERT

The Art and Science of Litigation Advocacy

A publication of the American Society of Trial Consultants Foundation

J&J to Pay \$158M to Settle Texas Drug Case

\$1,979,228 Verdict for Retired Los Angeles Brickmason

Jury Awards \$1.5 Million in Suicide Malpractice Suit

Massachusetts Family Receives \$3.582 Million Verdict Following Untimely Death of 12-year-old Son

Media Exposure, Juror Decision-Making, and the Availability Heuristic

By Judith Platania and Jessica Crawford

ALTHOUGH MUCH OF THE RESEARCH regarding media exposure has centered on the harmful effects of pretrial publicity in criminal cases, it has been argued that civil cases may be more vulnerable to its effects compared to criminal cases (Bornstein, Whisenhunt, Nemeth, & Dunaway, 2002). In large part this appears to be due to the potential influence of media depiction of high-profile lawsuits and atypical verdict awards on judgments of liability and damages (Robbennolt & Studebaker, 2003). In our study we examined the effect of exposure to a news article (relating a verdict award in a product liability case) on juror decision-making in a conceptually similar case. We varied the amount of damages awarded by the jury in the news article as well as the amount of time between reading the article and the case summary. Our goal was to investigate whether and to what extent jurors use available information when awarding damages. In addition, we were interested in the influence of media exposure on perceptions of the plaintiff and defendant.

Media Exposure, Juror Decision-making, and the Availability Heuristic

Research addressing media exposure and trial outcome has generally focused on the role of pretrial publicity (PTP) in the context of the criminal trial. The published findings demonstrate the negative influence of pretrial publicity on verdict choice, perceptions of the defendant, and other criminal trial components (Studebaker & Penrod, 1997). Media depiction of high-profile lawsuits over the last decade however, has expanded the focus of this research into the civil arena. In various paradigms, researchers have assessed the influence of pre-trial publicity on standard of proof, liability and award determinations, and perceptions of the plaintiff and defendant. Similar to the criminal context, research finds that pretrial publicity negatively impacts the civil trial process. For example, in a study conducted by Landsman and Rakos (1994) [\[1\]](#), potential jurors as well as judges read a summary depicting a product liability case. The level of biasing information

presented in the summary favored the plaintiff. However, instructions regarding how to consider the information were varied (as admissible or inadmissible). Participants exposed to pro-plaintiff information labeled as inadmissible were also instructed to disregard the information. The researchers discovered that judges as well as potential jurors perceived the defendant as liable regardless of whether or not they were instructed to disregard biasing information. Similarly, Bornstein et al. (2002) found increased ratings of liability when individuals were presented with negative information regarding the defendant compared to neutral information. Alternatively, exposure to negative media-related information about the plaintiff led to decreased ratings of liability on the part of the defendant, although not to the same extent as the plaintiff.

Exposure to media can influence perceptions of other case-related factors in addition to verdict. Specifically, individuals perceived air bags more negatively after reading news articles stating only the risks associated with their use compared to articles presenting both the risks and benefits of air bag use (Feigenson & Bailis, 2001). Similarly, Otto, Penrod, and Hirt (1990) exposed participant-jurors to negative pretrial publicity regarding the defendant and plaintiff's negligence. They found that jurors judged the defendant less negligible when they were exposed to negative information about the plaintiff (e.g., police reports) compared to exposure to neutral information regarding the plaintiff. Research also finds the magnitude of the link between media exposure and bias to be quite substantial. For example, Saks (1998) reported that his class of law students overestimated the amount awarded to individuals who experienced non-fatal injuries. Finally, Garber's (1998) large-scale study of newspaper coverage of product liability cases revealed that over 40% of plaintiff victories and 60% of punitive damages involving automobile manufacturers received newspaper coverage. This was in sharp contrast to an obvious lack of coverage of defense verdicts. This type of media exposure has the potential to shape perceptions of how the civil litigation process works.

Excessive media coverage of high profile civil settlements in recent years^[2] has also influenced perceptions of the civil trial process – specifically many people accept the idea that large monetary awards are commonplace in the legal arena (Robbennolt & Studebaker, 2003). One explanation for this belief has been offered through the availability heuristic. According to the availability heuristic, judgments of the likelihood of a particular event are a function of the ease of recalling similar, past events (MacLeod & Campbell, 1992). Additionally, our judgments of uncharacteristic events as the norm are frequently a function of the availability heuristic (Kahneman & Tversky, 1982; Tversky & Kahneman, 1974; 1973). Research has demonstrated that the availability heuristic influences a variety of decision-making situations from workplace ethics to plea-bargaining (Gregory, Mowen, & Linder, 1978; Hayibor & Wasieleski, 2009). Results converge on the idea that the manner in which information is presented can drastically alter an individual's response to that information. Unfortunately, reliance on the availability

heuristic can often lead to biased judgments. In the context of civil litigation, the consequences of relying on the availability heuristic to determine liability and damages can be significant, specifically when the available information is in the form of media coverage of the atypical award. The risk is that jurors will use this information as an anchor (i.e., a "typical" award) and adjust their own case-specific damage awards accordingly (Robbennolt & Studebaker, 2003). Ultimately, this can lead to larger damage awards decided by juries.

Our Study

In our study, we investigated the effects of exposure to a news article summarizing a verdict award in a product liability case on award determinations in a conceptually similar case. We were primarily interested in whether participants would use the availability heuristic when determining award. If so, we should also find that participants would frame their award based on the verdict award presented in the news article. In addition, we tested whether and to what extent the media exposure would influence perceptions of the plaintiff and the defendant.

An equal number of jury-eligible undergraduates and community members (N = 174) read one of three news articles describing a verdict award in a product liability case^[3]. We varied the amount awarded to the plaintiff as either \$14.25 million, \$4.75 million (the actual award), or \$800,000. We also included an article on drug testing in the workplace as a control. Three days or three weeks later, they read a case summary in a product liability case^[4] and assessed liability and damages. In the summary, the plaintiff claimed \$24,000 in past medical expenses and \$10,000 in future medical expenses. She returned to the operation of her business and did not make a claim for lost wages. In the actual case, the jury found 100% negligence against the defendant and awarded \$424,500 to the plaintiff. In addition to reading the case summary, all participants read a specific jury instruction in which they were told to disregard any information they may have received before the actual evidence was presented as a basis for judgment in the case. Eighty-seven percent indicated they understood the instructions.^[5]

Overall, 70% of our sample found the defendant liable and awarded damages. Students and community members did not differ in judgments of liability or in the amount awarded to the plaintiff (\$298,000 v. \$390,000). Of jurors who found liability on the part of the defendant, damages ranged from \$8,000 to \$5M,^[6] with the average award \$344,500, the median award \$175,000. It appears that the most salient effects of the availability heuristic were found for jurors who read the article indicating the largest award three days prior to reading the case summary. Thus, exposure to the recent verdict award in the medical device case, influenced their assessment of the printing press case. As Figure 1 demonstrates, jurors who read the article indicating an award of \$14.25M three days prior to reading the case summary, awarded the plaintiff \$1,286,000. This was significantly different from all other conditions in which awards ranged from \$96,000 to \$226,000. To echo other scholars, "even when a focal number is not particularly relevant, it can exert a bias on judgment under uncertainty"

(Birke & Fox, 1999, p. 10). Thus, our findings demonstrate the convincing effect of the availability heuristic in this context.

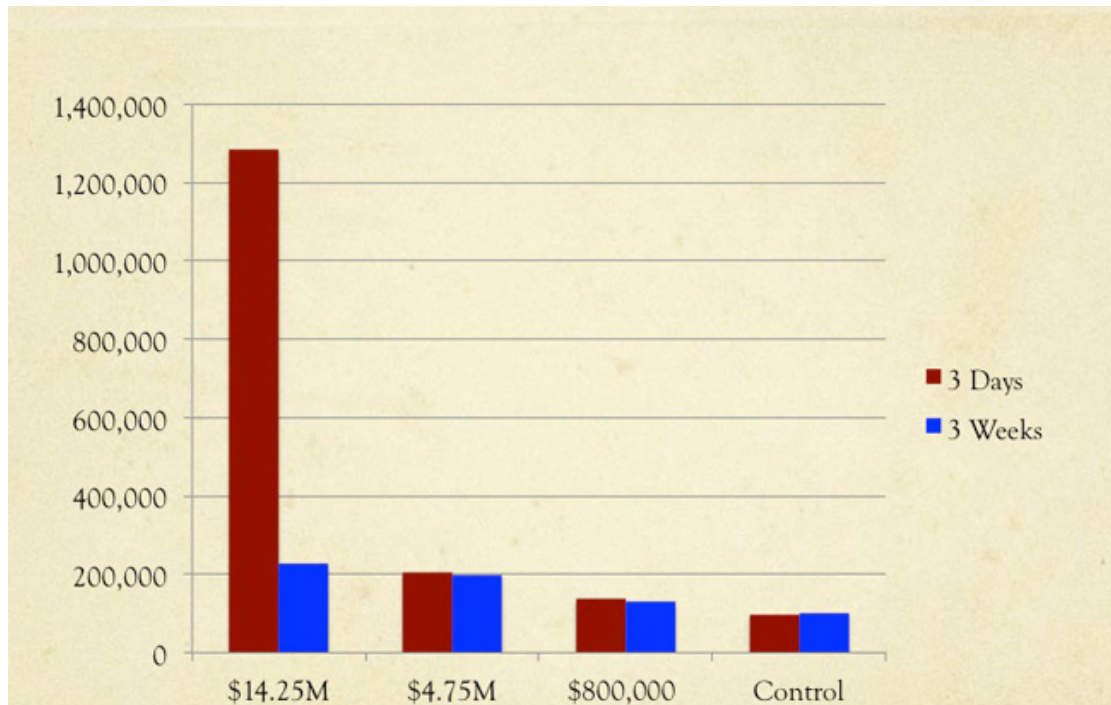


Figure 1. Amount awarded to plaintiff as a function of timing of news article and varied verdict award

Perceptions

We also tested whether media exposure would influence perceptions of the plaintiff and defendant as well as time spent considering award. As Table 1 indicates, jurors who read the article on drug testing (our control group) reported the most positive perceptions of the plaintiff. (The scores represent participant responses to a 7-point Likert scale 1 = negative and 7 = positive). In addition, this group reported spending the most time considering an award for the plaintiff. In all conditions, perceptions of the plaintiff were significantly better than perceptions of the defendant

Table 1. Verdict Award

Item	\$14.25M	\$4.75M	\$800,000	Control
Plaintiff perception	3.9	4.0	4.3	5.0
Defendant perception	3.0	3.1	3.1	3.0
Time spent considering award	3.9	4.0	4.0	4.8

As can be seen in Table 2, jurors who read the news article three weeks prior to reading the case summary reported more positive perceptions of the plaintiff and greater levels of sympathy for the plaintiff compared to our three-day delay. Similarly, jurors who read the news article three weeks prior to reading the case summary were less likely to think the plaintiff could have avoided injury compared to those who read the article three days before reading the case summary. The means reported in Table 2 were not significantly different from one another.

Table 2. Time Delay

Item	3 days	3 weeks
Plaintiff perception	4.0	4.4
Could plaintiff avoid injury	4.4	4.0
Sympathy for plaintiff	3.9	4.3

At the completion of the study we asked our participants a series of questions regarding the news article designed to test the efficacy of our manipulation. Almost all participants (90%)^[2] accurately recalled article-specific information, including award. Next, keeping in mind that 87% of our sample reported understanding the instructions, we asked our participants to indicate the impact (if any) of the article on their award determination in the printing press case on a scale ranging from 0 = No impact at all to 6 = A great deal of impact. As Figure 2 demonstrates, jurors who read the article indicating a \$14.25M verdict award three weeks prior to the case reported a greater impact on their decision in the printing press case compared to those who read the same article only three days prior to reading the case.

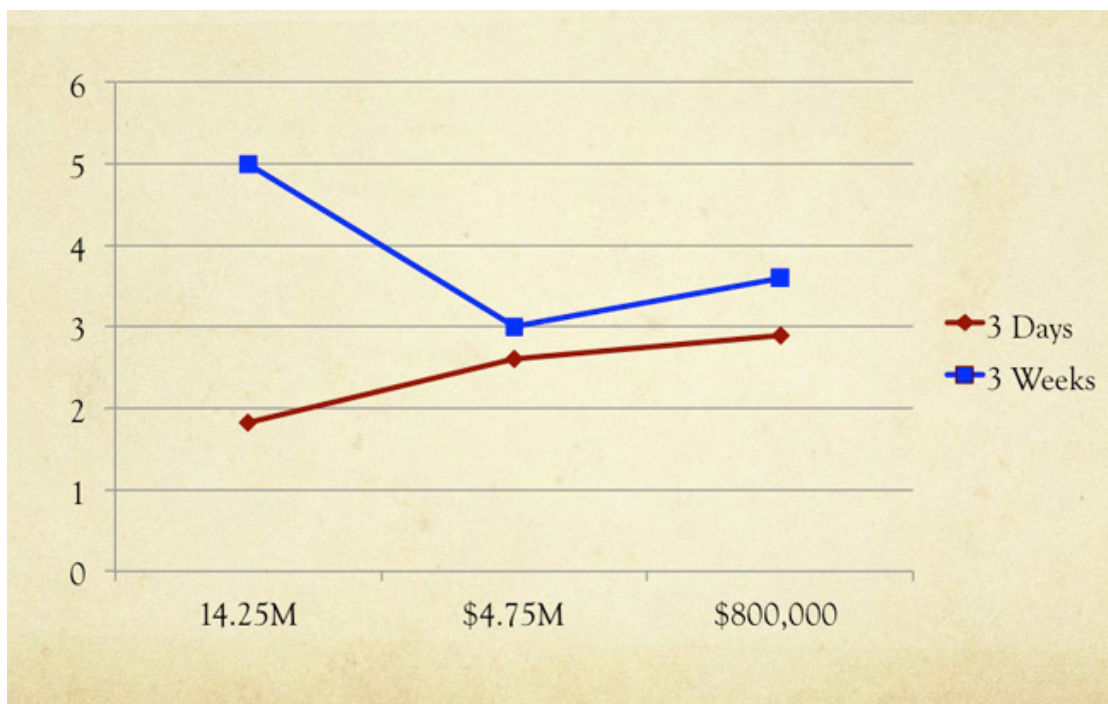


Figure 2. Responses to: “What impact (if any) did the article have on your judgment in this case” on a scale of 0 – No impact at all to 6 = A great deal of impact.

Conclusion

Although the current results support earlier research that demonstrates the biasing effects of the availability heuristic (Robbennolt & Studebaker, 2003), our findings seem to identify an important, yet subtle consequence of relying on the availability heuristic to determine liability and damages. Namely, while jurors will use available information to determine awards, they fail to acknowledge doing so (and insist they understand the directive to not consider previously observed information).

In addition, perceptions of the plaintiff differed significantly as a function of media exposure, particularly in the most salient condition – better perceptions of the plaintiff were not related to larger awards. To our knowledge, the current study is the first to demonstrate this counterintuitive finding, emphasizing the strength of the biasing effects of using available information to

determine awards. That is, exposure to the atypical award has a stronger biasing influence compared to positive perceptions of the plaintiff. Thus, the important question is how to counter the effects of the availability heuristic in this context.

In the current study, our goal was to investigate whether and to what extent jurors use available information when awarding damages. The data in our study suggest several ideas to reduce anticipated biases:

A brief continuance (for example, three days versus three weeks) significantly lessens the salient effects of media exposure, thus improving juror objectivity. However, the issue remains regarding how to effectively balance award determinations with perceptions.

One of the factors affecting availability is an object's distinctness. According to research, objects that are distinct are easier to retrieve (Tversky, & Kahneman, 1974). One way to increase availability is through repetition. In the current context, the availability heuristic appeared resistant to altering perceptions. Based on the research, in order to overcome this bias one suggestion would be to provide frequent references to vivid client- as well as case-specific information throughout the trial process. The implication is the potential for favorable decision-making through the use of repetition and vivid language.

Finally, we are aware that research has demonstrated the resistance of the availability heuristic to various remedies when presented in the context of PTP (Studebaker & Penrod, 1997). With this in mind, the evidence we provide does not directly test remedial efforts such as extended voir dire, judicial instruction, or jury deliberation. Rather, we offer data to support other researchers' findings (see Studebaker & Penrod, 1977) and to increase awareness to the biasing effects of the availability heuristic in this context. ●

Illustration by Brian Patterson of Barnes & Roberts

[Judith Platania](#) is a legal psychologist and Associate Professor of Psychology at Roger Williams University. Her [current research program](#) investigates the role of non-statutory mitigating circumstances in capital sentencing decisions. The results of her most recent empirical investigations were presented at the 2012 meeting of the American Psychology-Law Society in San Juan, PR. She teaches undergraduate and graduate research methods and statistics.

[Jessica Crawford](#) is a 2012 graduate of Roger Williams University 4+1 B.A. – M.A. Program in Forensic Psychology. She is currently employed as a jail diversion clinician with the Milford MA Police Department. Her academic/professional interests include working with juveniles, forensic populations, and research in the area of jury selection.

References

- Birke, R., & Fox, C. R. (1999). Psychological principles in negotiating civil settlements. *Harvard Negotiation Law Review*, 4(1), 1-57.
- Bohner, G., Dykema-Engblade, A., Tindale, R. S., & Meisenhelder, H. (2008). Framing of majority and minority source information in persuasion: When and how consensus implies correctness. *Social Psychology*, 39, 108-116.
- Bornstein, B., Whisenhunt, B., Nemeth, R., & Dunaway, D. (2002). Pretrial publicity and civil cases: A two-way street? *Law and Human Behavior*, 26, 3-17.
- Crawford, J. (2012). This looks familiar: The effect of prior notification of civil settlement on award determinations in a product liability case. Unpublished thesis. Retrieved from: http://docs.rwu.edu/honors_theses/13/
- Feigenson, N., & Bailis, D. (2001). Air bag safety: Media coverage, popular conceptions, and public policy. *Psychology, Public Policy, and Law*, 7, 444-481.
- Florida, Miami-Dade County (May, 2001). \$424,500 – Negligent repair of printing press – failure to warn that safety devices were deactivated. *Jury Verdict Review and Analysis*, 11(5), 8-9.
- Garber, S. (1998). Measuring the shadow of punitive damages: Their effect on bargaining, litigation, and corporate behavior. *Wisconsin Law Review*, 237-279.
- Gregory, W. L., Mowen, J. C., & Linder, D. E. (1978). Social psychology and plea bargaining: Applications, methodology and theory. *Journal of Personality and Social Psychology*, 12, 1521-1530.
- Hayibor, S., & Wasieleski, D. M. (2009). Effects of the use of the availability heuristic on ethical decision-making in organizations. *Journal of Business Ethics*, 84, 151-165.
- Jung, H. (2010, January 22). Portland man wins \$4.75 million after medical device damages shoulder. *The Oregonian*. Retrieved from: http://www.oregonlive.com/portland/index.ssf/2010/01/portland_man_wins_475_million.html
- Kahneman, D., & Tversky, A. (January 1982). The psychology of preferences. *Scientific American*, 246, 160–173.
- Landsman, S., & Rakos, R. (1994). A preliminary inquiry into the effect of potentially biasing information on judges and jurors in civil litigation. *Behavioral Sciences and the Law*, 12, 113-126.
- MacLeod, C., & Campbell, L. (1992). Memory accessibility and probability judgments: An experimental evaluation of the availability heuristic. *Journal of Personality and Social Psychology*, 63, 890-902.

- Otto, A., Penrod, S., & Hirt, E. (1990). The influence of pretrial publicity on juror judgments in a civil case. Unpublished manuscript.
- Robbennolt, J., & Studebaker, C. (2003). News media reporting on civil litigation and its influence on civil justice decision-making. *Law and Human Behavior*, 27, 5-27.
- Saks, M. J. (1998). Public opinion about the civil jury: Can reality be found in the illusions? *DePaul Law Review*, 48, 221-245.
- Studebaker, C., & Penrod, S. (1997). Pretrial publicity: The media, the law, and common sense. *Psychology, Public Policy, and Law*, 3, 428-460.
- Tversky, A. & Kahneman, D. (1974). Judgment under uncertainty: Heuristics and biases. *Science*, 185, 1124-1131.
- Tversky, A., & Kahneman, D. (1973). Availability: A heuristic for judging frequency and probability. *Cognitive Psychology* 5, 207-233.

Endnotes

- [1] Stimulus materials were not depicted as pretrial publicity, but rather as information presented during trial.
- [2] E.g., tobacco industry litigation, celebrity cases, etc.
- [3] An actual case in which a jury ordered a medical-device company to pay \$4.75 million to a Portland man in a product liability lawsuit (Jung, 2010). To summarize the case: The jury found I-Flow Corporation liable for destroying the cartilage in the plaintiff's right shoulder and leaving the 38-year-old father of four with constant pain and a disabled arm. The plaintiff picked up a muscle injury in 2004 playing football with his children. He underwent arthroscopic surgery to repair the muscle at which time the surgeon also inserted the pain pump into the shoulder joint where it delivered medicine for several days. The plaintiff began to recover but after six months found himself in excruciating pain. He has had a partial shoulder replacement and faces three to five replacements in his lifetime, the plaintiff's expert testified. Although he can still do his job as a commodities broker, it's unlikely he will be able to continue in his work until retirement age because of intensifying pain. He now suffers from a condition called chondrolysis, which is a severe deterioration of cartilage.
- [4] An actual case taken from Jury Verdict Review and Analysis (2001). To summarize the case: The female plaintiff, age 46 at trial, alleged that the defendant printing press service company negligently failed to advise her that the safety mechanism on her printing press was not functioning. As a result, the plaintiff alleged she sustained permanent injuries to her dominant right arm when it was crushed under a portion of the press. The defendant maintained that it was not asked to perform a safety evaluation of the subject printing press and had no duty to advise the plaintiff concerning its safety features. The plaintiff's mechanical engineer testified that the printing press short-circuited causing the unexpected cycle of the press. He testified that a safety mechanism, which should have prevented operation of the machine when the glass was raised, had been deactivated from the printing press. The plaintiff's expert also testified that the injury to the plaintiff's arm could not have occurred had the safety mechanism been in place at the time in question.
- [5] The average response was 5.4 on a scale of 1 = No understanding at all to 6 = Complete understanding.
- [6] \$5M was not an outlier value. Ten values were between \$1M and \$5M.
- [7] excluding our control group