



# Addressing Jurors' Natural Tendencies: The Role of Motive in Civil Litigation

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While motive is an ever-present element in criminal trials, it is not always a part of the causal equation in determining civil liability. Civil litigators are often surprised by jurors' propensity to inject motive into civil trials even when there is no claim of intentional wrongdoing. This is a common reaction when lawyers observe deliberations of mock juries, for instance. Lawyers have learned to compartmentalize the elements of a civil action; jurors have not. Even if the claims against the defendant include intentionality, the "why," or motive question is not something that is addressed explicitly because the law does not require that it be addressed. However, when laypeople are asked to determine what happened in a given case, their explanation usually includes a motive – "they did it because..." The attribution of motive in explaining behavior is a natural tendency that has been documented and studied for many years by sociologists and psychologists. The search for a motive is natural; ignoring motive is unnatural. Moreover, the tendency to assign motive in a civil action includes a systematic bias that should favor the plaintiff in many instances, especially where the defendant is a corporate entity.

Even though the issue of motive does not appear in the pleadings or motions underlying a civil action, the attorneys' rhetoric at trial often contains explicit references to motives, i.e., "they did it because they were greedy." This rhetorical insertion of motive is intended to motivate the jurors – to get them to view the behavior of the litigant more or less favorably. From a plaintiff's point of view, the thinking is that jurors will be motivated to punish the defendant because the defendant acted with base motives. From a defendant's point of view, there is often a temptation to impugn the plaintiff's motives in order to create an unsympathetic reaction and thereby reduce the jury's desire to reward the undeserving plaintiff. These attempts to inject motive into a case are made not to explain the facts, but rather may be made to sway the sympathies of the jurors. Regardless of the presence or absence of such appeals, the assumption of motive becomes a key element of the jurors' explanation of the facts in the case. If the attorneys do not address the issue, jurors will naturally inject attributions of motive into their deliberations. This curious inclination of jurors can have significant consequences: a negligence case

becomes a de facto willful or wanton negligence case; a compensatory damages case becomes a de facto punitive damages case.

Psychological studies of the tendency to attribute motive in the causal analysis of social behavior suggest that this process should favor the plaintiff in most cases. There are three primary reasons for this. The first is the primacy of behavior. Fritz Heider, a Gestalt psychologist, noted that actions dominate onlookers' attention, with the outcome of actions being the focal element. He also demonstrated that people will attribute intentionality to action given the most minimal cues. For example, if people observe two dots moving at random on a screen, they will describe one as chasing the other or following the other. There is a natural tendency for people to convert random movement into intentional behavior. In a civil matter, the behavior of the defendant and the harm to the plaintiff are the focal elements. The tendency of jurors viewing the action is to frame the action in terms of the doer (the defendant) and the consequences. More importantly, jurors will see the behavior of the defendant as purposeful.

The second aspect of the attribution of causation that favors plaintiffs is captured by the notion of actor (the "doer" of action) and observer (the onlooker to action) differences. When asked to explain the actions of the actor, the observer invariably focuses on the characteristics of the actor rather than the context in which the action occurs. The observer attributes the behavior to the intentions of the actor. The actor is assumed to act rationally, in his or her self-interest. The actor, on the other hand, explains his or her actions by focusing on the pressure of circumstances, past events, or other contextual factors. The actor also believes that he or she is acting rationally – in response to the demands of the situation. As observers, jurors explain the actions of the defendant in terms of the aims and motives of the defendant. Jurors focus on the outcome of the defendant's alleged behavior, harm to the plaintiff, and their first tendency is to assume that the behavior was intentional, i.e., reflecting the motives of the defendant. They also downplay the contextual factors that would de-emphasize or mitigate the intentions of the defendant. This leads to the third aspect of motive attribution, one that also favors plaintiffs.

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## The Can-Try-Do Analysis

Understanding the natural tendency to attribute motive is an important step in applying juror psychology to litigation strategy. For instance, the simplest analysis of social causation involving the assessment of motive is captured in the formula advanced by Heider. The formula he offered to explain the attribution of causation was Behavior (Do) = Ability (Can) + Effort (Try). When observing the actions of another, we start with the assumption that if the person did something, it was because he/she could do it and tried to do it. Since we cannot see inside the person, the effort made is a surrogate measure for the person's internal motivation, e.g., how much he/she wanted to do it. If the doer had to overcome obstacles, e.g., the law, in order to accomplish the act, the observer perceives greater effort and attributes even greater motivation to the doer.

Applying this formula to the reactions of jurors in a civil trial creates a mind-set that is favorable for plaintiffs in many cases. The jurors evaluate the ability of the defendant. If the defendant is a corporation, the defendant is seen as powerful, omniscient and capable. It is easy for jurors to conclude that the corporate defendant had the wherewithal to cause or prevent the harm that the plaintiff alleges. As part of their assessment, jurors will look at the effort that the defendant expended to either facilitate its positive outcome, e.g., sales, profits, or avoid the negative outcome to the plaintiff. If the defendant is perceived to have ignored warning signs and to have gone ahead with the action that caused harm, jurors will believe that the defendant was highly motivated to behave in a manner that caused harm. This explains the intractable and devastating effect of internal warnings or "smoking gun" documents. If the corporation committed a wrong, it is probable, given its superior knowledge and resources, that it was aware it was doing wrong; therefore it probably meant to do wrong.

The battleground in many civil actions is causation-attributing the outcomes of the plaintiff to the actions of the defendant. The typical strategies employed by a defendant are to break the causal chain, substitute an alternative causal solution that does not involve the defendant, and/or to reduce the perceived harm. These are the

core elements in the defense strategy since they deal directly with the plaintiff's liability claims. However, even when the legal requirements of the plaintiff's claims do not require a finding of intentional wrongdoing, the following tactical options should be considered given jurors natural tendency to attribute motive:

### Expand the Perceptual Field

- Lengthen the time frame that jurors are to consider. The plaintiff's most favorable scenario limits the field of action to the defendant's bad acts and the plaintiff's harm. Eliminating intervening or precedent events closes the door to alternative explanations. Providing the big picture, while maintaining relevance, opens the juror's field of vision and gives them a better appreciation of the Defendant's perspective. A helpful tool in this regard is a visual timeline to focus jurors' attention on the temporal field and to portray the intervening events that affect the action.
- Another way to expand the field is to bring in other players. The plaintiff benefits when it is just little guy versus big guy. Identifying other responsible parties while avoiding the appearance of blame shifting is often a challenge. For instance, showing a willingness to accept responsibility for actions that the defendant controls not only enhances credibility but defines the perceptual space so that jurors can appreciate the roles of other potentially responsible parties.
- The context is often the defendant's best ally. History is a part of the context; key players, technical and environmental constraints are all elements that broaden the focus and give jurors a way to view the world from the defendant's perspective.

### Put the Observer in the Actor's Shoes

- Transport jurors into the world of the corporate defendant. Walk jurors through the relevant environment, for instance, the production process or R&D department of the organization. Allowing jurors to be observers in a walk-through of the defendant's manufacturing plant or laboratory without advocacy opens their eyes to a new set of considerations and broadens their perspective. This is different from telling the "good corporate

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citizen story," which jurors often view skeptically as self-serving fluff because it lacks relevance to the events and issues the jurors are asked to consider.

- Detail the defendant's affirmative efforts to create safe products or safe work environments. The defendant must do more than assert its compliance to earn credit in the view of the jury. Taking the time to detail the effort earns the defendant added credit because jurors are often surprised by the level of effort, and they see that safety is a real objective (motive). Even if the company was negligent with respect to the plaintiff, it is hard for jurors to punish a company that expends a lot of effort to do the right thing.

### **Make the Juror an Active Observer**

- One technique that can be used is to ask the jurors to assume the role of a private investigator. Inviting jurors to investigate the incident takes the focus off the plaintiff as victim and puts the focus on the plaintiff as actor in the case scenario. If the jurors are asked to walk through the incident, accounting for all of the actors and other elements of the set, they are forced to pay attention to key influences, such as time, dynamic interaction among persons, things and events. This forces the jurors to deal with the behavior of the plaintiff objectively, rather than focusing just on the harm suffered, and takes some of the emotion out of the case. This also puts the role of the defendant in perspective.

### **Reduce the Power Differential**

- One of the key players is often the plaintiff. While the plaintiff wants to be perceived as the victim, his or her actions are often the more proximate cause. Point out all of the resources available to the plaintiff such as warnings, manuals, helpline numbers, safety equipment and common sense. If the plaintiff has the ability to act, but fails to do the right thing, the inference is that he or she did not try to do the right thing. Pointing out to jurors all of the relevant capabilities and resources at the plaintiff's disposal reduces the situational power difference and puts the burden on the plaintiff to act. If the worker fails to wear safety equipment, jurors must at least consider the weight of this

intervening and proximal factor, as well as the motivation of plaintiff.

- Don't pamper the plaintiff. One common mistake that attorneys make is to exacerbate the perception of the plaintiff as victim by treating the plaintiff like a fragile figure. Some attorneys will go so far as to pass up the cross-examination for fear of emphasizing the plaintiff's injuries. This merely emphasizes the victimization of the plaintiff. There are often instances where plaintiffs, despite their injuries, could do more than they are currently doing in their daily lives and for their future. Allowing jurors to see the lack of effort on the plaintiff's part in a sensitive way not only reduces the perception of powerlessness, but also calls into question the motives of the plaintiff. There are deserving victims, but there are also undeserving victims.
- Recognize when you are dealing with true victims. The two types of plaintiffs that are most difficult for the defense are those who are perceived to be truly helpless (victims) or plaintiffs who tried to prevent the harm, but were harmed nonetheless (valiant victims). There are some situations where the plaintiff could not have done anything to prevent the harm alleged. If the plaintiff was truly helpless and could not prevent the harm, jurors expect the defendant to have exerted extra care. If jurors believe that the defendant made the extra effort and the plaintiff was harmed nonetheless, jurors will find it difficult to attribute intentional harm.

### **Conclusion**

Understanding the natural tendency of jurors to inject motive into their consideration of a civil matter has important strategic implications. The jurors' psychological assessment of causation, especially the attribution of motive, is not the same as the legal analysis jurors are instructed to perform by the court. The psychological assessment of motive is an extralegal process that nonetheless affects liability decisions and most certainly affects the assessment of damages. While the facts of each case are different, this tendency on the part of jurors is a constant. By appreciating the position of the juror as the observer, e.g., anticipating the jurors' assessment of power and effort, the attorney can better understand the likely

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reaction of jurors to the case as it might be presented. The decision to specifically address jurors' tendency to inject motive or intent is primarily prophylactic: to prevent the judgment of negligence from turning into a de facto judgment of willful or wanton negligence; to prevent a compensatory damages case from becoming a punitive damages case. Of course, where the plaintiff's claims do include allegations of intentional wrong-doing, these considerations become more crucial. Applying the simple can-try-do analysis to the actions of the defendant is a simple exercise, one that could make a big difference when the jury does what comes naturally.

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