



# The psychology of framing and jury decision-making

“DECISION FRAME” DESCRIBES THE WAY AN INDIVIDUAL PERCEIVES A PROBLEM, THE POTENTIAL CHOICES AVAILABLE, AND THE OUTCOMES ASSOCIATED WITH THOSE CHOICES

Imagine you are a juror in a products-liability case involving a vaccine. Acme Drug Company developed two vaccines to combat a deadly epidemic expected to kill 600,000 people. Vaccine A was guaranteed to save 200,000 people. Vaccine B had a one-third probability of saving all 600,000 people, but a two-thirds probability that no one would be saved. Acme released Vaccine A into the market, without consulting public-health officials. Was that the appropriate choice?

Now imagine this case: Another company, Globex, also developed two vaccines to fight the outbreak. If Globex released Vaccine C, 400,000 people would die. If the company released Vaccine D, there was a one-third probability that no one would die, but a two-thirds probability that all 600,000 would die. Without consulting public health officials, Globex released Vaccine C, where 400,000 would die. Was that the right choice?

If you are like most people, you would find that Acme was not negligent – Vaccine A was the right choice. You would also most likely believe that Globex was negligent and should have chosen Vaccine D instead of C.

What you may or may not have determined by now is that both Acme and Globex made the same choice: the survival/mortality rate between Vaccines A and C (and Vaccines B and D) are equivalent. The only difference is how the vaccines were framed – in terms of gains (lives saved), or losses (deaths).

## Framing makes a difference

“Decision frame” describes the way an individual perceives a problem, the potential choices available, and the outcomes associated with those choices. Decision frames are individualized – different people will see the same situation differently, based in part on how the

problem or situation is presented, and in part on the personal characteristics of the decision maker.

“Framing effect” refers to the phenomenon that how a situation, problem, or choice is posed influences the way we perceive value, make choices, or behave – even when the alternatives are equivalent. Changing the frame can change the preferred outcome or choice. Framing effects include Risky Choice Framing, Attribute Framing, and Goal Framing.

## Risky choice framing

The Acme/Globex scenario above is a variation of the classic experiment on framing. (Tversky and Kahneman, *The Framing of Decisions and the Psychology of Choice* (1981) 221 *Science*, 453.) In that study, 72% of respondents believed the corresponding Vaccine A scenario (200,000 lives saved) was the right choice, while 78% of respondents said Vaccine C (400,000 died) was the wrong choice. *Yet the number of lives saved is the same.*

Why do these two equivalent choices result in such vastly different decisions? Because the certain death of 400,000 is perceived as less acceptable than the two-out-of-three chance that 600,000 will die using the Globex vaccines.

When options are framed in terms of loss versus gain, more people take the riskier proposition. This is known as the Risky Choice framing effect. When we make choices involving gains, we tend to be risk averse. But when we make choices involving losses, we are more likely to be risk taking. How an issue is framed affects how we value the different options and make decisions.

Risk aversion versus risk taking can also help explain why plaintiffs are more likely to settle for less than they should, and defendants are more likely to go to trial versus offer a settlement. A certain loss, i.e., paying a settlement, motivates

risk-taking behavior more than the potential of a lesser gain (accepting a lower amount) does. Mediators may be more inclined to push plaintiffs towards settlement because of this psychological construct.

## Attribute framing

The attributes describing a situation can impact perceptions of what happened. In one study, participants watched a film of a traffic collision and were asked to list how fast the cars were going when they either: contacted, hit, bumped, collided, or smashed each other. (Loftus and Palmer *Reconstruction of Automobile Destruction: An Example of the Interaction between Language and Memory* (1974) 13 *J. Verbal Learning & Verbal Behav.* 585.) The perceived speeds increased the more violently the impact was described: contacted (31 mph), hit (34 mph), bumped (38 mph), collided (39 mph), smashed (41 mph). Word choice is a frame because of the images they conjure up.

Word choice framing also influences memory of the details of an event. Participants in that same study were later asked if they had seen broken glass at the accident site. There was no broken glass, but 47% of those who heard the word “smashed” believed there was, compared to just 16% of those who heard the word “hit.”

Attribute framing is why plaintiff lawyers want to say “collision” instead of “accident” because it frames the scenario as more violent and intentional than the word accident – “accidents” can happen to anyone.

## Goal framing

Goal framing describes outcomes in terms of successes or failures, and positive or negative outcomes. Studies have found that when survival rates of a medical procedure are emphasized,

*See Chopra, Next Page*

people are more likely to choose to have the procedure than when the mortality rates are emphasized.

How can you apply these findings at trial? If your client is facing a risky procedure he doesn't want but the defense is pushing, and using that reluctance to argue your client isn't really hurt so bad or he would have the surgery, highlight the failure rate. If the defense says a procedure or treatment isn't necessary and therefore there is no need to compensate for it, stress the success rate or probability of improvement.

### The endowment effect

The Endowment Effect goes hand-in-hand with framing and can influence how jurors will perceive your case and make decisions. This phenomenon explains why people tend to overvalue what they own or already possess, and undervalue things they have to purchase.

Several components of the Endowment Effect are relevant to legal decision making: Status Quo Bias; Loss Aversion; Framing; and Reference Dependence. (See Rachlinski & Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary* (2018) 94 Notre Dame L. Rev. 521). Status Quo Bias reveals that people prefer an option when that option represents the status quo – what they already have. Loss Aversion explains the tendency for people to perceive loss as psychologically more costly than an equivalent gain.

Framing, in terms of the Endowment Effect, describes how the same thing can be perceived as a gain or a loss depending on the way an equivalent situation is presented. For example, getting a penalty for using credit cards at the gas station is perceived as a loss; getting a bonus or discount for using cash is a gain. So, people will be more likely to use cash in the penalty situation. When a procedure is described as having a 10% failure rate vs. a 90% success rate, fewer people are willing to undergo it since we pay more attention to and are unduly influenced by negative information. Reference Dependence is simply how the frame of reference (gain vs. loss, reward vs. penalty) alters the perceptions of a situation,

and of the motivations of the actors involved.

To study the effects of framing in a legal context, Rachlinski and Wistrich asked 1186 judges from across the country to review a series of cases, each designed to test the impact of different framing effects. In addition to the product liability scenario described above, the judges were also asked to decide a breach of contract case, an employment discrimination case, and a medical malpractice case.

### Breach of contract: Reference dependence

The plaintiff contracted with the defendant to install floors in a house he is trying to sell. The defendant installer expected to receive \$1,000 profit. In the first scenario, defendant does not complete the work because prices for materials are higher than expected and it would have cost him \$1,000 to finish the project. In the second scenario, defendant does not complete the work because he got a better job that would give him \$1,000 more than he would have received from the job for the plaintiff. The contractor is portrayed as acting to avoid a \$1,000 loss or get a \$1,000 gain.

The judges reviewing the “avoid a loss” (prices higher than expected) condition awarded plaintiff less than those in the “obtain a gain” (working for a different client) condition. The difference in perspective taking/reference point results in judges being more sympathetic to a contractor trying to avoid a loss than one trying to obtain greater gain. Depending on the point of reference, the contractor is seen as being desperate, or greedy. The psychology of framing leads one to think a potential loss will hurt more than a potential gain, and thus results in sympathy and greater understanding of the defendant's decision.

Potential empathy or sympathy for the defendant based on their perceived motivations is an important concept for plaintiff's counsel to explore in jury selection and strive to reframe at trial. Whenever possible, portray the defendant

as acting out of self-interest or gain as opposed to avoiding a loss.

### Employment discrimination: Status quo bias

A 61-year-old plaintiff filed an age discrimination case against a university. Half of the judges heard the plaintiff was one of five applicants for a dorm resident director position and not hired, while the other half was told that he was one of five current resident directors faced with a layoff and let go. All of the applicants/current directors had similar credentials.

The defense argued they chose not to hire (or chose to layoff) the plaintiff because he lacked the interpersonal and management skills possessed by the other applicants/employees. The plaintiff argued that all of those who were hired/retained were under 30 years old. Notes from the interviewer/current supervisor stated, “Energy? Understanding of today's students?”

Judges were more likely to find in plaintiff's favor in the termination condition than in the failure-to-hire scenario. This outcome suggests a status quo bias, where the loss of an existing job, something plaintiff already had, was deemed more detrimental than the potential gain of employment.

The authors argue that the comments regarding the plaintiff should have actually been more damning to the defense in the failure-to-hire condition than in the termination: in the termination scenario, the notes could have been based on actual performance. In the failure to hire, those notes would be based on stereotype. Yet the verdicts did not reflect this logical conclusion.

The status quo effect increases the obstacles already faced by employee litigants in failure-to-hire and failure-to-promote cases. Applicants who don't get a job have a different status quo than one that has been fired. Failure-to-hire or promote cases are harder to win – the plaintiff is claiming a loss of a job he did not already have, and the gain of a potential opportunity is deemed less

*See Chopra, Next Page*

psychologically damaging and less certain than the loss of an existing position.

### **Medical malpractice: Endowment effect**

The plaintiff was a 34-year-old man who used to work as a welder. He developed an infection in both eyes after ocular surgery because the nurse mistakenly brought surgical equipment used on another patient with a staph infection. The defendants admitted liability but disputed the damages for loss of enjoyment of life, which were described in one of two ways:

In one scenario, the plaintiff was presented as a welder whose retinas in both eyes were damaged in an explosion on a work site four years earlier. The surgery was supposed to repair his vision, but now, because of the botched surgery, his condition would not improve. The judges were asked how much they would award to the plaintiff for the hospital failing to restore his eyesight.

In the other condition, the plaintiff was described as having a rare disease that caused his retinas to degenerate slowly and had the potential for long-term vision loss. The surgery was supposed to avoid the risk of losing his vision; however, the surgery and resulting infection caused him to lose his vision permanently. The judges were asked how much they would award the plaintiff for his loss of enjoyment of life attributable to the hospital causing him to lose his sight.

Judges in the already-blind condition awarded \$1,000,000 *less* than those in the loss-of-sight scenario, consistent with the concept that losing something you currently have is worse than regaining something you did not already possess.

The study suggests that plaintiff's claims will be more persuasive when presented in terms of experiencing a loss rather than a lost opportunity. The losses suffered should be described from the client's current position, even if effects of the injury are actually one of a foregone gain. The defense is more persuasive when characterizing the plaintiff's current situation as being something that

they may or may not have obtained in the future – a foregone opportunity instead of a true loss or departure from what they had. This psychological bias can especially play out in loss-of-earning capacity claims where the client was young and not yet employed or was early into their career at the time of the adverse event.

### **Noneconomic damages: avoiding "make whole"**

Noneconomic damages are hard for jurors to assess. The literature suggests that the framing of these intangible losses can have a vastly different impact on the value jurors assign to them.

Some lawyers talk about how much it would take to make the person whole, while others frame the loss in terms of how much the plaintiff would take to have had the injury occur to them. The latter frame is known as the selling price perspective.

The reference point matters. The selling price makes the plaintiff's healthy state the reference point while making whole puts the injured state as the reference point. Making someone whole occurs after the injury, the selling price reference point is before. Why does that matter? Research suggests that people are likely to demand much more to part with an item they already have, than they are to pay to acquire the same thing.

Researchers tested the difference in damage awards when the question was phrased in terms of how much one would need to receive in order to be made whole again once an injury has occurred, versus how much one would charge in order to sell the corresponding pre-injury good health. (McCaffery, Spitzer & Kahneman, *Framing the Jury*, (1995) 81 Va. L. Rev 1131.)

In this study, the participants were to assess noneconomic damages of a plaintiff injured in an admitted liability case. In the "make whole" condition, the participants were instructed: Imagine the following from the injured person's point of view. You have recently suffered the injury and expect to live with it for three full years. What amount of money would

be just enough to make you on balance as fortunate as you were before the injury happened?

In the selling point condition, participants were instructed: Imagine the following situation from the injured person's point of view. You have recently suffered the injury and expect to live with it for three full years. Before anything happens, you are offered a sum of money to experience the injury exactly as it later occurs for the full three years. What amount would be just enough to make you accept the injury?

Participants instructed on the make-whole condition awarded an average of \$245,000. Those given the selling point instructions awarded more than three times as much, \$775,000. Viewing the plaintiff from a preinjury, healthy reference point results in higher awards than when considering them from a postinjury baseline.

During jury selection, focus groups, and posttrial interviews, those who are more defense-oriented often use the term "make whole" when talking about awarding damages. I have found that these individuals are the most likely to use economic anchors like income and medical bills to determine their noneconomic awards. They reason that someone like the plaintiff would have never made more than \$X in their lifetime, so providing money that would put them back to where they likely would have been economically is enough, and anything more is a windfall.

When developing your noneconomic damages case, do not talk about bringing your client back to where she was before, righting wrongs, or paying bills owed. This language invokes a make-whole perspective. Instead, talk about what it is worth to lose the things that each of us holds dear in our lives, how much it would take before we would willingly give up those things in exchange for a lifetime without them. In closing, you can use the scenario of an online job ad, someone coming up to your client with a bag of money and an offer, or similar analogies to express the point that the price of forgoing one's health, happiness, and enjoyment of life is and should be

*See Chopra, Next Page*

very high – higher even than what you are asking.

### Framing your case for trial

The framing effects in cognitive psychology discussed so far deal with choices and how the wording of the choice or the framing of the question/problem/scenario impacts what people choose. Case framing in the context of litigation is more like the traditional framing of a picture: You mount the frame based on where you want the eye to focus, you shift the view from the areas that you do not. Several other psychological concepts relevant to jury decision-making will help you decide how to most effectively frame your case.

### Fundamental attribution error/defensive attribution

Jurors in a civil trial make attributions about causality and responsibility. When making decisions about the cause of negative events that happened to others, we are most likely to form internal attributions – we are more likely to scrutinize the behavior of the individuals involved as opposed to the circumstances. On the contrary, we are more likely to place blame for our own misfortunes on circumstances, or the situation. This propensity is known as the Fundamental Attribution Error.

A subset of the fundamental attribution error is Defensive Attribution. We use this cognitive bias to protect ourselves from the fear that a negative event that happened to someone else could also happen to us. When we hear about a tragic outcome, we want to psychologically distance ourselves from the belief that we could befall a similar fate. How do we do that? We focus on the actions, motivations, and behavior of the injured party as opposed to the circumstances. We say, “If I were in that situation, I would have checked my mirrors, crossed the street, notified HR,” etc.

The more similar we are to the person who experienced the bad event, or the more likely we could find ourselves in similar circumstances, the more likely we are to engage in defensive attribution. For example, research has demonstrated

time and again that young women who could imagine themselves being victims of sexual assault are the harshest critics of rape victims, contrary to what one might expect.

This can happen in almost every kind of case, no matter how strong the facts are for the plaintiff. An admitted liability drunk driver defendant? The plaintiff should have been paying more attention. A woman was sexually harassed at work? “I wouldn’t have stood for that. I would have reported this right away.” Internal documents showing potential consumer risks? The plaintiff probably misused the product.

### A common misstep in framing your trial story

The most common misstep I see plaintiffs’ attorneys making in case presentation is to begin their trial narrative like this:

*Let me tell you about my client. Jorge Hernandez was 68 years old at the time of this injury. He grew up in California, worked his way through school and was the first one in his family to attend community college. He retired from his job as a facilities manager three years ago. Jorge has been married to Maria for 40 years. They have one daughter, Sophia, and three grandchildren. Their grandchildren are Robert, who is 12, Tomas, who is 8, and Adrian who is 10.*

What’s the problem? Jurors want to know what happened and why they are here. The jurors don’t care about your client yet and think you are just angling for sympathy. They don’t understand why you are showing pictures of the plaintiff and his family, pictures of his kids – what does this have to do with anything?

Moreover, this approach puts the frame, the focus, on the plaintiff. Why is that a problem? Trials occur because there was a negative outcome for someone. Both the fundamental attribution error and defensive attribution teach us that people want to blame the actors for bad things that befall them, and credit the situation for good things that occur. They will begin the case by looking to see who was at fault.

If you start with the employee, the question is: Why didn’t she go to HR, why didn’t she tell him to stop, if I were her I would have... If you start with the crash victim: How could he not have seen the gigantic truck? Why wasn’t he driving defensively? He should have double-checked even though the light was green. If you start with the consumer: Did he follow the instructions? Why didn’t he wear protective gear? He probably misused it or altered it. Everyone knows XYZ can be dangerous.

Start your story with where you want the jurors focused. In employment cases, the focus is usually the harasser; in auto cases it is the driver or the company who trained the driver; in product liability it is the corporate officers or head of R&D. It is never the plaintiff. When telling the story, I recommend taking the perspective of whichever bad actor you want the jurors to focus on first.

What happens when this is your story: On Monday morning, October 4, 2016, James Smith left his house to go to his job of 20 years at the Bank of America where he worked as an accounts manager. He was driving along Broadway, his usual route, going the speed limit. He needed to make a left-hand turn at Green Street, but he had difficulty determining if there was oncoming traffic. The roadway was designed in a way that made it hard to see, and there was overgrown brush on the side of the road. He waited until he thought it was clear, then turned. He was struck by an oncoming vehicle and was severely injured.

What are you focused on at this point? The roadway, the other driver, or the actions of Mr. Smith? Mr. Smith. Because of the inherent skepticism about people who bring lawsuits for money damages and the attorneys who represent them, you must shift the focus.

Consider this case: The plaintiff was a motorcyclist injured by a tractor-trailer which tipped – but it tipped because of roadway conditions. The initial opening began with the truck driver loading up the truck that morning and doing so improperly, before heading to the stretch

*See Chopra, Next Page*

of the road where the collision occurred. The truck company was at fault, but the primary defendant was the State. At this point the focus is on the driver.

How to change the frame? The frame is the story of the road. Years ago, when this stretch of roadway was developed, what were the considerations, what were the traffic conditions? How had that changed over the years? Why was the road not maintained/changed with changing conditions? Who failed their

obligations to do that? Now, this road is a trap, and the trucking company, while negligent, is only partly responsible. They were put into this situation by the Caltrans workers who did not do their jobs.

Understanding the cognitive biases and psychological constructs that influence decision making can help you to present your cases in ways that are more likely to lead to positive outcomes and larger damage awards.

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