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Valerie P. Hans

Juliet Dee

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WHIPLASH: WHO'S TO BLAME?*

Valerie P. Hans & Juliet Dee[†]

Tom is sitting in his car at an intersection, waiting for the red light to change. Without warning, the car behind him, driven by a distracted mother named Elaine, slams into the rear of Tom's car. After the accident, Tom experiences severe neck pain, which interferes with his work and family life.

Who's to blame?

This straightforward account of a car accident is a common story in today's legal landscape. It may seem immediately obvious that Elaine, who drove her car into Tom's, is the blameworthy party. If Tom suffered physical injury as a result, then under current legal principles she is responsible for compensating him for his injury. However, research on jury decision making in civil cases suggests that a constellation of psychological, legal and political factors operate together to focus a surprising degree of attention, critical scrutiny, blame and responsibility on Tom, our hypothetical victim.

Attention, blame, personal responsibility and legal liability are conceptually distinct phenomena.¹ Attention does

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[†] Valerie P. Hans, Ph.D., is a Professor of Sociology and Criminal Justice at the University of Delaware. Juliet Dee, Ph.D., is an Associate Professor of Communication at the University of Delaware. Contact information for Valerie P. Hans: Department of Sociology and Criminal Justice, University of Delaware, Newark, DE 19716; email: vhans@udel.edu. Contact information for Juliet Dee: Department of Communication, University of Delaware, Newark, DE 19716; email: juliedee@udel.edu. The Roscoe Pound Institute funded the research on whiplash described in this Article. Research on jurors' responses to business and corporate wrongdoing was funded by National Science Foundation grants SES-8822598 and GER-9350498, and the University of Delaware. A preliminary version of this Article was presented at the conference "Responsibility and Blame: Psychological and Legal Perspectives," held at Brooklyn Law School on October 18, 2002. The authors wish to thank Lawrence Solan for organizing an intellectually exciting conference, and commentator Sharon Lamb for her insightful remarks about our work at the conference.

¹ KELLY G. SHAVER, THE ATTRIBUTION OF BLAME: CAUSALITY,

not necessarily lead to blame. Legal responsibility does not attach to all morally blameworthy conduct. Yet, as a practical matter, they are often intertwined. In reality, from both moral and legal perspectives, not all plaintiffs are blameless and not all defendants are culpable. For example, if we look at jury verdicts as one measure of the defendant's legal culpability, we find that plaintiffs win about half of their tort cases, including 60% of automobile accident cases.² Our interest is in analyzing a striking tendency to blame the victims of personal injury, even in instances where they are legally blameless. Therefore, this Article focuses on the related phenomena of attention, responsibility assessments, blame and legal judgments in the context of the personal injury plaintiff.

In this Article, we describe the tendency for jurors to focus on injury victims in their assessments of legal responsibility. In Part I, we discuss recent empirical research indicating this predilection in the larger context of personal injury cases generally. In Part II, we explore this tendency by focusing on attributions of responsibility and blame in whiplash cases. This Part identifies three main factors that cause jurors to focus on injury victims rather than defendants: psychological factors, social and political norms, and media coverage. In Part III, we propose and discuss the feasibility of developing mechanisms to shift attention and blame away from injury victims and back onto the perpetrators of accidents.

I. VICTIM BLAME AND DEROGATION IN PERSONAL INJURY LAWSUITS

Perhaps no assumption about the civil jury is so universally accepted as the belief that juries are highly sympathetic to injured plaintiffs.³ Opinion surveys, business and insurance industry briefs and court opinions reflect beliefs that juries naturally take the side of the injured plaintiff.⁴

RESPONSIBILITY, AND BLAMEWORTHINESS (1985); Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 557 (2000); M. Karlovac & John M. Darley, *Attribution of Responsibility for Accidents: A Negligence Law Analogy*, 6 SOC. COGNITION 287 (1988); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

² Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 235 (1996).

³ VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 22-23 (2000).

⁴ *Id.*

Research on civil juries, however, provides evidence that jurors and the public are inclined to question the credibility and claims of plaintiffs who bring personal injury lawsuits.⁵ In Valerie Hans's interviews with civil jurors who decided lawsuits against businesses and corporations, many jurors expressed hostility toward the plaintiffs who brought the lawsuits, even when they eventually found for the plaintiffs.⁶ Jurors searched for ways that plaintiffs could have contributed to their own injuries, and worried about trumped-up claims and fraudulent or exaggerated injuries.⁷ Jurors tended to blame the victim, finding responsibility in injured persons and their families, as well as the corporate defendants.⁸

A central task of the civil jury is to assess the competing claims of the defendant and the plaintiff. However, in retrospective accounts of their own decision making, the civil jurors interviewed by Hans seemed to focus more on the plaintiffs, and their scrutiny was often extraordinarily intense. "Jurors' suspicions about plaintiffs' claims led them in most cases to dissect the personal behavior of plaintiffs, with seemingly no limits. Jurors criticized plaintiffs who did not act or appear as injured as they claimed, those who did not appear deserving, and those with preexisting or complicated medical conditions."⁹ Juror interviews also reflected concerns about money-hungry plaintiffs: "I just thought they felt they were going to come into a big sum of money and just live the rest of their life on easy street" or "I think, probably, looking at these medical claims, [the plaintiff] said, 'well, maybe I can cash in on this knee injury.'"¹⁰

Of course, jurors' reactions to the plaintiffs in their cases could have as much to do with the facts of the case and the individual parties to the lawsuit as with jurors' predispositions toward plaintiff blame. The factual circumstances of the event, the causal actions of the defendant, any contributory fault on the part of the plaintiff and the presence of extenuating circumstances will figure centrally in how jurors judge the responsibility for an accident. Yet, Neal

⁵ *Id.* See also NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

⁶ HANS, *supra* note 3, at 22-49.

⁷ *Id.* at 22-33.

⁸ *Id.* at 22-49.

⁹ *Id.* at 28-29.

¹⁰ *Id.* at 29.

Feigenson and his colleagues conducted experimental studies confirming that, in certain cases, people ascribe some responsibility to legally blameless plaintiffs.¹¹ They conducted a scenario experiment in which the plaintiffs' blameworthiness varied between conditions. They found that, even when the plaintiff was completely blameless as a legal matter, some participants still held him accountable. For example, one condition involved a worker who obeyed all the rules, and thus did not appear to deserve blame, yet study participants judged him to be 22% responsible for his accident.¹² In another scenario, study participants allocated to a homeowner 14% of the blame for injuries stemming from a faulty valve on a propane gas tank in his home that was the property of the gas company.¹³

Questions about credibility in individual personal injury cases reflect larger doubts about the general merits of plaintiff claims in civil litigation. Recent polls indicate that most people believe that many lawsuits are worthless. In one recent national survey, 92% of the respondents agreed with the statement: "There are far too many frivolous lawsuits today."¹⁴ In fact, 76% of respondents said that they "strongly agreed" with the statement,¹⁵ suggesting an emotionally laden endorsement. Beliefs in frivolous lawsuits are ubiquitous. Public opinion polls expose a common concern about the amount of illegitimate litigation today.¹⁶ There is widespread agreement among the public that many people who sue are not negligently injured; instead, they are just trying to blame others for their problems.¹⁷ Plaintiff lawsuits are seen as attempts to violate the important principle of individual

¹¹ See FEIGENSON, *supra* note 5; Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597, 610-12 (1997); see also Feigenson et al., *supra*, at 600-01 (describing other research showing anti-plaintiff bias). See also Douglas J. Zickafoose & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 LAW & HUM. BEHAV. 577, 579 (1999).

¹² Feigenson et al., *supra* note 11, at 611.

¹³ *Id.* See also *id.* at 610-12 (discussing plaintiff blame).

¹⁴ Valerie P. Hans & Nicole Vadino, *Whipped by Whiplash? The Challenges of Jury Communication in Lawsuits Involving Connective Tissue Injury*, 67 TENN. L. REV. 569 (2000).

¹⁵ *Id.* at 572.

¹⁶ See studies cited in HANS, *supra* note 3, at 236-37 nn.16-18.

¹⁷ Hans & Vadino, *supra* note 14, at 572 (stating that 77% of national poll respondents agreed that people who bring lawsuits are just trying to blame someone else for their problems).

personal responsibility. Indeed, President George W. Bush recently exploited this widespread perception of frivolous lawsuits in advocating his administration's plan to limit jury awards in medical malpractice cases: "We're a litigious society," the President proclaimed, "[e]verybody is suing, it seems like."¹⁸

At the same time that members of the public believe that jurors are highly sympathetic to civil plaintiffs, they hold a concomitant view that fraud among claimants is rampant. Respondents in one national poll estimated which was likely to be more frequent, an insurance company denying a valid claim or a person attempting to bring a fraudulent claim. Over half of the poll respondents thought that an individual was more likely to bring a fraudulent claim.¹⁹ Although the extent of fraudulent claims is unknown, practitioners in the insurance industry consider false claims a major problem. The Insurance Research Council reported that people submitted \$42 billion worth of claims for auto accident injuries in 1997, and estimated that as many as 40% of these claims (\$16.8 billion) could have been fraudulent.²⁰ The Coalition Against Insurance Fraud asserts on its Web site that insurance fraud is an \$80 billion problem.²¹ It is difficult to assess the validity of these estimates. A separate but related question is the extent to which false legal claims result in lawsuits, since personal injury attorneys provide an additional layer of scrutiny before filing a lawsuit.

Whatever the accuracy of public perceptions about frivolous or false litigation, jurors' general views about the extent of frivolous lawsuits are related to how they assess an individual plaintiff's claims.²² For example, Hans's research found that beliefs in a litigation explosion significantly related to actual and mock juror judgments in civil disputes. Actual

¹⁸ Richard A. Oppel, Jr., *With a New Push, Bush Enters Fray Over Malpractice*, N.Y. TIMES, Jan. 17, 2003, at A24.

¹⁹ Hans & Vadino, *supra* note 14, at 585.

²⁰ *Attack on Insurance Fraud*, PATRIOT LEDGER (Quincy, Massachusetts), Sept. 8, 1998, at 10.

²¹ The Coalition Against Insurance Fraud home page warns: "Watch out! Insurance crooks are picking your pockets. Insurance fraud is an \$80-billion crime wave. It's driving up everyone's insurance prices" See Coalition on Fraud, at <http://www.insurancefraud.org> (last visited Feb. 1, 2003). The Coalition Against Insurance Fraud identifies itself as a national advocacy organization consisting of insurance companies, consumer and public interest groups and government agencies concerned with crime control. Members are listed at http://www.insurancefraud.org/member_list.html.

²² See HANS, *supra* note 3, at 22-23.

and mock jurors who believed that there was a lot of frivolous litigation were much more likely to question a plaintiff's claims, a finding replicated in other studies.²³

II. WHIPLASH CASES: "JURY JURY, HALLELUJAH!"

Once I had an accident—not too bad, just a little dent
A new Mercedes hit me from the rear
Man got out in a 3 piece suit & asked if a thousand dollars would do
I said, "Well, let me think for a minute here"
I'm gonna talk to my lawyer—I might have whiplash
I might have trauma—let's not talk petty cash
I've got a witness—to put a hand on the Bible
Jury jury, hallelujah—you might be liable.²⁴

The tendencies to question plaintiff credibility and to wonder whether a plaintiff might be responsible for his or her own injury are likely to be exacerbated in whiplash cases. As singer and songwriter Chuck Brodsky suggests, whiplash cases (or "whip-cash" cases) are commonly and even comically equated with fraud. For example, in the situation comedy *Yes, Dear*, when Greg's car just barely taps the car that Jimmy's freeloading father is riding in, Jimmy's father blithely feigns a crick in his neck: "Say, Greg, you have insurance, right? Gee, I think I got some whiplash."²⁵

The features of a typical whiplash case invite the questioning of plaintiff credibility. A plaintiff's broken bone can be seen in an X-ray, but whiplash and other soft-tissue injuries do not manifest themselves on common medical tests. Instead, the injuries are demonstrated primarily through the plaintiff's claims about physical symptoms and problems stemming from the injury. The lack of definitive medical testing means that the plaintiffs and their credibility lie at the heart of the case.

²³ *Id.* at 74-76. See also Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805 (1991) (finding lower awards by mock jurors who supported tort reform); Shari Seidman Diamond et al., *Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 307-09 (1998) (finding that mock jurors who believe plaintiffs receive too much in damages are less likely to hold the defendant liable).

²⁴ From the song *Talk to my Lawyer* by CHUCK BRODSKY, on *LETTERS IN THE DIRT* (Red House Records 1996), reprinted with the permission of Chuck Brodsky. Lyrics are available online at <http://www.chuckbrodsky.com/lyrics.html>. For full lyrics and more information on the artist and his music, please see <http://www.chuckbrodsky.com/music.html>.

²⁵ *Yes, Dear: House of the Rising Son* (CBS television broadcast, Jan. 13, 2003).

General perceptions about the tendency of plaintiffs to bring frivolous lawsuits, and beliefs that plaintiffs commonly and easily fake whiplash injuries, are likely to have a more pronounced effect in connective-tissue trials than in other types of cases.

Some preliminary research shows that whiplash cases are indeed problematic for plaintiffs and their attorneys.²⁶ In a focus group study, participants expressed substantial skepticism about whiplash claims.²⁷ One study reflected a common theme of doubts about the validity of claims and the exaggeration of injury: "Yeah, if you are in a car accident and you sprain your thumb and now you can't flip the remote and you want ten grand because you can't flip the remote for two months, give me a break."²⁸ Another participant voiced the opinion, "I think we're a sue-happy society. And I think so many people are out for what they can get from the insurance company, from whoever . . ."²⁹

In addition, many participants did not know the meaning of the common terms—including soft-tissue injury and connective-tissue injury—that lawyers and medical experts use to describe whiplash and other injuries in the courtroom.³⁰ The ambiguity surrounding connective-tissue injury seemed to encourage focus group members to minimize and even dismiss those injuries.³¹ A scenario experiment in a national poll conducted by Hans and Nicole Vadino varied according to whether a hypothetical plaintiff in an accident experienced a broken bone or a connective-tissue injury, both of which a doctor confirmed.³² Respondents were significantly more likely to believe plaintiff claims of the broken bone.³³ They saw the broken bone as more serious than the connective-tissue injury, even though the consequences of the injury were held constant.³⁴ Notably, people who reported that they, or a close

²⁶ Valerie P. Hans, *What Jurors Think About Connective Tissue Injuries*, TRIAL, July 2000 at 19; Hans & Vadino, *supra* note 14.

²⁷ Hans & Vadino, *supra* note 14.

²⁸ *Id.* at 573.

²⁹ *Id.* at 572-73.

³⁰ *Id.* at 577-79.

³¹ *Id.*

³² Valerie P. Hans & Nicole Vadino, *After the Crash: Citizens' Perceptions of Connective-Tissue Injury Lawsuits* (unpublished manuscript, on file with authors).

³³ *Id.* (manuscript at 14-15).

³⁴ *Id.*

friend or family member, had experienced whiplash were more supportive of the plaintiff in the case.³⁵

Yet, even if a jury believes that the plaintiff suffered a connective-tissue injury, it may blame the plaintiff for that injury. It may seem counterintuitive for a jury to blame the victim rather than the person who caused the accident. Our analysis, however, shows that there are potent psychological motivations for attributing blame to victims of injury, particularly in accident cases. We argue that these psychological factors interact with other variables, including social and political norms and media coverage, to encourage jurors and lay observers to blame the victim.

A. *Why Blame the Whiplash Victim? Psychological Factors*

Psychologists have generated a substantial body of empirical research indicating people do sometimes blame victims for negative outcomes. The landmark work by psychologist Melvin Lerner, as well as a body of experimental research on attribution theory, provides ample evidence of victim blaming.³⁶ Lerner's original insight was that people's need to believe in a just, predictable and controllable world created considerable discomfort when they observed suffering.³⁷ In response, people engaged in strategies to minimize their own discomfort, including derogating innocent victims, minimizing their injuries and reinterpreting injuries as victim-precipitated.³⁸ Lerner reasoned that, if we see another person survive a negative event, such as being struck by a car, it is psychologically more comforting to believe that that person did something to cause it, rather than to believe that the event occurred by chance.³⁹ After all, if negative events are random, they could easily befall *us* as well.

One strategy in blaming the victim is to attribute unfortunate circumstances to a character flaw or other

³⁵ *Id.* (manuscript at 17).

³⁶ MELVIN LERNER, BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1990); Howard Tennen & Glenn Afleck, *Blaming Others for Threatening Events*, 108 PSYCHOL. BULL. 209 (1990); SHAVER, *supra* note 1; BERNARD WEINER, AN ATTRIBUTIONAL THEORY OF MOTIVATION AND EMOTION (1986); Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and their Symbolic Expression in Condemning and Shaming*, 68 BROOK. L. REV. 929 (2003).

³⁷ See generally LERNER, *supra* note 36.

³⁸ See generally *id.*

³⁹ *Id.*

negative feature of the victim. In his classic work from the 1950s, social psychologist Fritz Heider explained, "[t]he relationship between goodness and happiness, between wickedness and punishment is so strong, that given one of these conditions, the other is frequently assumed. Misfortune, sickness, and accident are often taken as signs of badness and guilt."⁴⁰ We prefer to think that people who suffer deserved their suffering for some reason.⁴¹ We can scrutinize the victim's actions, and if no negligent action can be found, we might derogate the person's character. Both strategies allow us to distance ourselves, albeit unconsciously, from threatening circumstances.⁴²

The blame accorded to victims of sexual assault and domestic violence illustrates this phenomenon in a criminal justice setting.⁴³ Psychologist Sharon Lamb argues, "[w]e do not hold perpetrators responsible enough for the harms they inflict. Perpetrators are masters at self-deception, blaming themselves too little; victims blame themselves too much."⁴⁴ She summarizes research studies on attributions of responsibility in rape cases, which regularly find that people focus on the rape victim, her characteristics and her actions in making culpability judgments.⁴⁵ Similarly, Regina Schuller has found in her work on juries and battered women that juries focus on a woman's character and actions in assessing blame, responsibility and legal liability in battering incidents.⁴⁶ The theoretical underpinnings of this work help to explain why both juries and the general public attribute blame to victims even when it is unwarranted.

In analyzing the issue of victim blame, it is worth examining the fundamental processes underlying the attribution of responsibility. An attribution of responsibility points to who can be held accountable for a positive or negative

⁴⁰ FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 235 (1958).

⁴¹ SARAH TRENHOLM, *PERSUASION AND SOCIAL INFLUENCE* 81 (1989).

⁴² Melvin J. Lerner & Carolyn H. Simmons, *Observer's Reaction to the "Innocent Victim": Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966).

⁴³ SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS AND RESPONSIBILITY* (1996); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 204-14 (1986).

⁴⁴ LAMB, *supra* note 43, at 8.

⁴⁵ *Id.* at 92-96.

⁴⁶ Regina A. Schuller, *The Impact of Battered Woman Syndrome Evidence on Jury Decision Processes*, 16 LAW & HUM. BEHAV. 597 (1992).

event.⁴⁷ Attributions of responsibility presuppose a judgment of causality,⁴⁸ and attributions of blame presuppose judgments of both causality and responsibility.⁴⁹ In ascribing blame, a jury must also eliminate acceptable excuses, rationalizations or justifications.⁵⁰

Mark Alicke's culpable control model of blame delineates the conditions that increase as well as mitigate blame.⁵¹ Alicke identifies three important components that affect blame.⁵² They include volitional behavior control, that is, whether a person's actions were freely chosen or compelled by circumstance; causal control, which focuses on the actor's link to the harmful consequence; and volitional outcome control, or whether an actor desired or anticipated the specific outcomes.⁵³ Compared to an individual who knowingly chooses an action with harmful consequences, a person who causes an accident is less likely to be blamed because of low volitional behavior control and low volitional outcome control.⁵⁴ If jurors perceive that the person who caused the accident had personal control over the situation, this will intensify attributions of blame, whereas if there were constraints on the person's control of the situation, this will mitigate attributions of blame.⁵⁵

Thus, juries are most likely to attribute responsibility when (1) a particular person can be identified as the source of the action; (2) the jurors believe that that person should have foreseen the outcome of the action; (3) the person's actions were unjustified by the situation; and (4) the person operated under the condition of free choice. Suppose the brakes fail on a private plane and it careens into a truck on the runway, killing the truck driver. Would the pilot of the plane be held responsible? He is most likely to be held responsible and blameworthy if he was aware that his brakes were faulty and he failed to have them checked. He is less likely to be held

⁴⁷ Kelly G. Shaver, *Defensive Attribution: Effects of Severity and Relevance on Responsibility Assigned for an Accident*, 14 J. PERSONALITY & SOC. PSYCHOL. 101 (1970).

⁴⁸ Kathleen M. McGraw, *Conditions for Assigning Blame: The Impact of Necessity and Sufficiency*, 26 BRIT. J. SOC. PSYCHOL. 109 (1987).

⁴⁹ SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 83-84 (1991).

⁵⁰ Alicke, *supra* note 1, at 557.

⁵¹ See generally Alicke, *supra* note 1.

⁵² *Id.* at 557.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

responsible if he did not know of, and could not have known of, the mechanical failure in the plane's brakes that caused the accident. In other words,

an attribution of blameworthiness is typically reserved for cases in which a causal agent is regarded as subject to censure or punishment for a negative event. A jury would tend to attribute blame only when an actor is seen as intending to produce an outcome, and achieving a negative outcome was the actor's purpose.⁵⁶

The culpable control theory proposes that accidents, because they typically are not foreseen, may be less likely to engender strong blaming of the individual who causes the accident. That supplies one piece of the puzzle of plaintiff blame in automobile accident cases. In looking for fault, observers may not be strongly motivated to blame the defendant, since the accident was not intended and the outcome was not foreseen. Other pieces of the puzzle fall into place when we consider the phenomenon, uncovered by psychological research, of defensive attribution. When an observer evaluates the responsibility of another individual, attributional processes may take on a defensive posture if the person is highly similar to the observer and is in a situation that the observer might also experience.⁵⁷ Defensive attribution processes may encourage people to hold responsible for negative outcomes actors whose behavior has linked them to negative outcomes, even when the actors have not caused those outcomes.⁵⁸ If people are motivated to distance themselves from the possibility that an accident could happen to them, they may adjust their responsibility judgments of others so that the subjective likelihood of an accident occurring is low, or at least so that no one would blame them for the consequences.⁵⁹ Two factors have been associated with the tendency toward defensive attribution: the similarity of the observer to the actor and the severity of the injury. We take up each of them.

⁵⁶ FISKE & TAYLOR, *supra* note 49, at 83-84.

⁵⁷ SHAVER, *supra* note 1, at 134-35.

⁵⁸ Dretha M. Phillips, *Defensive Attribution of Responsibility in Juridic Decisions*, 15 J. APPLIED SOC. PSYCHOL. 483, 498 (1985).

⁵⁹ Neil Vidmar & L.D. Crinklaw, *Attributing Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCHOL. 73 (1974).

1. The Role of Similarity in Defensive Attributions

Kelly Shaver hypothesized that situational and personal similarities facilitate defensive attribution.⁶⁰ Shaver argued that if an observer is never going to find herself in a situation like that of the actor who caused the accident (low situational similarity: she does not drive, so she would never be guilty of hitting the car in front of her), the accident may not arouse a great deal of defensiveness.⁶¹ But if the observer is likely to be in a similar situation (high situational similarity: she does drive), her defensiveness could be aroused and she may attempt to deny personal similarity to the actor.⁶² If personal similarity to the actor is high, Shaver predicts that the observer might also look for other distancing strategies.⁶³ The observer may attribute the accident to chance or bad luck, or minimize resulting injuries.⁶⁴ Indeed, in research studies, Shaver found that observers rating the responsibility of a person with similar personal characteristics to themselves are more lenient, compared to their rating of a person with dissimilar personal characteristics to themselves.⁶⁵

In twenty-two studies testing the defensive attribution hypothesis, J. M. Burger found support for Shaver's predictions about the role of similarity.⁶⁶ When subjects were personally and situationally similar to the person who caused the accident, they attributed less responsibility to that actor, particularly as the severity of the consequences increased. When subjects were situationally or personally dissimilar to the actor, they attributed more responsibility to the actor as the accident's severity increased.⁶⁷ Presumably, these defensive

⁶⁰ Shaver, *supra* note 47.

⁶¹ Kelly G. Shaver, *Redress and Conscientiousness in the Attribution of Responsibility for Accidents*, 6 J. EXPERIMENTAL SOC. PSYCHOL. 100 (1970).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Shaver, *supra* note 47.

⁶⁵ *Id.*

⁶⁶ J.M. Burger, *Motivational Biases in the Attribution of Responsibility for an Accident: A Meta-analysis of the Defensive Attribution Hypothesis*, 90 PSYCHOL. BULL. 496 (1981).

⁶⁷ *Id.* See also Dongo Rémi Kouabenan, *Degree of Involvement in an Accident and Causal Attribution*, 7 J. OCCUPATIONAL ACCIDENTS 187 (1985); Dongo Rémi Kouabenan et al., *Hierarchical Position, Gender, Accident Severity, and Causal Attribution*, 31 J. APPLIED SOC. PSYCHOL. 553 (2001); Simo Salminen, *Defensive Attribution Hypothesis and Serious Occupational Accidents*, 70 PSYCHOL. REP. 1195 (1992).

attributions served to deflect the threatening implications for the subjects.

Bill Thornton and his colleagues have also found that the more personally similar observers are to the *victim*, the greater the observers' motivation to engage in defensive attribution.⁶⁸ Arguably, jurors most likely to "blame the victim" are those who have the most in common with the victim or plaintiff.⁶⁹ Donald Vinson explains, "[i]n the jurors' minds, blaming the victim reduces the chances that they too will suffer a similar fate. Jurors confronted with the details of a terrible injury *want* to conclude that 'this wouldn't happen to me.'"⁷⁰

What would Shaver's theory predict in the typical whiplash case? Most jurors across the country drive automobiles, and automobile accidents are very frequent, suggesting high situational similarity for the vast majority of jurors. Personal similarity to the defendant or the victim could play a key role. In our hypothetical whiplash case, in which Elaine hits Tom from behind, a young mother sitting on the jury might be most inclined toward leniency for Elaine and fault-finding, derogation or injury minimization for Tom.

Interestingly, research on people's reactions to whiplash cases suggests that direct experience with whiplash is positively and significantly related to perceptions about whiplash plaintiffs.⁷¹ In one public opinion poll, 44% of respondents reported that they themselves, a close friend or a family member thought they had experienced whiplash.⁷² Those who said they had some firsthand experience with whiplash were more likely to grant it legitimacy.⁷³ Fully 40% of respondents with whiplash experience said that people who claimed whiplash were "usually" or "always" injured, in contrast to only 20% of the respondents without whiplash experience.⁷⁴

⁶⁸ Bill Thornton et al., *Physiological Evidence of an Arousal-Based Motivational Bias in the Defensive Attribution of Responsibility*, 22 J. EXPERIMENTAL SOC. PSYCHOL. 161 (1986).

⁶⁹ DONALD E. VINSON, JURY PERSUASION: PSYCHOLOGICAL STRATEGIES AND TRIAL TECHNIQUES 97 (1993).

⁷⁰ *Id.*

⁷¹ Hans & Vadino, *supra* note 14, at 575.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

2. The Role of Accident Severity in Defensive Attributions

Injury severity also may affect judgments of blame, responsibility and legal liability. The tendency to engage in defensive attribution appears to intensify as the consequences of an action increase in severity. The more serious the injury from an accident, the greater is the bystander's need to engage in defensive attribution.⁷⁵ In a meta-analysis of seventy-five studies, Jennifer Robbennolt concluded that people attribute greater responsibility for the outcome of a negative incident when that outcome is more severe than when the outcome is minor.⁷⁶ More severe injuries are more likely to lead to compensation.⁷⁷

The fact that whiplash injuries are relatively minor raises the question of the extent to which observers are psychologically motivated to engage in defensive attribution. Defensive attribution motives may be entirely absent. Further, because the whiplash injury is relatively minor, people may be psychologically comfortable calling it an accident that is no one's fault. Unfortunately, the research does not clearly indicate the level of psychological pressure to engage in defensive attribution faced by jurors in whiplash cases.

Viewing the problem from an angle that contradicts the just world and defensive attribution phenomena, we observe that jurors have an easy avenue for relieving any personal discomfort in observing the plaintiff's suffering—they can hold the defendant liable and provide a generous compensatory award for the plaintiff. In Valerie Hans's research with civil jurors, however, she found a substantial amount of plaintiff criticism and blame, even in cases in which the jury ultimately found for the plaintiff.⁷⁸

⁷⁵ Elaine Walster, *Assignment of Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCHOL. 73 (1966).

⁷⁶ Jennifer K. Robbennolt, *Outcome Severity and Judgments of "Responsibility": A Meta-Analytic Review*, 30 J. APPLIED SOC. PSYCHOL. 2575, 2601 (2000).

⁷⁷ Roselle L. Wissler et al., *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions*, 21 LAW & HUM. BEHAV. 181 (1997). See also Roselle L. Wissler et al., *Decision-making About General Damages: A Comparison of Jurors, Judges and Lawyers*, 98 MICH. L. REV. 751 (1999); Troyen A. Brennan et al., *Relation Between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation*, 335 NEW ENG. J. MED. 1963 (1996).

⁷⁸ HANS, *supra* note 3.

B. *Social and Political Factors Affecting Plaintiff Blame*

In addition to psychological factors, social norms and political issues encourage people to hold personal injury plaintiffs responsible. Perhaps no social norm is more strongly held in the United States than the ethic of individualism, with its emphasis on individual responsibility and freedom.⁷⁹ In an insightful early study of people's reactions to civil lawsuit plaintiffs, Professor David Engel conducted interviews with residents of a rural Illinois community in the 1970s.⁸⁰ He discovered that the community members had negative views of plaintiffs who brought personal injury lawsuits.⁸¹ The residents saw these plaintiffs as troublemakers who would not accept responsibility for their own actions.⁸² They viewed the plaintiffs as attempting to blame others, undermining the community's strong commitment to personal individual responsibility.⁸³ In the eyes of the community, those who suffered personal injuries were usually at fault in some way, and would have been able to prevent their injuries had they been more careful.

Similarly, Professor Robert Hayden maintains that society perceives, rightly or wrongly, plaintiffs who bring legal claims against other individuals or against corporate entities as violating important social norms.⁸⁴ In addition to the norm of personal responsibility, Hayden points to the way that some citizens may see civil lawsuits as violating the social norms of equality and wealth redistribution.⁸⁵ Individual litigants use the state's resources to bring a lawsuit, lessening the formal equality between the parties as the machinery of justice is used on behalf of the plaintiff and against the defendant. Furthermore, a monetary compensatory award for an injury gives a financial benefit without a plaintiff having to work for it, much as welfare recipients are seen as receiving financial

⁷⁹ ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

⁸⁰ David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 *LAW & SOC'Y REV.* 551, 556-58 (1984).

⁸¹ *Id.* at 553-54, 559-60.

⁸² *Id.* at 553.

⁸³ *Id.* at 558-59.

⁸⁴ Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, 11 *STUD. L. POL. & SOC'Y* 95 (1991).

⁸⁵ *Id.*

benefits without work.⁸⁶ These perceived advantages, inequalities and benefits for the civil plaintiff may create hostility.

Some political realities also help to shape contemporary views of the plaintiff in a civil lawsuit. Many lawsuits today pit an individual plaintiff against a business or corporate defendant.⁸⁷ The National Center for State Courts reports that in forty-five of the largest state courts, over half of the civil jury trials included a corporation as a defendant.⁸⁸ Some major corporations, along with insurance companies, have pointed to the high cost of fraudulent claims and supposedly frivolous litigation to support their civil justice reform efforts, which are aimed at limiting their legal liabilities.⁸⁹ These efforts have succeeded in many state courts.⁹⁰ Part of the secret of their success, we believe, is the skewed media coverage that shapes public views of civil litigation.

C. *Media Coverage*

Media coverage of excessive litigation, combined with negative views that whiplash is a fraudulent injury, could create initially negative impressions of the whiplash plaintiff that, in turn, could shape the jury's liability judgments. Media coverage and advertising campaigns could be potent influences in framing how the public perceives legal claims.⁹¹ Most people obtain information about legal proceedings through television, newspapers, magazines and other media.⁹²

⁸⁶ *Id.*

⁸⁷ HANS, *supra* note 3, at 10.

⁸⁸ Ostrom et al., *supra* note 2, at 237.

⁸⁹ See the following exchange for divergent views of insurance company political efforts: Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, LAW & CONTEMP. PROBS., Autumn 1989, at 269; and Judyth W. Pendell, *Enhancing Juror Effectiveness: An Insurer's Perspective*, LAW & CONTEMP. PROBS. Autumn 1989, at 311.

⁹⁰ THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 71-80 (2001).

⁹¹ Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5 (2003).

⁹² Valerie P. Hans & Juliet L. Dee, *Media Coverage of Law: Its Impact on Juries and the Public*, 35 AM. BEHAV. SCIENTIST 136, 137 (1991). Media reporting of criminal cases overrepresents serious and violent crime, providing a biased picture of crime frequency. Nancy Signorielli, *Television's Mean and Dangerous World: A Continuation of the Cultural Indicators Perspective*, in CULTIVATION ANALYSIS: NEW DIRECTIONS IN MEDIA EFFECTS RESEARCH 85-106 (Nancy Signorielli & Michael Morgan eds., 1990); DAVID J. KRAJICEK, SCOOPED!: MEDIA MISS REAL STORY ON CRIME WHILE

Media coverage of civil litigation presents an inaccurate and sensationalist picture of civil lawsuits. Daniel Bailis and Robert MacCoun's systematic analysis of media stories about tort litigation in popular national magazines from 1980 to 1990 found that magazines devoted disproportionately high attention to big award cases.⁹³ For example, median jury awards ranged from a low of \$51,000 in state court tort trials to a high of \$318,000 in federal products liability cases. Yet, the median jury award in cases discussed in the magazine articles was \$1,750,000.⁹⁴ The media also favor heavy coverage of the lawsuit "horror story." Whether it is a woman who spills coffee on herself and wins a \$2.9 million jury award from McDonald's,⁹⁵ a Philadelphia "psychic" who wins a \$1 million jury award after a botched medical treatment⁹⁶ or a bystander who sees a car hit a bus and then hops on the bus in order to fraudulently claim a whiplash injury, media coverage of these and other horror story cases provides familiar and readily available exemplars of the excesses of our civil justice system.⁹⁷

Advertising campaigns by businesses and insurance companies also promote the ready availability of horror stories. Stephen Daniels analyzed insurance advertisements that called attention to seemingly questionable lawsuits.⁹⁸ One Aetna Insurance ad read:

The right to sue is as essential to a free and fair country as any right guaranteed in the Constitution. But when a woman riding in an automobile spills hot coffee on her lap, then sues the restaurant where she bought the coffee, something is wrong. And when a man

CHASING SEX, SLEAZE AND CELEBRITIES (1998).

⁹³ Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996).

⁹⁴ *Id.* at 426.

⁹⁵ William Glaberson, *Ideas and Trends: The \$2.9 Million Cup of Coffee*, N.Y. TIMES, June 6, 1999, at D1. Glaberson observed that although the media raised a hue and cry over the \$2.9 million jury award, far less media attention was devoted to the fact that the woman who spilled the coffee was eighty-one years old and the coffee scalded her so badly that she needed skin grafts for third-degree burns. There were also far fewer media reports when the woman settled for \$600,000 after the judge reduced her jury award. See generally Michael McCann et al., *Java Jive: Genealogy of a Judicial Icon*, 56 U. MIAMI L. REV. 113 (2001).

⁹⁶ Glaberson, *supra* note 95. Although a jury awarded the "psychic" \$1 million, Glaberson pointed out that the media barely reported the fact that the psychic's verdict was reversed and she collected nothing at all. *Id.*

⁹⁷ See, e.g., McCann et al., *supra* note 95.

⁹⁸ See Daniels, *supra* note 89.

can drag a liquor company into court because he has become an alcoholic, something is wrong.⁹⁹

Fraudulent claims of whiplash and other soft-tissue injuries in accidents have been exposed in high-profile news stories. For example, in 2001, the New York State Insurance Department conducted an investigation, dubbed "Operation Whiplash," which exposed an insurance fraud ring that created fake accidents and injury claims and ripped off insurance companies for millions of dollars.¹⁰⁰ In another highly publicized series of incidents, the fraud division of the New Jersey Insurance Department staged a sting operation using fake bus accidents.¹⁰¹ They were concerned about the phenomenon of "ghost riders," people near a public transit vehicle who hop aboard after an accident and then submit false injury claims.¹⁰² The sting operation staged a number of false bus accidents and filmed the events. They were then able to catch bogus claimants and some of their doctors and lawyers.¹⁰³

These widely publicized insurance fraud cases no doubt contribute to negative schemata toward plaintiffs in whiplash cases.¹⁰⁴ As jurors begin their task of apportioning legal responsibility, these examples may help to shape their views of the plaintiff in the case before them. Jurors may be more alert for evidence of fraud, but they may also be more suspicious of legitimate injury claims.

III. SHIFTING BLAME BACK TO THE DEFENDANT

The psychological literature suggests that plaintiff blame, derogation and injury minimization will be a common occurrence in personal injury lawsuits, resulting in a possible disinclination to hold a defendant responsible for the plaintiff's injury. Focus group results and the national survey on whiplash also indicate that whiplash cases present distinctive

⁹⁹ *Id.* at 288.

¹⁰⁰ Celeste Katz, *Insurers Lose Big to Fraud Ring Scam*, N.Y. DAILY NEWS, Feb. 12, 2002, at 53.

¹⁰¹ Jerry DeMarco, *A Surprise for New Jersey in Insurance Sting: 2 Cops Among More than 100 Accused*, RECORD (Bergen County, N.J.), Aug. 19, 1993, at A1.

¹⁰² *Two Cops, Doctor Indicted in Phony Bus Accident*, RECORD (Bergen County, N.J.), Aug. 18, 1993, at A4.

¹⁰³ *Coalition Lists Top Insurance Scams of '93*, UNITED PRESS INTERNATIONAL, Jan. 12, 1994; Peter Kerr, *"Ghost Riders" Are Target of an Insurance Sting*, N.Y. TIMES, Aug. 18, 1993, at A3.

¹⁰⁴ Robbenolt & Studebaker, *supra* note 91, at 17.

problems.¹⁰⁵ The relatively low severity of many whiplash injuries may lessen the jury's need to find a defendant responsible. The extensive publicity and high visibility of insurance fraud cases may present challenges even for plaintiffs with meritorious cases to convince a jury that their injuries are real and deserve compensation.

Having documented the problem and having outlined some of the psychological and social processes that underlie it, we ask whether it is possible to do anything to correct it. That is, can we modify the arguments and evidence presented in a trial so that jurors are more likely to believe and compensate a deserving plaintiff? In a whiplash case, can we shift blame away from the plaintiff and back onto the defendant? How can we effectively communicate the severity of a whiplash injury and ensure adequate compensation?

Trial handbooks and communication and psychology treatises on effective communication and persuasion can inform our inquiry on trial tactics.¹⁰⁶ We do not aim to survey that voluminous literature here, although we draw on its insights. Instead, we focus on a set of questions, identifying two key areas for fruitful exploration: blame shifting from plaintiff to defendant, and the communication of injury validity and severity. In proposing relevant strategies, we draw on the work of major psychological researchers, communication scholars, persuasion theorists and lawyers.

A. *Influencing Jurors' Attitudes*

First, we begin with the insight that jurors' attitudes toward the issue of personal injury litigation and even whiplash will be based on their beliefs and values, the building blocks of attitudes.¹⁰⁷ Attitudes about related issues linked

¹⁰⁵ Hans & Vadino, *supra* note 14, at 573-77.

¹⁰⁶ W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981); THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES (1980); INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING (Reid Hastie ed., 1993); SONYA HAMLIN, WHAT MAKES JURIES LISTEN TODAY (1998); John C. Reinard, *Persuasion in the Legal Setting*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 543 (James Price Dillard & Michael Pfau eds., 2002); HERBERT W. SIMONS, PERSUASION IN SOCIETY (2001); PERSUASION: ADVANCES THROUGH META-ANALYSIS (Mike Allen & Raymond W. Preiss eds., 1998) [hereinafter ADVANCES]; COMMUNICATION AND SOCIAL INFLUENCE PROCESSES (Charles R. Berger & Michael Burgoon eds., 1995).

¹⁰⁷ SIMONS, *supra* note 106, at 27.

together form a knowledge structure or schema.¹⁰⁸ A relevant example is a schema of frivolous and fraudulent plaintiffs bringing sham lawsuits. Once formed, schemata are resistant to change, but it is sometimes possible to alter schemata if individuals are receptive to new information. The first small step in the persuasive process is providing new information that will change a juror's negative schemata about the plaintiff.

Framing is another approach to effective persuasion. "A frame . . . is one among a number of possible ways of seeing something, and a reframing is a way of seeing it differently, in effect changing its meaning."¹⁰⁹ Attorneys might try to frame or reframe an argument in such a way as to cause jurors to alter their pre-existing schemata. For example, successful reframing occurred in a survey of respondents who were generally opposed to the federal welfare program called Aid to Families with Dependent Children ("AFDC").¹¹⁰ If researchers told the survey respondents that federal spending on welfare was about 1% of the annual federal budget, they thought that it was a small amount and were far more favorable toward welfare.¹¹¹ In contrast, if researchers told survey respondents the actual amount in dollar figures (over \$10 billion), they expressed alarm at the amount spent on welfare.¹¹²

Another approach to predicting how jurors might react to an argument is the Elaboration Likelihood Model ("ELM") of persuasion developed by Richard Petty and John Cacioppo.¹¹³ Petty and Cacioppo differentiate between circumstances that encourage central processing of information, that is, systematic analysis of the content of a persuasive argument, and peripheral processing of information, which relies more on shortcuts and heuristics to evaluate the validity of a persuasive message.¹¹⁴

¹⁰⁸ *Id.* at 26.

¹⁰⁹ *Id.* at 120.

¹¹⁰ J.H. Kuklinski & P.J. Quirk, *Political Facts and Public Opinion*, Paper presented at the University of Pennsylvania conference on "The Future of Fact" (Feb. 26-28, 1997), cited in SIMONS, *supra* note 106, at 33.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ RICHARD E. PETTY & JOHN T. CACIOPPA, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE (1986); Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, in 19 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 123 (L. Berkowitz ed., 1986).

¹¹⁴ RICHARD E. PETTY & JOHN T. CACIOPPA, ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES 257 (1996).

In one study, Richard Petty, John Cacioppo and Richard Goldman found that listeners with a high degree of personal involvement in an issue were more persuaded by strong, as opposed to weak, arguments and were less concerned with the communicator's degree of expertise.¹¹⁵ In contrast, they found that listeners with a low degree of personal involvement in an issue were less concerned with the strength or weakness of various arguments, but were more persuaded by a speaker who they perceived to have high, rather than low, expertise on the subject.¹¹⁶ Highly complex material appears to have a similar effect in shifting people from central to peripheral processing, at least in laboratory experiments.¹¹⁷

Predictably, jurors, given the significant consequences of their decision, will be highly motivated to engage in central processing of the evidence. Trial consultant Donald Vinson, however, maintains that jurors also rely on heuristics or shortcuts to simplify their task, especially in complex trials.¹¹⁸ In some instances, reliance on heuristics may decrease the accuracy of decision making.¹¹⁹ The representativeness heuristic, for example, leads jurors to estimate the probability of an event from the ease with which particular examples come to mind.¹²⁰ The widespread publicity given to frivolous litigation and insurance fraud stories may make it easy for jurors to recall specific instances, which in turn may increase their estimate of how often frivolous and fraudulent lawsuits are filed. Plaintiffs' attorneys should anticipate that fraud cases will be readily available in jurors' memories and should confront the matter directly.

Vinson explains how to identify affective and cognitive approaches in jurors.¹²¹ An affective juror is one who "makes decisions on an emotional rather than a rational basis.

¹¹⁵ Richard E. Petty et al., *Personal Involvement as a Determinant of Argument-Based Persuasion*, 41 J. PERSONALITY & SOC. PSYCHOL. 847 (1981).

¹¹⁶ *Id.*

¹¹⁷ Joel Cooper & Isaac M. Neuhaus, *The "Hired Gun" Effect: Assessing the Effect of Pay, Frequency of Testifying, and Credentials on the Perception of Expert Testimony*, 24 LAW & HUM. BEHAV. 149 (2000). *But see* Brief of Amici Curiae Neil Vidmar et al., *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (No. 97-1709) (arguing that the empirical evidence including judge-jury agreement studies, case studies and experimental research does not show conclusively that juries are unable to assess expert testimony or that they uncritically defer to experts).

¹¹⁸ VINSON, *supra* note 69, at 63.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 60.

Affective jurors are generally impulsive decision makers. They often base their decisions on highly selective perception and organization of what they see and hear, rather than reserving judgment until all the facts have been gathered.¹²² In contrast, cognitive jurors are "very orderly and logical decision-makers, . . . information seekers because they are information processors."¹²³ Affective jurors tend to remember¹²⁴ and respond to emotional appeals.¹²⁵ Focusing on how an injury affected the plaintiff's ability to participate in family life has more emotional impact than does documentation of a plaintiff's lost wages. Vinson concludes, "[s]uccessful plaintiff personal injury lawyers are . . . masters at structuring affective communications. At the same time, most defense lawyers adhere to a highly structured cognitive approach."¹²⁶ Yet, if jurors respond to diverse appeals, attorneys on both sides would do well to include both affective and cognitive appeals.

Persuasion researchers have found some evidence that listeners are most persuaded when they believe that the speaker is actually arguing against her own belief or position.¹²⁷ Listeners tend to form prior beliefs regarding the position that the witness is likely to take. If the witness' message is then seen as the opposite of the prior position, the witness gains credibility and, thus, is more persuasive.¹²⁸ Interestingly, whiplash cases sometimes put the defendant in a position to benefit from this phenomenon. If a defendant admits liability but disputes damages, a frequent occurrence in rear-end automobile accidents, the admission of liability may enhance her credibility.

B. *Addressing Defensive Attributions at Trial*

The attribution literature suggests that the perceptions of personal control and individual self-determination are strongly linked to judgments of responsibility. Thus, the most powerful strategy for shifting responsibility and blame away from a plaintiff and toward a culpable defendant is to frame or

¹²² *Id.*

¹²³ VINSON, *supra* note 69, at 61.

¹²⁴ KATHLEEN KELLEY REARDON, PERSUASION IN PRACTICE 132 (1991).

¹²⁵ GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME 180 (1995).

¹²⁶ VINSON, *supra* note 69, at 62.

¹²⁷ Alice H. Eagly et al., *An Attribution Analysis of Persuasion*, in 3 NEW DIRECTIONS IN ATTRIBUTION RESEARCH 37 (John H. Harvey et al. eds., 1981).

¹²⁸ *Id.*

reframe the issue of individual responsibility, emphasizing the factual circumstances that constricted the plaintiff's personal control and expanded the defendant's personal control. As described above, if the plaintiff had any possible way of influencing the outcome of the situation, jurors exhibit strong tendencies to blame the plaintiff. In our hypothetical case, despite the fact that Elaine's fault seems more direct and obvious, if Tom could have moved his car as he saw Elaine hurtling toward him in his rear-view mirror, jurors will likely blame him for failing to avoid the accident. Based on the psychological and social phenomena explained above, we should expect at least a modest degree of belief that Tom is at fault, even if it is clear that he had no warning or personal control over the situation. Nonetheless, we think that emphasizing the plaintiff's inability to avoid an accident would be a worthwhile strategy.

The theme of individual responsibility that leads jurors to scrutinize plaintiffs for fault can also be applied to a personal injury defendant. If jurors view plaintiffs as avoiding personal responsibility by bringing lawsuits, so too might jurors come to view defendants as avoiding responsibility by fighting a reasonable request for compensation. The factual circumstances that support defendant control and responsibility, along with the possible steps that a defendant could have taken to avoid an accident, underscore the extent of the defendant's culpability for the untoward event. Negative dispositional attributions about the character of the defendant may flow from the facts and circumstances of the case. As some persuasion scholars maintain, "[p]ersuading jurors to make this type of dispositional attribution increases the likelihood of significant damages."¹²⁹ If Tom's lawyer can succeed in showing Elaine's lack of care and irresponsibility, the tendency to blame the injury victim should decrease.

A plaintiff's attorney may want to establish common ground between the jurors and the plaintiff,¹³⁰ for example, by emphasizing that a plaintiff's attitudes and background are similar to those of the jurors.¹³¹ Shaver's research¹³² and

¹²⁹ *Id.* at 92.

¹³⁰ HERBERT W. SIMONS, PERSUASION: UNDERSTANDING, PRACTICE AND ANALYSIS 157-167 (1976).

¹³¹ GARY C. WOODWARD & ROBERT E. DENTON, JR., PERSUASION AND INFLUENCE IN AMERICAN LIFE 167 (2d ed. 1992).

¹³² Shaver, *supra* note 47, at 101-13.

Burger's research, discussed earlier,¹³³ suggest that jurors could be more lenient toward people who are similar to themselves. Arguably, then, the best jurors for the plaintiff may be those who have already been victims of a car accident because they will not want to blame themselves for their accident.¹³⁴ Another tack is to search for jurors with similar backgrounds or experiences. As noted above, Hans and Vadino's study found that respondents with whiplash were more likely to believe that whiplash victims were actually injured.¹³⁵ Muzafer Sherif and Carl Hovland's classic observation from social judgment theory posits that people make social judgments based on anchors or reference points.¹³⁶ Personal experience can provide a powerful anchor or reference point that a litigator could employ to make a persuasive argument.

In terms of structuring the argument, the plaintiff's attorney will probably be more persuasive when using a two-sided message with refutation rather than a one-sided message.¹³⁷ For example, suppose Elaine was momentarily distracted by her children fighting in the back seat of the car just before the accident. Elaine's situation highlights the accidental quality of the event and also diminishes an observer's perception of Elaine's personal control. Indeed, as Professor Sharon Lamb pointed out to us, the woman could be seen as acting as a good mother, doing the best she could to handle her important parental responsibilities.¹³⁸ The plaintiff's attorney might be tempted to ignore or downplay Elaine's excuse. However, the attorney would be better off by acknowledging Elaine's defense that her children's fighting distracted her, and then refuting her argument by pointing out

¹³³ See Burger, *supra* note 66.

¹³⁴ VINSON, *supra* note 69, at 101. Vinson makes the argument that a defense attorney in an auto accident case would want jurors who believe that a similar accident could happen to them. Donald Vinson explains that, "[c]onsistent with defensive attribution theory, a juror who thinks he or she could personally have such an accident will possess a deep need to rationalize the situation" and blame the victim. *Id.* Vinson further explains that during voir dire, defense attorneys should focus on the key question of whether prospective jurors believe that such an accident could have happened to them, and put those who believe it could have on the jury. *Id.*

¹³⁵ Hans & Vadino, *supra* note 14, at 575.

¹³⁶ MUZAHER SHERIF & CARL I. HOVLAND, SOCIAL JUDGMENT: ASSIMILATION AND CONTRAST EFFECTS IN COMMUNICATION AND ATTITUDE CHANGE (1961).

¹³⁷ ADVANCES, *supra* note 106, at 93.

¹³⁸ Sharon Lamb, Remarks at the Brooklyn Law School Center for the Study of Law, Language & Cognition Symposium, Responsibility & Blame: Psychological and Legal Perspectives (Oct. 18, 2002). For an interesting discussion of mothering and responsibility attribution, see Lamb, *supra* note 36, at 945-48.

her irresponsibility in failing to pull over to stop their fighting.¹³⁹ And, of course, all lawyers know that choice of words can be crucial, so the plaintiff's lawyer may be drawn to words with highly visual negative imagery, such as "smashed" and "struck," rather than the more benign "hit" and "bumped."¹⁴⁰

The omnipresence of the individual responsibility ethic among jurors suggests that the theme of personal control will figure importantly in jurors' perceptions of the accident. Emphasizing the plaintiff's lack of control, as well as the actions and choices that the defendant made that led to the accident, is a potentially fruitful way to have the individual responsibility ethic work for, rather than against, the plaintiff.

C. *Communicating the Severity of a Whiplash Injury*

The widespread media coverage of insurance fraud, coupled with tendencies to minimize injuries and derogate plaintiffs, make challenging the presentation of a convincing case of injury, particularly when the injury is not readily visible, as with whiplash and other soft-tissue injuries. Establishing and emphasizing the impossibility or low likelihood of fraud, either by referring to the plaintiff's personal characteristics or to external confirmations of the injury, is an essential first step.

Plaintiffs' attorneys have made many suggestions for the more effective presentation of a whiplash client's case. Concerned by the aura of fraud and triviality surrounding the term whiplash, plaintiffs' attorneys have proposed alternative words to convey the injury. One favorite recommendation is that attorneys use the term "connective-tissue" injury because of its medical connotation. Of course, the use of this term is likely to be one-sided, particularly if the defense uses other

¹³⁹ In the adversarial context, people have information about opposing arguments; therefore, a two-sided message with refutation is more effective. RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION* 167 (1993).

¹⁴⁰ Elizabeth F. Loftus and John C. Palmer showed subjects a film of a multi-car accident. After seeing the film, the researchers asked the subjects one of two leading questions: "About how fast were the cars going when they *smashed* into each other?" or "About how fast were the cars going when they *hit* each other?" If Loftus and Palmer asked the question using the word "smashed," they found that subjects estimated that the cars were going faster, and they also reported seeing broken glass at the accident scene despite the fact that none was shown in the film. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974).

words, such as whiplash or soft-tissue injury, to minimize the perceived injury or connote fraud. Furthermore, focus group discussions of whiplash cases show that many people do not have a firm grasp of the meaning of connective-tissue injury, whereas whiplash, and even the prosaic "neck injury," are more understandable.¹⁴¹ The national poll on perceptions of personal injury showed that people rated a neck injury as more serious than soft-tissue injury, connective-tissue injury and whiplash.¹⁴² Whether simply changing the injury label used by one side without any other trial modifications would be effective is unknown.

Other plaintiffs' attorneys are worried, and reasonably so, that jurors will not grant credibility to whiplash claims if there is only minimal damage to the vehicle in a car accident and no strikingly visible physical deformity on the plaintiff. They have searched for concrete analogies to whiplash injuries. One is the "egg carton" analogy. It is a common experience for all of us to get an unblemished egg carton that nonetheless contains one or more broken eggs. Similarly, the more sensitive muscles and tissue surrounding an accident victim's bones can be injured even though the vehicle's impact does not leave a dent. A migraine headache is also analogous to whiplash in the sense that it can produce devastating pain although there is no external visible sign of the pain during a migraine.

Finally, plaintiffs can draw on psychological principles in effectively framing the injury's worth for the jury.¹⁴³ Experimental studies find that "selling price" approaches to asking juries what an injury is worth generate higher recommended awards than "making whole" approaches. That is, if we ask jurors to consider how much money they would want for selling their good health, the amount is considerably larger than if we ask how much a plaintiff needs to receive to buy back her good health, to be made whole again after an injury.¹⁴⁴

In sum, effective communication of the validity and severity of injury may include confronting the possibility of plaintiff fraud directly, modifying terminology, using apt analogies and incorporating insights from framing theory.

¹⁴¹ Hans & Vadino, *supra* note 14.

¹⁴² See Hans, *supra* note 26.

¹⁴³ Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995).

¹⁴⁴ *Id.* at 1353-54.

CONCLUSION

The research summarized in this Article shows that psychological, social and political factors as well as media coverage tend to encourage observers and civil jurors to search for fault in personal injury plaintiffs and, most acutely, whiplash plaintiffs. A plaintiff's attorney will have a better chance of prevailing in a whiplash case by seeking common ground between the jurors and the plaintiff; looking for jurors with whiplash experience; underscoring the plaintiff's lack of personal control over the accident; directly addressing presumptions about the plaintiff's blame; and emphasizing the theme of the personal responsibility (or irresponsibility) of the defendant.

Effective communication of the severity of a whiplash injury might best be accomplished by referring to the whiplash injury as a "neck injury" rather than whiplash or connective-tissue or soft-tissue injury, which are mystifying terms to most people; focusing on concrete ways in which the neck injury has done serious damage to the plaintiff's quality of life, providing both emotional and rational appeals and using effective analogies to whiplash (such as the egg carton or migraine metaphors). Framing can also be used to convey the full worth of the injury.

Some open questions remain about the causes of plaintiff blame in personal injury trials, particularly those involving whiplash and other soft-tissue injuries. Are the psychological motivations described above likely to be the prime causes of derogation of plaintiffs who bring lawsuits? Are jurors simply less willing to compensate because of the low severity of the injuries? Are the readily available media examples of fraudulent claims so powerful that they trump plaintiff evidence of injury?

Then, too, there is the problem of prediction. When attorneys look to research in the areas of psychology (attribution theory) or communication (persuasion theory) to inform their approaches to arguing civil cases, they are no doubt aware that research in both disciplines can point in a general direction with broad strokes, but cannot predict with absolute certainty how twelve individual jurors will decide a particular case. Nonetheless, the literature reviewed here provides some specific ideas for how to present an injury victim's case. We hope that the theoretical literature will guide the design of finely tuned empirical studies on jurors'

perceptions of plaintiffs and more effective methods for the presentation of their injuries.