Praise for *Recovering for Psychological Injuries*

"Learn how to make the invisible psychological injuries that haunt your clients visible to the jury. Barton provides invaluable advice about how you can support these fragile clients through the legal process while you await settlement or trial. The new Bible for lawyers and psychological professionals involved in legal cases."

—Randi McGinn, member of the Inner Circle of Advocates, past president of the New Mexico Trial Lawyers Association

"Bill Barton's book is filled with practical, punchy wisdom. He sugarcoats nothing. He passionately believes in telling the truth; his advice hews to that principle. He has useful suggestions for trial lawyers and witnesses alike. Bill Barton is a Ph.D. in trial preparation and trial."

—Edwin J. Peterson,
Willamette University College of Law

Recovering for Psychological Injuries

Recovering for Psychological Injuries

Third Edition

By William A. Barton

With Assistance from Darien S. Fenn

Trial Guides, LLC and American Association for Justice

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Dedication

Because I believe in the work plaintiff's civil jury trial lawyers provide to our neighbors, communities, and way of life, I dedicate the net royalties from the sales of this book equally to the American Association for Justice, the Oregon Trial Lawyers Association, and the Gerry Spence Trial Lawyers College.

Each of my prior editions was dedicated in part to my children. Well, they aren't kids anymore. Monique is now thirty-eight and a senior vice-president for Bank of America in charge of its Northwest philanthropy. Almine is thirty-five and a busy acupuncturist in Bend, Oregon, enjoying all the outdoor recreation amenities in central Oregon, including rock climbing. Brent is thirty, an associate at Perkins Coie's Portland, Oregon, office, and serves as a representative in the Oregon legislature. So, who says time flies?

Next, I dedicate this to my Sons and Daughters of Bill (SOBs and DOBs). These are about two dozen younger lawyers I mentor. I've selected them because I believe by the years 2030, 2040, and well into the second half of this century they will be leaders in our profession and communities. I believe in them and so can you.

For a number of years I've run a Litigation Boot Camp. Each year as the "Camp Commandant," I teach the craft of civil jury trial advocacy to ten to twelve lawyers I've carefully selected. Every class, and each member, is special to me.

I recently stopped in to watch a trial. I'd lectured to and taught all four of the young lawyers involved. I felt pleased, but also old, very old. I was impressed with their skills. I also dedicate this book to the next generation of jury trial lawyers who are being born before my very eyes.

Finally, I dedicate this to my wife, JoAnn. She's a wonderful life partner with whom I can be honest and vulnerable. She gives more than she takes, and cares about others and the world we all share. To my way of thinking, you can't do too much better than that.

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Acknowledgments

I start with Fadra Day and Carrie Schmitt. Fadra practiced in Texas as a plaintiff's medical negligence lawyer. She was an assistant law review editor at Baylor and an "AV" rated lawyer. She retired from practice a little early and came to Newport, where she now babysits Kevin and me. Carrie Schmitt is my "executive secretary," paralegal, and brains. If I'm on time, it's because of her; if I'm not on time, then somehow it's always because of me. Fadra and Carrie have typed and retyped every sentence, paragraph, and page. Thank you.

Marcus Whitney provided invaluable help with updating the legal citations in this edition. I'm proud to note that he is a recent graduate of my alma mater, Willamette University School of Law.

My partner, Kevin Strever, is always helpful with both the ideas and details. We've been together for twenty-five years, which is the longest voluntary relationship in my life, and to him I am grateful.

I thank Diane Perkett for her constant help and sweet nature, and Tina Ricks for all the work she's done keeping tabs on me and making the final product into what it is. Without Aaron DeShaw's patience, this book would not have happened. I thank you all.

Publisher's Note

This book is intended for practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment, to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication of this book), and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

As set forth in the Author's Note, the cases described in this book are composites, and the names and other identifying details of litigants, witnesses, and counsel (other than the author of this book) have been fictionalized.

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Author's Note

This book is based on various actual cases in which I have participated as counsel. However, the cases presented in this book are composites of actual cases, and the names of all litigants, witnesses, and counsel (other than my own name), and various other identifying details, have been changed. For these reasons, any similarity between the fictionalized names, and other particulars in this book, and real individuals, companies, and cases is strictly coincidental.

Preface

This is a book by a plaintiff's lawyer for plaintiff's lawyers. It's been twenty years since the second edition of *Recovering for Psychological Injuries* was published. This third edition is its new and bigger brother. I've kept the best of the prior editions and added new materials from my national lectures, writings from the Professional Education Group, and updated research. The writing is more relaxed and in keeping with my speaking style except that my occasional expletives have been deleted.

Some of the new material on psychological injuries involves sexual abuse claims against the Catholic Church. In 2004 the Portland, Oregon, archdiocese became the first in the United States to file for bankruptcy as a result of claims against it arising from the sexual abuse of children by Catholic priests. The bankruptcy was filed the morning my case, *C.B. v. The Archdiocese of Portland,* was beginning. I've included two new chapters written by Erin Olson of Portland, Oregon, and Jeff Anderson of Minnesota that give an overview of the experience of Oregon and the nation since the mid-1980s in the area of child sexual abuse by Catholic priests. While the conduct of the Roman Catholic Church is the focus, the legal

principles are generic and apply to all institutional defendants. I've also included a chapter written by my friend Kelly Clark of Portland, Oregon, discussing his trial and $19,000,000 verdict against the Boy Scouts of America for their (non)handling of child sexual abuse within their organization.

Dr. Darien Fenn brings his experience as a forensic psychologist to the book in his discussion of the Diagnostic and Statistical Manual references in *DSM-IV-TR* and his insights on the interface of forensic psychology, psychiatry, and the legal arena.

A chapter on qualitative case analysis is important and new. It builds on the earlier work of Moe Levine and Marvin Lewis, both now deceased. This generic model helps in identifying and refining case themes and helps address the eternal problem of causation that will forever vex plaintiff's lawyers. I've also beefed up the chapter on negotiation and mediation with an eye on mediation, which is what we "trial" lawyers mostly do now.

While the book's focus is on psychological injuries, some physical injuries are so serious the emotional consequences are often undervalued or taken for granted. I've included a chapter that briefly summarizes issues and concerns associated with severe physical injuries such as amputations, traumatic brain injury, burns, and spinal cord injuries. Another neglected area involves loss of consortium claims for spouses of seriously injured persons.

I've tried to stay as practical as possible. You're busy and you need some practical advice, now. This book will help. The core ideas and suggestions I proffered in the second edition have been tested in courtrooms across America by lawyers of all experience and talent levels, and they work.

—William A. Barton

Introduction

What is a chapter on philosophy doing in a legal cookbook? Theory and practice, philosophy and practicality overlap in litigation, though not perfectly.

The theoretical is relevant in litigation for good reason: Unless lawyers have a philosophical foundation for their arguments, their work will be sterile even though they may be skilled technicians. A consistent philosophy of advocacy, based on professionalism and social ethics, is the foundation for courtroom wins and, more importantly, true success both in and out of the practice of law.

Lawyers do not create social truths; they simply help jurors rediscover them. When you help jurors understand why all parties are equal before the law, then you become a member of an elite group that includes John Locke, Thomas Jefferson, Abraham Lincoln, and many others.

Other chapters in this book focus on how to try psychological injury cases. Beyond developing technical skills, to try each case properly, lawyers must:

1. Articulate the social ethics that generate the theme of each case.
2. Understand why what we do as lawyers is important.
3. Know how to adjudicate a claim economically and efficiently.
4. Confront the personal fears that limit us.

The first step to winning advocacy is to embrace a correct philosophy. Juries and judges quickly sense the inherent legitimacy and sincerity of the lawyer who understands why advocacy is important and how it furthers the ideals of our society.

These are some precepts of an integrated philosophy:

1. The world does not need more technicians; it needs lawyers who think of ethics and morality before their own interests. Trial lawyers serve as social engineers by effectively representing the aggrieved. The resulting jury verdicts help define the legal and social relationships of our society.
2. Our judicial system is predicated upon fault and accountability. The deterrent effect of significant verdicts in product liability and medical negligence cases promotes safety within our society through financial accountability.
3. Ours is a participatory democracy. Jury service gives citizens an opportunity to make a statement about what is important for the community. The ballot box and the jury box are where citizenship is fully exercised.
4. Our liberties, our loved ones, and our personal health are our most treasured possessions.

5. Lawyers are officers of the court with responsibilities to clients, to the judicial system, to the legal profession, and ultimately to themselves as ethical human beings.
6. Each lawyer is independently accountable for acting ethically. The shortcomings of a client or another lawyer can never excuse illegal or immoral conduct.

Each generation has a new opportunity to further refine the morality of its predecessors. Explain to the jury that we need not learn a new morality, but need only reawaken what our predecessors knew and what we have half forgotten.

The fundamental concepts of morality embodied within the instructions the court will give are:

1. All parties are equal before the law.
2. Anyone who breaks the community's rules is fully responsible for the legally defined consequences of that misconduct.
3. A wrongdoer takes the victim "as is." Predisposition is no defense. This is a subdivision of our jurisprudential system's first and broadest concept, which is that all parties are equal before the law.
4. People and safety are more important than profit.

A significant verdict is legitimized when counsel anchors its basis to community values. Do not give the jury facts and self-interested arguments alone. Provide them with moral congruence. How does a verdict for the plaintiff both affirm and further moral quality-of-life choices?

Every case has a potential theme, a proposition that rises above the facts and provides the scaffolding for your arguments. You may find it in the plight of the plaintiff, in a lie by the defendant, or in the conduct of an indifferent defense lawyer. Quicken your sensitivity to what is right and decent.

Your side will not always be pure, but as an advocate you must choreograph the facts to support the most poignant, compelling, and redeeming aspects of your case.,

Dealing With Fear

We are all a host of inconsistencies, a mixture of brilliance, stupidity, bravery, cowardice, great vision, and blindness. The drive to excel is often a function of a motivation to avoid failure. Failure may be in the eyes of the client, of significant others—or in your own eyes.

To see how you view failure, think of yourself as:

1. Who you think you are.
2. Who others think you are.
3. Who you want others to think you are.
4. Who the real you is.

The first three exist; the last is only theoretical.

Most of us have difficulty reconciling who we want to be with who we believe we really are. We want to be great, but suspect that we are not and doubt that we deserve to be. We feel scared, little, and impotent, yet we want others to see us as confident, successful, and powerful. We try to reduce the difference between where we think we are and where we want to be.

Real success is measured by effort and commitment. Contrast this with the world's scoreboard, which measures wins and losses in the number and size of successful verdicts. Placing courtroom wins in their correct perspective means acknowledging that lawyers cannot sell wins, only effort and skills.

No matter what, it is unlikely that you will win all your cases. Keep the challenge of being a trial lawyer in perspective, thus enhancing your chances for good mental health. Courtroom wins are not everything. They mean a lot. They may mean everything to

your client. But you are not the client. Too much emphasis on fighting and winning hurts everyone, even those who "win."

Trials have two ingredients: effort and results. These two components produce four combinations:

- Win/Best Effort
- Win/Less than Best Effort
- No Win/Best Effort
- No Win/Less than Best Effort

The preferred combination is your best effort and a win. You may extend your best effort and lose. You may give less than your best effort and still win. You are only accountable for what you can control, and that is your effort. It is easy to live with wins. I work hard partly so that I can live with the losses; they are acceptable only if I have done my best.

Litigation is inherently pressure-ridden. Uncertainty is part of the process. What will the jury panel be like? Who is the judge? Will all the witnesses show up on time? How will the court rule on a crucial evidentiary question or a particular instruction? The best a lawyer can offer is a prediction within a range of probabilities that a particular event will occur. People's lives, liberties, and fortunes are at risk. There are enough external anxieties without unnecessarily burdening yourself with accountability for what you cannot control. Make the effort. Do your best. Then move on.

Starting Off Right

The first interview is a good time to introduce your philosophy to the client: explain the distinction between effort and results, and define what you can offer in exchange for a fee. Clients want a lawyer who is on their side and who personally agrees with their position. This desire for alliance should not dilute your objectivity or prevent you from educating the client with a heavy dose of reality

about litigation, including the time it will take, the costs to be advanced, and the risks of losing, even with favorable facts.

Don't be so hungry for business that you fail to make the problems and pitfalls plain to clients at your first meeting. Remind them periodically thereafter. You cannot and do not sell results; you sell only effort and skills, and these do not necessarily result in wins.

The reality is that lawyers who do not win often enough will not be thought of as good lawyers; economics will ultimately drive such lawyers out of practice generally or litigation specifically. The marketplace is harsh to lawyers who lose because they have accepted cases beyond their skill or have exercised poor judgment by accepting claims with marginal facts. Effort without skill in case evaluation and selection is a recipe for financial failure—and properly so.

Nothing produces a winning track record quite like having good facts. If you are just starting to practice, and do not have the luxury of picking from several prospective claims, consider referring your large cases to a lawyer who has the necessary experience. Apprentice yourself to the senior lawyer. The case will probably be worth more and you will learn more. This is less important, however, than the opportunity you will have to learn and become better prepared to handle the next large case that comes your way.

During your first few years, look for a job that will provide you with maximum opportunities to acquire experience. Work as a deputy district attorney or an associate in a litigation firm. If you are on your own, represent the indigent, watch experienced lawyers try cases, attend seminars, and aggressively litigate the inventory of cases you do have.

It is okay to feel scared and impotent. We all feel that way at times. Bravery does not mean you are not afraid; only fools have no fear. The real test is how you deal with these feelings. Do you permit fear to dominate you? Or do you accept it as a natural and

generally healthy reaction? These inevitable emotions may be an ally; after all, who doesn't run fastest when being chased?

Your intrinsic value as a person has nothing to do with courtroom wins and losses. Assuming reasonable skill in case screening, you will win in the courtroom more often by realizing you can only sell effort and skills, not wins. Focus on quality professional service as an end in itself. If you do the right thing for the right reasons, the wins will take care of themselves.

If you work efficiently to provide quality professional services, you are a success right now. The process of becoming as competent professionally as you can is an end unto itself. Courtroom wins are not mileposts along the road, but only part of the passing landscape.

Our society affords great privileges and deference to lawyers. Transcending the physical violence of such older forms of dispute resolution as dueling, society has developed nonviolent systems for resolving disputes. The mechanisms by which a particular nation resolves its disputes are largely a function of history and philosophy. In our nation, the right to a jury trial in civil disputes enjoys a venerable heritage. We should welcome the many responsibilities that accompany the privilege of being advocates within this system. Any temptations to cut corners in order to win or simply to please clients become easier to resist when an advocate's role is fully appreciated. Marginal conduct says more about you as a person and as a lawyer than about your client's case or your opponent.

Each time a lawyer circumvents a rule, it reduces the confidence society has in our profession. Abuse a privilege and soon it will be lost.

Working Effectively

In 1983, representatives of the plaintiffs' bar, through the board of governors of the Oregon Trial Lawyers Association, and representatives of the defense bar, through the directors of the Oregon

Association of Defense Counsel, convened to evaluate how to reduce litigation costs and delays. I served as a member of the joint committee from 1983 to 1988. The rules that the committee recommends (see appendix 1) have the endorsement of both plaintiff and defense bars. In conformity with our experience, we found ways to expedite dispute resolution cost-efficiently, without compromising the fundamental rights of either party.

Why does the behavior of so many lawyers violate the wisdom of the bipartisan committee's suggestions? At conventions, experienced lawyers of every persuasion tell horror stories about the ill deeds of opposing counsel or particular defendants. Our committee guidelines may seem too soft for the dog-eat-dog climate that often characterizes big cases, particularly those tried in big cities. The pretrial discovery papers become so vociferous that they acquire a life of their own. If you are in a case like this, send a copy of the guidelines to opposing counsel and ask if he or she is willing to process the claim accordingly. Consider filing any agreement with the court, with a copy of the guidelines attached. Neither side gives up anything by using the guidelines; both sides gain enormously.

Though there will still be numerous disagreements, the guidelines provide a context that fosters efficiency and professionalism. You do not have to be disagreeable to disagree; treat the other side as you would wish to be treated in matters of discovery, procedure, and protocol.

When lawyers are asked about their personal contribution to litigation delay and costs, they generally blame opposing counsel, citing a few well-worn complaints. I call these responses "myth-facts," because the statements are generally a mixture of both. They discourage lawyers from constructively focusing on ways to process claims effectively.

The following "myth-facts" are common:

1. "My opponents hide discoverable materials, forcing me to file a raft of discovery motions."
2. "Cases are settled on the courthouse steps because the opposing lawyer will not seriously evaluate the case earlier."
3. Some plaintiff's lawyers do not seem to appreciate that once a claimant is medically stabilized, passage of time does not necessarily increase the value of a case. Yet the more time a plaintiff's lawyer invests in a case, the less per-hour return there is on a contingency basis. Assuming that an injured plaintiff is going to be paid basically the same sum at any point in the case, a quicker payment is to everyone's advantage and reduces the volume of cases in the system.
4. Many plaintiff's lawyers, especially the inexperienced ones, are unrealistic in assessing the value of their cases. Even a few experienced plaintiff's lawyers put their egos ahead of the client's interests.
5. Younger plaintiff's lawyers are concerned that cooperating with the defense will result in waiving a substantial right of their client, exposing them to malpractice claims. They mistakenly believe that aggression is synonymous with effectiveness.
6. "Big defense firms have a financial interest in generating billable hours." Substantial partnership salaries are produced by creating pyramids in which young associates bill 2,000+ hours a year, based in part on reams of pretrial motions and depositions of marginal necessity. Associates take lengthy shotgun depositions without a clear understanding of the issues or much guidance from the senior lawyer who will actually try the case.

7. "Defense lawyers are not responsible for delay; their clients, the insurance companies, are." Unless the jurisdiction has a prejudgment interest statute, insurance companies have little incentive to settle. Carriers can earn substantial sums by investing the reserves set aside to pay the ultimate judgment, and in the interim pay only the legal defense costs.

   Yet defense lawyers state that the carriers they represent constantly are pressuring them to settle—but within reasonable limits. The insurance companies like early evaluations that allow the money to be put into a reasonable settlement offer instead of defense costs.

8. "Unnecessary defense motions and excessive depositions would be reduced if plaintiff's lawyers would voluntarily provide discoverable materials, narrow their pleadings as early as possible to a few viable theories of recovery, and give sufficient facts to apprise the defense of what the plaintiff is claiming."

All of the preceding complaints are certainly true for some lawyers and some insurance carriers. Many lawyers are general practitioners who handle plaintiff's cases only occasionally. They also may be business lawyers, sole practitioners or members of small firms, or young and inexperienced. Contrast this with the insurance defense lawyer, who is often a member of a medium-sized or large firm and is typically an experienced litigator. The defense lawyer probably represents a number of carriers, and insurance defense is usually a significant portion of the practice. New admittees who do defense work are generally employees of firms representing insurance carriers and are mentored by seasoned lawyers. This is seldom true for the young plaintiff's lawyer, who has no one to turn to for practical guidance.

Senior members of the bar talk of the "good old days" when agreements were made by telephone or handshake. The size of the legal profession, particularly in metropolitan areas, has grown so

that the familiarity that facilitated such behavior is dwindling. When an opposing lawyer is an unknown, many lawyers feel that it is prudent, if not essential, to protect their client with defensive lawyering.

Given this backdrop, it is no surprise that the process of resolving a claim can take on a life of its own.

Courtroom Skills

The final component of advocacy deals with clinical skills. Can you actually perform the operational tasks necessary to litigate effectively? Do you know the rules of evidence? Are you familiar with effective tactics and proof? The remainder of this book is dedicated to teaching you exactly how to try a particular kind of case.

Before we begin, a few general propositions of advocacy are in order:

1. Try a clean case: Select just a few theories of liability that can be proven and have been accepted by your state's highest court. I encourage expanding the common law and believe that a great service is rendered when through one lawyer's persistence a new concept of duty finds a toehold in the law. But if you have good facts and an acknowledged theory of liability, why be brave? It is better to be smart.
2. Give opposing counsel an opportunity to object to known matters of controversy out of the presence of the jury.
3. Find ammunition within safe, nonreversible damages instructions to support strong closing arguments. Appellate reversals generally occur when you are:
    a. Pleading theories of liability that are new to your state's jurisprudence.
    b. Arguing theories of liability that are not supported factually when you have other theories that are.

c. Getting overenthusiastic about instructions and thinking that cases are won or lost there.

Facts, not instructions, win lawsuits.

4. Understatement is advocacy's most powerful tool.
5. Preempt the defense by promptly acknowledging the weak points in your case and integrating them in the most favorable light as early as possible.
6. Effective advocacy is a matter of A B C.
   - Accurate
   - Brief
   - Clear
7. Learn how to disagree without being disagreeable.
8. All effective advocates are C C C.
   - Credible
   - Competent
   - Caring

   If you are competent and caring, it follows that you will be credible. Where the choice is between competence and caring, there can be no doubt which is more important. If you give the impression that you do not care, that you are not emotionally committed to your case, then why should the jury care?
9. Rarely raise your voice. Loud people are stereotyped negatively.
10. It is very dangerous to accuse anyone of being a liar. If it is obvious a witness is lying, then there is no need to state it; if lying is not obvious, then it is probably too risky to mention.

11. Show mercy: Judge acts, not people. Never vanquish—leave that for the jury.

I will close with three presumptuous moral principles.

1. Decide whether you would like a career only or would like simultaneously to maintain a family. If the latter is important to you, you ought to consider the following: At times the challenges of work will command all of your time, but there should be an underlying proportionality that reflects the priority of family. The quantity of time is not the only criterion; more important is the quality of the time that is spent with loved ones. Victories in the courtroom are ashes in the mouth if you lose your family. If your home is merely a pit stop in the race, you are in the wrong race.

2. Excessive alcohol and substance abuse are sinister allies to anyone, and particularly to one who aspires to an undertaking as demanding as the trial lawyer's.

3. The public library has many nonlaw books that deserve your time. The New Testament's Sermon on the Mount and its parables, writers from Kahlil Gibran to Shakespeare, and all great literature offer powerful messages that communicate enduring social truths. Their insight into human nature is timeless. Great books are all law books, and of the highest order, because they are dedicated to the challenges of mortality, its dilemmas, heartaches, defeats, and triumphs.

Part I

Deciding to Take the Case

1

Quantitative v. Qualitative

This chapter is a metaphor for the entire book. The chapter's paradigm is the underpinning of every trial strategy and technique you'll read about.

It restructures the traditional damages analysis in a manner that increases your chances of receiving a significant damages award. It will also shorten your trials and improve your credibility with the judge, jury, and yes, even your worthy opponent. It's an organic tool for identifying and refining your case themes.

Read this chapter a couple of times. Reflect on its potential effect on the cases you've tried, and those in your current inventory you might try. Once you've read the book, go back and reread this chapter. The ideas in this model are both old and new, and if their wisdom wasn't obvious on the first or second reading, it certainly will be then.

The idea of this chapter is to shift the damages analysis from an extrinsic, numeric one of subtracting objective losses to a more personalized and intrinsic view. Rather than calculating what the plaintiff has lost, the analysis focuses on where the plaintiff is left after their injury.

The Quantitative or Subtraction Mode

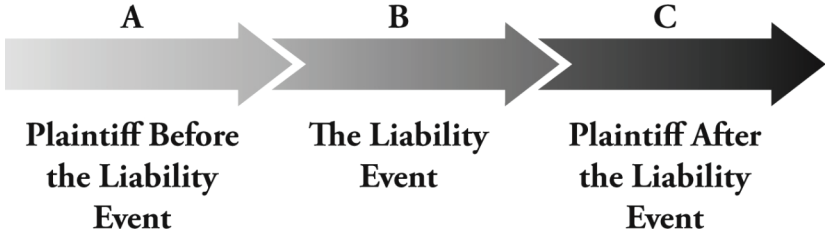
During the first week of torts class, you were taught that in order for a civil negligence cause of action to exist four elements must occur: a duty, a breach of that duty, an injury, and finally, causation, meaning that the injury was caused by the breach of the duty. When facts support these four elements, then a tort or civil wrong has occurred. What this all means is injured parties can then sue the wrongdoer and be redressed by receiving a money damages verdict for their resulting injuries.

There's a simple way to algebraically express this:

$$\$ = (A - C) \times B$$

Our formula involves two axes. The first is horizontal and involves a time continuum from A, the plaintiff's preinjury status, to C, the plaintiff's postinjury future. Somewhere along this time line the liability event, B, occurred, which caused injury.

Our time continuum is expressed as follows:



This model is generic and fits all circumstances. The liability breach can be anything from a discrete one-time failure to heed a stop sign, to multiple and ongoing allegations of sexual harassment.

The second axis is vertical and expresses the extent of damages. Assume we have a scale of health (A and C in our model above), which ranges from 10 to 0. We'll call the person who is a 10 in great health, and at the opposite end, if the person is 0, they're dead. If they're like most of us, their health is average and falls in between 4 and 6.

Applying the above model with its two axes, assume the plaintiff is walking down the street, in generally good health (6) and the

defendant blows a stop sign (B), striking the plaintiff in a crosswalk. The injuries caused by the defendant's conduct reduce the plaintiff physically from 6 to 2 (C). After a year of rehabilitation, the plaintiff recovers to a 4. The difference between A (6) and C (4) involves a permanent difference, meaning the loss is the difference between the preinjury condition of the plaintiff (A) and the way he is now (C). This is expressed as:

$$\$ = (6 - 4) \text{ or } (2 \times B)$$

Causation is expressed by the liability event, B, being placed outside of and after the bracketed damages proof. This communicates the idea that the injuries are interactive and caused by the liability event. Our formula is obviously oversimplified and the subtraction within the damages component doesn't express the period of time the injured party may have been in recovery.

This is the traditional torts model taught in all law schools. It's all pretty straightforward so far. Most law school professors became who they are in rather traditional paths. They excelled as law students, spent time clerking for an appellate judge, went on to work as an associate at a large and prestigious firm for a few years, and then returned to academia. They possess little clinical experience in application and argument before juries of the principles upon which they're paid to instruct. Most of them have never tried a single civil jury trial as lead counsel. The result? A generation of bright thinkers passes on sterile and aseptic legal recipes to future generations of lawyers.

What's being taught, and intellectually fossilized, is correct in every linear sense. It's a numeric, quantitative model of analysis that reflects Aristotelian modes of thought. It's a paradigm that's logical, and therefore seems right to every lawyer. Keep in mind that you, as a lawyer, aren't typical. You don't mirror the thought processes of average citizens and jurors. You had to take an LSAT to even get into law school. That exam tests your capacity for multifactorial analysis and logical thinking. Capacities in these areas are the *sine qua non* of commercial litigators. These are the advocates who live in the numerical world of actuaries, accountants, business records,

and tax returns. These lawyers revel in data-driven analysis and emotionally seem to need certainty and precision. They're intellectually uncomfortable discussing pain and suffering in terms of dollars, or losses that can't be precisely quantified.

Shifting from the Quantitative to the Qualitative

I advocate a different paradigm than extrinsic subtraction. It's a qualitative approach. It's *intrinsic*. Conclusions derived from a qualitative methodology are radically different from those born of the quantitative method.

The traditional quantitative or numeric approach views a person in the context of the whole, and defines losses by extrinsically referring to how the group or community values similar losses among its various members. Call this a comparable or a deductive right-brain way of seeing things. You can find illustrations in any insurance company's scheduled approach to valuing losses. This is the adjuster's mind-set when he says "my company's rule of thumb is, we don't pay general damages in an amount more than three or four times the specials." Further examples include the scheduled losses in workers' compensation claims and tort reform attempts to level losses through caps on noneconomic damages awards.

The quantitative method reduces the economic consequences and increases predictability, thereby decreasing the incentive to avoid engaging in B conduct. The Ford Pinto litigation from the 1970s is a good example. It's against this backdrop that punitive damages find their most persuasive arguments. Predictability increases the prospect manufacturers will pursue profits by analyzing consumer injuries as a cost of doing business. The intellectual headwaters of this are found in the political philosophy of Jeremy Bentham (1748–1832) and utilitarianism, that is, "the greatest good for the greatest number."

On the other hand, the qualitative model doesn't focus on the group; rather, it shifts the spotlight to the individual within the group. The qualititative model derives conclusions inductively, by focusing on the uniqueness of the loss to the specific individual

within the group. The political writing of John Locke (1632–1704), with his philosophical view that the rights of the individual are preeminent to those of the group, supports this thinking.

The qualitative model says we're all unique and different, and that when the rights of the least among us are fully protected, then the rest of us are beneficiaries because it assures that our rights are also protected. This argument has protected the right of free speech for advocates of unpopular and extremist positions. We reason that if the rights of those on the fringe are protected, then the rest of us closer to the center are also safe. I call this a kind of perimeter or "tripwire" analysis. Advocates argue every individual within the group is a beneficiary if there are full economic consequences when anyone within the group is injured. This emphasizes deterrence because of the fullness of the economic consequences.

It's true that "the law is the law," and the jury should apply the rules charged by the court; but that's really only the starting point of good advocacy. It's when a rule is actually applied by a committee of the community, meaning a jury, that it comes to life. As Oliver Wendell Holmes said, "The life of the law is experience, not logic." Jury verdicts are the energizing headwaters of our common law tradition. This is where an appreciation and understanding of the reasons for a rule become essential. Discernment is found in the creative application of the rules. Here's where advocacy finds some of its loftiest expression. If you use the law as a template, or cookie cutter with sharp edges, and each trial is but another rote application of uniform rules, then you really don't understand the power of advocacy.

Learning to Ask the Right Questions

When a jury returns a large verdict, defense lawyers sometimes express surprise saying it was a "runaway" jury. What often happened is a good plaintiff's lawyer persuaded the jury to analyze the facts with a qualitative or intrinsic approach instead of from a quantitative or subtraction model.

Let's illustrate the differences between quantitative and qualitative models of analysis by considering the multiple possible responses to the simple question: "Who has lost more?" Assume we have two people, one is a millionaire, and the other a beggar with only one dollar. Take away half of what each possesses and then ask, "Who has lost more?"

We know under a quantitative model it's obviously the millionaire because he's lost $500,000, which is far, far greater than the fifty cents the beggar's lost. Smug with the knowledge that half a million is always more than half a dollar, shift the focus of the same question using a qualitative analysis and ask which loss means more to each of them.[1] As you do this, reflect upon the biblical parable of the Widow and the Mites. It's found in two places in the King James Version of the New Testament. The second gospel, Mark 12:41–44, reads:

> And Jesus sat over against the treasury, and beheld how the people cast money into the treasury: and many that were rich cast in much. And there came a certain poor widow, and she threw in two mites, which make a farthing. And he called [unto him] his disciples, and saith unto them, Verily I say unto you, That this poor widow hath cast more in, than all they which have cast into the treasury: For all [they] did cast in of their abundance; but she of her want did cast in all that she had, [even] all her living.

Luke, in the third gospel (21:1–4) narrates the experience slightly differently:

> And he looked up, and saw the rich men casting their gifts into the treasury. And he saw also a certain poor widow casting in thither two mites. And

1. For my generation the argument belongs to the great Moe Levine, who died in 1974. Trial Guides has compiled many of Moe's closings and speeches in *Moe Levine on Advocacy* (2009).

> he said, Of a truth I say unto you, that this poor widow hath cast in more than they all: For all these have of their abundance cast in unto the offerings of God: but she of her penury hath cast in all the living that she had.

This scriptural material is powerful, not because of any historical authenticity, but for the social and moral values communicated. Regardless of anyone's particular religious orientation, this parable expresses core values of our culture's Judeo-Christian heritage.

Are aspects of these values expressed in any of your jury instructions? Consider the "as is" rule commonly called the "previous infirm condition" instruction. What it essentially says is a wrongdoer takes his victim as is, and therefore can't defend on the infirmities or shortcomings of his victim. Stated more abstractly, the law protects the weakest among us. Philosophers agree. Protection of person and property is the primary purpose of laws. Think about it. The bully needs no protection. It's the weakest among us that needs the law's protection most. Continuing with our extrapolation, within the machinery of American government, the ballot box protects the expressed will of the majority; it's within the judiciary, or the third branch of government, that the rights of the individual find their most explicit protection through judicial interpretation of the Bill of Rights.

When the injuries and damages are serious and self-evident, such as fractures, burns, and amputations, then there's no reason to stray from an objective and extrinsic subtraction-driven analysis; after all, you've got "the facts." Yet even here there's often a place for a melding of the two approaches.

The qualitative model lends itself to situations where before the B event occurred, the plaintiff was disadvantaged or had less than what's considered normal. Examples include people with shortened life expectancies or others with serious pre-B challenges. Also included are the "problem" cases and clients with prior injuries blurring medical causation, or with lots of personal baggage causing them to be unattractive to a jury.

I know how important it is to have a presentable plaintiff; and, if you're really lucky, you might also have a target defendant. I don't know about you, but these types of cases are rare, and when they do occur, they usually settle for obvious reasons. A more likely scenario involves an unpresentable plaintiff with less serious injuries and dubious liability. This is where the qualitative approach can be far more effective than subtraction. So you want to be a plaintiffs' jury trial lawyer? Welcome to the real world.

Let's be specific. Suppose you have someone with modest losses. More than likely many cases in every office's inventory fit this description. Applying the formula introduced at the beginning of this chapter, they're a 2 or 3 in health before the B event, with a loss of 1 because of the defendant's misconduct. Obviously, not a very attractive case on an extrinsic basis. Consider the following approach: instead of forfeiting credibility by trying to make your client look worse or more damaged than he really is through the use of excessive subtraction by stretching before and after, consider focusing on what your client is left with. How do you do this?

Start with the A list. Think creatively. Rather than your client being a 4, 5, 6, or 7, honor all his foibles and freckles making him a 2 or 3. In other words, you generate credibility by embracing the naked truth. Ninety percent of defense lawyers' cross-examination is driven by plaintiff's lawyers and their clients trying to, consciously or unconsciously, stretch the facts in furtherance of perceived self-interest. There's no need for this. Once the client is accurately positioned down low on the A list, then assess the client's losses quantitatively. If the objective losses aren't much, then be comfortable in telling the jury this. It's okay. Honesty is a great start. The losses may not be much to someone else, say for you, me, or perhaps most of the jurors, but explain how they're profound to

this particular person. Remember, when you don't have much, losing even a little means a lot.[2]

We plaintiff's lawyers do this every time we argue the importance of a client's disability rather than a minimal or mild impairment. An impairment is an objective assessment of a loss of some bodily function, such as range of motion. A disability assessment applies the impairment to the life and activities of a specific person. For example, two persons can have exactly the same injury or impairment, yet it can have dramatically different implications for the purposes of a disability assessment. If a professional baseball pitcher with a 94 mph fastball loses 2 percent of the range of motion in his pitching arm, then he's probably 100 percent vocationally disabled as a professional baseball player; yet to most other people the same impairment is probably a nuisance at most. In my case, I have an injured left knee; however, it has no employment implications to me because of my chosen career as a trial lawyer.

To be effective, you must be confident the jury will follow you. Unless you believe and really understand why the principles within the "as is" instruction are so important, you'll be receiving many compromise verdicts. This takes us back to embracing the history and philosophy discussed earlier. Qualitative arguments aren't appeals for sympathy, they're an invitation for the jury to apply their common sense and the "as is" instruction from the judge.

Once the client is positioned low, and accurately, along the preinjury A scale, say a 2 or 3, the next step is to not overstate the extent of the C or later injury. You don't need to. You do this because you think it's necessary. It's not! If you believe in the legitimacy of the "as is" instruction, and the distinctions embodied in Moe Levine's question focusing upon "not what they took from your client, but what they left him with," then everything falls into

2. This argument was perfected by the late Marvin Lewis of San Francisco. He was a president of the California Trial Lawyers Association, Western Trial Lawyers, and American Trial Lawyers Association (now known as the American Association of Justice). *Marvin E. Lewis, 84, A Pioneering Lawyer*, N.Y. Times, October 7, 1991, at B10.

place. If you can't or don't embrace this philosophy, then you can't make the argument; your personal conviction and ethos are a large part of the persuasion calculus.

There are many other benefits to the qualitative approach. You and your clients will have enhanced credibility with juries, opposing counsel, the court, and not to mention your own peace of mind. Trials are quicker because you're up front with an accurate assessment of the facts. Courts will welcome you back as an advocate because you're A B C, meaning accurate, brief, and clear. There's no huffing and puffing. If anything, there's a bit of understatement in both your client's preinjury position on the A list and the extent of the later loss. Can you believe that? A plaintiff's lawyer effectively advocating with an understatement?

Remember, most of what defense lawyers do is point out the exaggerations and inconsistencies within the plaintiff's case. No wonder the adversary model is so aptly named. You've just eliminated half of the defense's justified cross-exam. It should now be apparent why less can be more.

Vary your arguments to fit each jury. During jury selection, learn what's important and special with each juror. What are their hobbies? What do they enjoy doing most? Even though the plaintiff's loss may not be big to others, if any of the jurors suffered a loss of something small but important to them, they should consider how profoundly diminished their lives would be. The law protects the weakest among us, "the black and white, old and young, weak and strong, those who shine shoes, and those who wear the shined shoes." You must make the idea of the plaintiff's loss personal and relevant to each juror.

You can think of endless examples. After the plaintiff's loss, what has the defendant now left the plaintiff with, in the largest sense? Enlarge your paradigm. Extrapolate from the impairment-disability model. Don't be self-limiting and linear.

The question is, how do you persuade jurors to *qualitatively* apply the "as is" rule? Those who are young, strong, or wealthy will have real trouble shifting to a more touchy-feely way of understanding. You've got to access their sense of vulnerability. This is

something everyone resists; no one welcomes these feelings. Remind the jurors that, if they're lucky, each of them will someday be old, infirm, and powerless during their final days. So, no matter how strong and independent we may be today, each of us will face our time of weakness and vulnerability. The aging process guarantees this.

Develop your case themes around your case strengths. It may be something about the defendant or a positive aspect of the plaintiff. Be creative, let your imagination go. There's plenty of time to later fine-tune and chisel the specifics of the opening and closing. What are the most attractive features of the case? Find and play to your trump suit.

Template for Maximizing Psychological Injuries

Let's summarize what we've said so far. There's a model or template that's anchored in the law as expressed in the court's jury instructions and driven by merging arguments originally devised by Marvin Lewis and Moe Levine. You're arguing for a legal result from legal rules. Request that the judge instruct the jury before the closing arguments, also ask that a written copy of the instructions be provided to the jurors for reference during deliberations. Enlarge and prominently display the instructions you rely on during your closing arguments to the jury.[3]

1. Start with the language from your instructions declaring that emotional injuries are compensable: "The (pain/mental suffering/emotional distress/humiliation) that the Plaintiff has sustained from the time (he/she) was injured and that the Plaintiff will probably sustain in the future." The selected content of most state's civil jury instructions are sufficient, if properly argued. Consider requesting supplemental instructions on emotional losses. An example is:

3. James McElhaney, *Trial Notebook* xviii, 189, 693 (4th ed. 2006). Remember again that I'm of the Jim McElhaney school on plagiarism. Scholarship is theft with attribution.

> You are further instructed that when the law says that a recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as "physical pain." It includes the various forms that mental suffering may take, which will vary in each case with the nervous temperament, age, and sex of a person, his or her ability to stand shock, and the nature of the injuries. Mental worry, distress, grief, and mortification, where they are shown to exist, are a proper component of that mental suffering for which the law entitles the injured party to redress in money damages.
>
> *Fehely v. Senders,* 170 Or. 457, 134 P.2d 283 (1943); *Capelouto v. Kaiser Found. Hosp.,* 7 Cal. 3d 889, 500 P.2d 880, 883 (1972).

Explain the difference between pain and suffering. Pain has a physical connotation, such as pulling your fingers away from something hot. Suffering suggests an emotional dimension.

2. Discuss your client's preinjury status. Consider counterintuitively reducing or lowering the plaintiff's preinjury condition (the A list). This is Marvin Lewis's contribution.

3. Argue qualitative losses by explaining: "She didn't have much before, but it was everything she had," which is a variation of Moe Levine's "When you take away half, who has lost more, the beggar with a mere dollar or the millionaire?" Moe then added: "It isn't what you take from them, it's what you leave them with."

These arguments are legally grounded in the "previous infirm condition" or "as is" instruction. Plaintiff's lawyers use variations of these arguments when arguing the serious consequences of an objectively small injury or minor impairment in the life of a specific individual (for example, loss of feeling in a finger of a neurosurgeon). Avoid the aggravation of a pre-

existing condition instruction because it generally states there is to be no compensation for the plaintiff's prior condition, while the previous infirm condition instruction doesn't usually say this.

4. Next, argue your state's multiple causation rules declared in your jury instructions. They legally explain how a small or benign B liability event can (legally) cause big damages to a fragile plaintiff who is low on the A list. Here's where "one man's meat is another's poison" and "the straw that broke the camel's back" analogies fit. When you have a benign liability event (B), a fragile plaintiff explains why a "modest" impact had such a profound effect.
5. During jury selection ask each of the jurors about their hobbies and leisure interests, then have them discuss what the loss of these activities would mean to them. This dialogue foreshadows your closing argument.
6. During closing ask the jurors to compare the plaintiff's important and personal qualitative losses to what it would mean to each of the jurors if they were to lose something they treasured, even though others may not value the loss similarly.
7. Argue for specific dollars on an enlarged copy of the verdict form. Remember that memorable line Tom Cruise delivered in the 1996 movie *Jerry Maguire*? "Show me the money!" Justice means full compensation for all the plaintiff's legal losses, and that means one dollar less than full justice is one dollar of injustice.

Theme Variations

Let's next examine how good lawyers work within the generic formula of $\$ = (A - C) \times B$ to identify the strengths of their case, which then become their case themes. By this time you should now understand how sterile and aseptic damages based on subtraction can be. At first you may not be comfortable with the qualitative

application, but sit back and relax. Let's explore how dynamic the $ = (A – C) × B model can be.

What's more important, an attractive plaintiff or a target defendant? While there's no one answer to this, it captures an enduring enigma. Let's go back to two tenets of advocacy lore: liability provokes damages, and its corollary, damages provoke liability. What are the ideas behind these statements? They prove our formula, $ = (A – C) × B, is really an elastic process. Let's study some variations to our standard formula that effective trial lawyers use when creatively advocating.

1. Liability provokes damages. Here we place the accent on the liability event B if it's aggravated. Within our formula, we symbolically express this by using an uppercase *B* if the defendant's misconduct is aggravated or quasi-punitive in nature, and a lowercase *b* when it's more benign:

   $ = (A – C) × B when aggravated or

   $ = (A – C) × b when benign.

   If our liability event is an ongoing series of events, such as in repeated sexual harassment, we can reflect this by labeling the event B (1–10 or 20) meaning the event occurred multiple times, perhaps an exact number or maybe an estimate.

2. Damages provoke liability. This means that A – C is significant, or that you have good damages facts. Here, the extrinsic or traditional quantitative model fits nicely, so there's no need to shift to a qualitative model. There's no need to ask what they've left the plaintiff with, as you can win by emphasizing what the plaintiff's lost.

   You have the facts, you can easily answer what they took from the plaintiff, and it's self-evident how important these losses are. With these facts, the formula is expressed as follows:

   $ = (A – C) × b

   That means the internal difference between the before and after on our 0 to 10 scale is at least a 3. The larger the difference between A and C, the bigger the damages, and thus the better

the case. The challenge with this kind of case is to avoid overtrying it. Think here about a burn case.

3. Case themes that are grounded in and further desirable community values. Suppose you have a dispute arising over the meaning of an oral agreement, solidified only by a handshake. An attractive case theme might be, "let's put honor back in a handshake."[4] Find a value you can present the facts from. In other words, search for an aspect of the liability or B component for your case theme. By rendering a significant verdict for your client, the jury affirms the importance of these values.
4. The faces behind the formula. Is the plaintiff attractive or the defendant unappealing? This means the damages are processed in the context of who the plaintiff actually is, and in like fashion, the liability facts equally depend on the defendant's citizenship and status. Think of this as a referendum on each party's citizenship. In our formula, and further continuing with our algebraic formulation, this is represented by ×P for the plaintiff, meaning "times the plaintiff." And in a similar vein, ×D means "times the defendant." If the particular party will make a favorable or unfavorable impression, you can designate some symbol expressing this, such as a plus sign (+) if positive, or a minus sign (−) if negative. Drawing from the liability analogy, you can use a capital letter if good, and a lowercase if bad. Once again good or bad is obviously a function of perspective.
5. The community where the case is being tried. More specifically, consider the committee of the community at large, meaning the specific jury, selected to resolve this dispute. Everything that happens has meaning only as the particular jury deciding the case interprets it. If the jury doesn't agree, then the event doesn't have meaning. That's the power of the jury. When

4. This is Gerry Spence's argument in a case he tried in Chicago for a small family business who sued McDonald's for breach of an oral contract. Harry Mills, *Artful Persuasion: How to Command Attention, Change Minds, and Influence People* 136 (2000); *see In re* Central Ice Cream Co., 59 B.R. 476 (1985).

you're a plaintiff and are on the receiving end of the jury nullification, it smells exactly like bias and prejudice. When you're the beneficiary, it's simply common sense.

6. The judge. We've all had the unfortunate experience of trying a case in front of a mediocre judge, or a good judge who was having a bad day. If the jury senses you aren't getting a fair shake at the hands of this judge, perhaps they'll lean your way just enough to level the playing field.

7. The court's instructions. Review the exact words of the court's instructions. Ask yourself, "is there a common sense policy reason for a rule or law given in the court's instructions that reinforces my case theme?" If an instruction doesn't comport with community values, then the jury will ignore or nullify it. Conversely, if your argument really is common sense, then it doesn't need the support of an instruction to be persuasive. If an argument is in keeping with jury values, you don't need the "dignity of the robe" via its instructions for reinforcement, but it sure helps.

8. The B event. When the nature of the B event is really deplorable, then argue that. Don't emphasize A – C, or any type of subtraction (quantitative). Instead, emphasize what the plaintiff was left with (qualitative). In a case involving sexual abuse of a child, ask, "If this case isn't worth $3 million, then how much more did the plaintiff have to endure before it's worth that amount?" This shifts the focus from what actually happened to the plaintiff as a matter of quantification, to the base nature of what happened to her.

   Again, you're always asking what's your trump suit? Ask and answer this question long before trial. Then, once you've generated your theme or themes, align the rest of the case to cleave with your strengths.

9. A Fragile plaintiff. A fragile plaintiff explains causation and why it took so little (meaning a very small *b*) to have produced such devastating results in this particular plaintiff. It also

explains why "the straw can break the camel's back" and why a wrongdoer takes their fragile and predisposed victim as is.

These are just some ideas. You'll see features within the case that resonate with you. The author F. Scott Fitzgerald said no one reads a long book that isn't about them. Now you're starting to personalize the case in a way that accesses who you are in an authentic way.