Praise for *The Domino Theory*

“Ed Capozzi found an ingenious way to drain the verbal swamp of proximate cause and make the concept as clear and easy for the jury as a row of falling dominos. The proof of its merit is that it seems so obvious in hindsight. I said to myself, ‘Why didn’t I think of that?’ — the mark of a really good idea.”

—Patrick Malone, member of the Inner Circle of Advocates, coauthor of *Rules of the Road*, author of *The Fearless Cross-Examiner*

“An engaging book about proximate cause. With *The Domino Theory*, Ed Capozzi gives you tips and insight on how to come up with bold strategies for demonstrating this confusing jury issue.”

—Rodney Jew, litigation strategist

“Too many well-tried plaintiff’s cases have been lost because of juror confusion over what proximate cause means. With brilliant simplicity, Ed Capozzi presents an intuitive and logical approach that allows jurors to hear and see how the accident cause connects to the injury evidence, enabling them to ‘get it.’

And the book is something far more than that. It is a plaintiff lawyer’s roadmap to success. Ed takes the reader through a methodology that, if followed faithfully, will bring success beyond imagination. I have been trying personal injury cases for forty-two years, and Ed brings a rarely encountered wisdom to so-called ‘garden variety’ soft-tissue cases. Once you adopt and practice the domino theory, you will never ever call a soft-tissue case ‘garden variety’ again, and nor will your adversaries.”

—Michael Maggiano, past president of the New Jersey Association for Justice and the Melvin Belli Society, member of the Million Advocates Dollar Forum, and fellow of the American College of Trial Lawyers

“Ed Capozzi’s *The Domino Theory* is the ultimate set of builders’ plans and specifications on how to prevail on the most vital issues in every personal injury case. It is a masterpiece of winning advocacy. This book will help every plaintiff’s attorney maximize the result for his or her client. It is such a fun and interesting read. Every lawyer in our
firm will have this book—it is a practitioner’s manual on how to get it done! Ed’s writing makes for such a practical and easy-to-understand guidebook on practices, steps, principles, and more. The chapter-by-chapter “Takeaways” are stepping stones to victory. This book is a must for every trial lawyer’s library!

—John Romano, past president of the Academy of Florida Trial Lawyers, the Southern Trial Lawyers Association, and the National Trial Lawyers Association
The Domino Theory

Edward P. Capozzi

Trial Guides, LLC
This book is dedicated to my beautiful wife, Mariana, and my four children: Alex, James, Olivia, and Thomas. And of course, my mom and dad.
# Table of Contents

Introduction ............................................................. 3
1. You ................................................................. 7
2. Your Client ......................................................... 15
3. Customize the Case .............................................. 23
4. Collecting the Dominos ......................................... 29
5. Interrogatories ...................................................... 37
6. Depositions .......................................................... 43
7. Defense Medical Exams ......................................... 57
8. Settlement and Mediation Packages ......................... 71
9. The Pretrial Exchange ............................................ 75
10. Going to Trial ...................................................... 81
11. Opening Statement ............................................... 87
12. Discussing the Accident and Treatment in Opening Statement .................................................. 93
13. The Elements ...................................................... 101
14. A Preponderance of the Evidence ......................... 117
15. Common Soft-Tissue Injuries ................................. 121
16. The Diagnosis ..................................................... 135
17. Soldiers and Tanks .............................................. 151
18. Damages in Opening Statement ............................. 157
19. Proving the Plaintiff’s Case ................................... 161
20. Direct Examination of the Plaintiff ....................... 165
21. Direct Examination of the Plaintiff’s Physicians .173
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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 date 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.

The cases described in this book are composites, and the names and other identifying details of participants, litigants, witnesses, and counsel (other than the author of this book) have been fictionalized except where otherwise expressly stated.

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Introduction

The Domino Theory

You have a row of dominos set up, you knock over the first one, and what will happen to the last one is the certainty that it will go over very quickly.

President Dwight D. Eisenhower

Proximate cause is one of the most confusing issues a jury will encounter. I cannot tell you how many times the foreperson has requested the judge reread the definition of proximate cause during deliberations. Knowing this, I reiterate its definition several times during my opening and closing arguments. Proximate cause is a cause that is not remote. It does not have to be the direct cause, but it does have to be a substantial factor in bringing about the resultant accident and injuries. The defendant’s negligence (the cause) sets in motion a natural and continuous sequence of events. But for the defendant’s initial negligence, these events would not have occurred. There are several definitions of proximate cause. In fact, every State has its own definition. This is also true for the Federal Courts and many legal books and dictionaries. These various definitions all contain the same premise: a proximate cause is a cause that sets a sequence of events in motion.¹

¹ The Appendix at the end of this book lists definitions of proximate cause by State, legal treatise, and legal dictionary.
I practice law in New Jersey. I am a plaintiff’s lawyer specializing in personal injury cases involving trucking accidents, automobile accidents, and premises liability matters. I have been trying approximately fifteen cases a year for the last ten years—and not only for my firm, but other firms as well. I pride myself on thoroughly understanding the medicine and using analogies to make it simple for the jury.

I do this through a show-and-tell format that simplifies confusing and complex medical and legal concepts—concepts that jurors typically know nothing about and that are about to be thrust upon them. You only have a brief period of time to teach them these very complicated principles. I have practiced simplifying medical and legal principles at trial, in my conference room, in restaurants, bars, in my home, and in my car. I have conducted focus groups, not to determine the outcome or value of a case, but just to learn which medical, legal, or technological demonstration is easiest for juries to understand.

When I first began trying cases, I did not completely understand the proximate cause charge. Notwithstanding, I was still winning a majority of my cases. However, today I probably wouldn’t lose the cases I lost then because I have a clearer understanding of proximate cause. New Jersey Courts define proximate cause as follows:

By proximate cause, I refer to a cause that in a natural and continuous sequence produces the accident/incident/event and resulting injury/loss/harm and without which the resulting accident/incident/event or injury/loss/harm would not have occurred. A person who is negligent is held responsible for any accident/incident/event or injury/loss/harm that results in the ordinary course of events from his/her/its negligence. This means that you must first find that the resulting accident/incident/event or injury/loss/harm to [name of plaintiff or other party] would not have occurred but
for the negligent conduct of [name of defendant or other party]. Second, you must find that [name of plaintiff or defendant] negligent conduct was a substantial factor in bringing about the resulting accident or injury/loss/harm. By substantial, I mean that the cause is not remote, trivial or inconsequential.

If you find that [name of defendant or other party]’s negligence was a cause of the accident/incident/event and that such negligence was a substantial factor in bringing about the injury/loss/harm, then you should find that [name of defendant or other party] was a proximate cause of [name of plaintiff]’s injury/loss/harm.²

As you can see, it is no surprise that your average juror, when listening to this charge among the dozens of others, fails to understand it. In fact, many experienced lawyers still don’t understand it. After years of attempting to wrap my head around proximate cause, I set out to discover a way to simplify this concept for trial. I came up with the domino theory.

During my opening and closing statements, I explain that but for the initial negligence of the defendant, the accident and my client’s initial pain and following treatment, diagnosis, surgery, and continuing pain would not have occurred. Thus the defendant’s negligence was both a proximate cause of the accident and a proximate cause of my client’s injuries. I demonstrate this using dominos that are each labeled with a specific event. You can add as many events, or dominos, to the chain as you need to tighten up your argument. I usually line them up on the jury rail or set up a long table that allows me to fully display what occurred following the defendant’s initial act of negligence that ultimately caused my client’s injuries. This demonstration is the

² New Jersey Civil Model Jury Charges available at http://www.judiciary.state.nj.us/civil/civindx.htm
culmination of a consistent theme that I interweave throughout the presentation of my client’s case.

This book will take you through a lawsuit, beginning with evaluating your work ethic as a lawyer and onto client intake, prelitigation, the lawsuit’s filing, discovery, and trial. I also include how I use the domino theory to demonstrate all of the elements needed to prove a personal injury case: negligence, injuries, permanence, preponderance of the evidence, damages, and proximate cause. I will share not only some of the tactics I created and use at trial, but also some of the effective trial techniques I have learned from my colleagues that I regularly use in the courtroom.

Additionally, this book will explain how to set up your case presuit, as well as during the discovery process, to collect the dominos—or facts and evidence—that you’ll ultimately use at trial to prove proximate cause. The domino theory can also assist you in preparing your case for settlement by preparing a pretrial settlement package showing that the negligence of the defendant was a proximate cause of the accident and laying out the resultant accident and injuries in an indisputable chronological format.
When you are inspired by some great purpose, some extraordinary project, all of your thoughts break their bonds, your mind transcends limitations, your consciousness expands in every direction and you find yourself in a new, great, and wonderful world. Dormant forces, faculties, and talents become alive and you discover yourself to be a greater person than you ever dreamed yourself to be.

Anonymous

Being a lawyer is not a job; it’s a career. Being a trial lawyer is not a career; it’s a lifestyle. You try a lot of cases, you attend and lecture at many seminars, you get involved in the plaintiff’s bar associations, you discuss the newest case law with your colleagues and you share information with your brothers and sisters of the plaintiff’s bar. You live and breathe the law every minute of every day. You work hard and play harder. Even while at play, you discuss the law over cocktails, tell stories about your cases, and bounce ideas off of anyone that will listen.
Recently, I gave an opening statement in my sleep. My poor wife had to listen to the whole thing. It is not uncommon for me to dream about a trial while I am in the middle of it. I am so consumed with trial work that I live, breathe, and even dream it.

My father, Louis Capozzi, was a linesman for the Long Island Lighting Company. He worked there for forty-six years and he never used a single sick day in his entire career. In fact, when he retired he had forty-six years worth of sick time in the bank. Unfortunately, I never saw much of him growing up because he was always working. He was also a bartender at a bowling alley and had his own catering business with my Uncle Gennaro.

The one possession I did receive when he passed away a few years ago was the ashtray he received as a token for his commitment and dedication to his job for working two million man-hours. It’s an ashtray. I still have it and cherish it because it took my father, and his division, the Queens/Nassau County Division, two million hours of hard work to earn it. But that is not all he left me.

I also received his intense and relentless work ethic. My dad was a family man. He was married to my mom for over fifty years, had four kids, and held three jobs just to get us by. He was a big time Mets and Jets fan and always found time to take us to Shea Stadium to see both teams play. He never turned down overtime or a catering job and his work ethic was as rock-solid as his forearms. My mom ran the household. She cooked, is the cleanest person I have ever encountered in my life, and used the threat of “wait ‘til your father gets home,” which always worked, to keep us in line.

If you do not have a solid work ethic, then being a trial lawyer is not the career for you. I have been a sanitation worker, a landscaper, a tile and marble setter, a contractor, a pizza maker, a pizza delivery boy, a butcher, and a musician. I began working at about age ten delivering papers.
I had two paper routes, the *Daily News* in the morning before school and the *Long Island Press* in the afternoon after school. I would ride my bike with a canvas bag full of newspapers attached to the handlebars of my Schwinn bicycle. I cannot tell you how many times, in the rain and the snow, the weight of the papers made my bike topple over when I was delivering them. Even worse, at night I had to ride my bike to all my customers’ houses and beg them to pay the money they owed for the weekly newspapers. I would ring the doorbell and yell, “Collect!”

They would either ignore me or yell back, “I’ll pay you next week!” I had this little book that I used to keep track of the money they owed. I mean, the paper was like maybe seventy-five cents for the week, including Sunday, and these people made it so difficult to collect. My pay came out of that money because I had to pay the newspaper companies their money first before I received mine. So I was always behind in my own income because the deadbeats that took the newspapers and waited four, five, or six weeks to pay me, had *my* money.

Little did I know that this was a premonition of the life I would someday lead, chasing insurance companies for other people’s money after these companies had taken the premiums for the coverage my clients had selected, been promised, and paid for. When that coverage has been either due to someone else, because the insured injured someone, or has been against my client’s own insurance company for uninsured or under-insured motorist coverage, they’ve used every sleazy tactic in their power not to pay the claim. This has included hiring physicians that have systematically never found anyone injured.

This is why the disdain I hold for the insurance companies is unmatched by any other hatred I have experienced in my life, (except maybe for the Red Sox and Patriots). This injustice is my inspiration. When you are as passionate as I am about forcing insurance companies to pay the coverage they owe, your passion is a force that cannot be stopped.
You must try cases. You must put fear in the minds of the adjusters and defense lawyers. You cannot expedite trials, try cases without experts, cap damages at the policy limits, or enter into high-low agreements. The only risk the insurance companies have at trial is a runaway or an excess verdict. You cannot eliminate that risk.

Insurance companies have lobbied laws that limit your clients’ right to sue under the guise that it will save money for the client. In New Jersey we have the AICRA statute, the Automobile Insurance Cost Reduction Act of 1998. AICRA established the limitation on lawsuit option. This option enables insurance purchasers to pay a lower premium for limitations on their right to sue. AICRA also adds an additional hurdle to filing a lawsuit. Pursuant to AICRA section 39:6A-8a, your client must prove that she has suffered an injury that meets one of the six following categories as a prerequisite to having the right to file suit and provide certification from a treating physician affirming one of these six injuries:

1. Death
2. Dismemberment
3. Significant disfigurement or significant scarring
4. A displaced fracture
5. Loss of a fetus
6. A permanent injury

Most drivers select this option as they just want to drive, and don’t think about protecting their loved ones or themselves from harm if an accident occurs. Who expects to have an automobile accident? These drivers just want to be legally able to drive a car and get to work and the limitation on lawsuit option is the cheapest way to accomplish just that.

Many lawyers do not accept cases if the limitation on lawsuit option was selected. The reason is that the majority of injury cases
You are soft-tissue cases such as neck, back, knee, and shoulder tears or spinal disc injuries. As these cases do not fall within categories one through five, they must be proven through category six: permanency. Section 39:6A-8a of AICRA defines permanent injury as the following: “an injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment.” You must accept and try these cases.

Any lawyer can win a case where someone suffers an injury within categories one through five. It’s the soft-tissue or whiplash-type injuries that insurance companies want to defend. These cases are difficult to win without excellent lawyering skills, knowledge of the medicine, and the money to properly finance a case from beginning to trial and beyond. You need to invest in your cases, emotionally and financially.

Most lawyers refuse to take soft-tissue or whiplash cases because insurance companies force plaintiffs to try them. When attorneys do not accept these types of cases, take a voluntary dismissal at trial, or even worse—settle them for peanuts, the insurance companies win. If your website states that you are a certified civil trial attorney, a member of the Million Dollar Advocates Forum, or you fight for the little guy, then prove it. Go to trial.

When you refuse to take on soft-tissue cases because of an insurance company’s policy to try limitation on lawsuit policies, you embolden them. You assure them of what they already know: most personal injury attorneys cannot and will not try cases. They only settle. They are used car salesmen, not trial attorneys. The insurance companies think the majority of us can make a hell of a television commercial but cannot try a case.

I often lecture that the limitation on lawsuit is a myth. It is. Insurance companies do not defend soft-tissue limitation on lawsuit cases on the issue of permanency. They try them on the issue of causation. The insurance company doctors do not opine the injury is not permanent, they opine the plaintiff did not suffer a permanent
injury caused by the accident. They opine that the herniated disc was preexisting, not that the herniated disc is not permanent or will heal to function normally. Of course it will not. In fact, proving permanency helps you, the plaintiff’s trial lawyer. If you do win on causation, then permanency increases damages. The domino theory will make the defendant’s argument weak and ridiculous.

So try cases, and try the good ones. Try the cases with credible clients, decent property damage, and compelling facts. You must try these cases properly and, if given the opportunity by your firm to do just that, you must win more than you lose.

You can’t waste opportunity. I recently heard Jim Craig, the goalie for the 1980 United States Olympic Hockey Team, speak at an event. He said that the key to his success, not only during the Olympic Games but also afterwards as a motivational speaker and businessman, was that he was given the opportunity to play and he took advantage of it. This led to all of the great things he achieved in his life. For those young lawyers just out of law school or who have been practicing for a short period of time, I cannot stress it enough: if your firm’s partners give you the opportunity to go and try cases, and try them correctly—that means spend money and put on the best case you can—do it. If you have talent, you can write your own book. You can become a heavy hitter in the game of trial advocacy.

The financial and emotional rewards for doing something as great as being a trial attorney are endless. There is no ceiling. But you must do it for the right reasons. You must do it for the injured clients. The rewards you sow, not only spiritually but also economically, will be life changing. I am so thankful that I am a trial lawyer. It is the greatest profession in the world. I wake up every morning, bright eyed and ready to go.

While driving in, I smile all the way to the office listening to music like Led Zeppelin, Nirvana, The Beatles, or Radiohead. I save Black Sabbath, Motley Crue, and Alice in Chains for trials. I am blessed to say I have never worked a day in my life since becoming
a trial lawyer. How can something so much fun be work? If you truly enjoy what you do, as stressful and taxing as trial work can be, it will be an adventure, a quest to learn everything you can, and keep you as knowledgeable and prepared as required for excellence.

There was a six or seven year period of my career where I was trying fifteen or more cases a year to conclusion. That does not include some weeks when I’d pick three juries and settle the cases after opening. That occurred on several occasions. I was appearing at trial calls every Monday with three or four cases on the trial list. I was settling the majority of my cases and trying the rest. If I lost I was suicidal. If I won my happiness was immeasurable. It was killing me. I needed to be able to handle losses with the same emotion as I did when I won, so I developed the C. C. Sabathia analogy.

One evening, I was watching the Yankee game and C. C. Sabathia was pitching. He was having a phenomenal year and was the front-runner to win the Cy Young Award. His record was 20–6. I started to think, wow, he lost six times and he is the best. Every five days he takes the mound, and sometimes he is lights out, sometimes he struggles and still wins, sometimes he gets creamed and wins and sometimes he just gets creamed. But every five days he still goes out there and takes the ball.

I was able to view the grind of trials every week or two with this simple sports related thought pattern. This is just like going to court every week: new opponent, new case, new city. Sometimes I massacre my opponent, sometimes I do a good job and win, sometimes I do a good enough job to win and lose, and sometimes I lose badly. But other times I hit home runs.

If you do not get into the batter’s box, or are afraid of striking out, you will never hit a home run and feel the greatest feeling you have ever experienced: a verdict. If you are given the opportunity to try cases and want to succeed in this business, then I suggest you take it, or seek out an office that will give you the opportunity. Otherwise, sit on the bench and watch the other players play.
CHAPTER TAKEAWAYS

◆ You must make the law your life.

◆ You must have a tireless work ethic.

◆ You must try cases. The insurance companies know who tries cases and who does not and the offers you receive will reflect it.

◆ You must invest financially in your cases to increase your ability to be successful.

◆ If the opportunity to correctly try cases is given to you, do not waste it. If it is not given to you, go find it elsewhere.