



David Ball on Damages in Civil Rights Cases

National Police Accountability Project

A Project of the National Lawyers Guild

Thursday, October 15, 2009

Marriott Renaissance Hotel Seattle

Seattle, WA 98104



October 15, 2009

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Thank you for joining us today. The National Police Accountability Project (NPAP) has offered CLE seminars since the project's inception in 1999. This year, NPAP is presenting David Ball on Damages in Civil Rights Cases. By providing a forum to learn from the nation's most influential and respected jury researcher and trial consultant we hope you will acquire techniques and strategies to deal with the worsening consequences of tort-“reform” and to help you win even your toughest cases.

The National Police Accountability Project, a project of the National Lawyers Guild, is a non-profit organization dedicated to ending police abuse of authority through coordinated legal action, public education, and support for grassroots and victims organizations combating law enforcement misconduct.

The NPAP has members nationwide and is steadily growing. The project offers a variety of services to its members. Our member only listserv has become a tremendous resource to share legal analysis, litigation strategy and information regarding expert witnesses and other topics. The Section 1983 Subscription Series, quarterly updates on critical Section 1983 case law developments, can be accessed by members and non-members for an additional annual fee; open to everyone we publish Amicus Briefs. To find out more about our organization please visit our web page at www.nlg-npap.org.

As always, many people have worked to make this event possible. Our thanks go to speaker David Ball who charged a discounted fee our small operation can afford and to Kelly Ramsdale ([Kelly Ramsdale & Associates, Denver CO](#)) and Jackie Bellows ([VanPelt Corbett Bellows, Seattle WA](#)) who generously sponsored this event; to our CLE committee members Fred Diamondstone, Howard Friedman, Julia Sherwin, Brian Spears and Paul Wright who have worked with me for many weeks; to Lembhard Howell for his introduction and to Howard Friedman for the moderation. Special thanks go to our hosts, the national office of the NLG and the Seattle chapter, as well as Hiedi Simon, the NLG convention planner, who always makes sure that NPAP has fine accommodations. Without volunteers, nothing goes in the non-profit world - many thanks go to King Downing, Tim Philips and Rachel Sledge for helping with registration and tying loose ends. We are grateful to John Burton and Hank Sherrod for sharing trial documents for this publication. Finally, we are indebted to the American Association for Justice and TRIAL magazine for the permission to reprint David Ball's article.

The National Police Accountability Project

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David Ball on Damages in Civil Rights Cases

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By David Ball

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NPAP member attorneys John Burton & Peter Williamson, Pasadena and Woodland Hills, CA

About the Faculty

Speaker: DAVID BALL is the nation's most influential and respected jury researcher and trial consultant. His book *David Ball on Damages*, which is the best-selling trial advocacy book ever written, has revolutionized trial advocacy across the country, and provided the first and most effective for effectively dealing with the worsening consequences of tort-“reform.” Since 1991 Dr. Ball has consulted on civil and criminal cases across the country. He founded JuryWatch, Inc., now called Miller Malekpour & Ball, the nation's only three consultants who can provide case guidance based on “Reptilian”-based methods. Dr. Ball teaches at law schools across the country, and is the nation's most in-demand CLE teacher. His three trial advocacy books (and his theater text analysis book) all remain best-sellers. He came to jury consulting from a long career as professional theater director, producer, theorist, and writer. He initially trained in engineering and physics, his favorite job was taxi driver in the early 60s, and his daddy was a Catskill Mountain bootlegger.

Introduction: LEMBARD HOWELL has been a lawyer in Washington State since 1966. He earned a bachelor's degree in History, with Honors, from Lafayette College in 1958 and a law degree from New York University in 1964. He began his legal career as a law clerk for the Washington State Supreme Court, then worked as an assistant Washington State Attorney General. In 1969, he and former Congressman John Miller formed the law firm Miller & Howell, which later became Miller, Howell & Watson. In 1973 Lem began his own firm. The Law Offices of Lem G. Howell, P.S. is representing people who have been injured by the negligent and wrongful acts of others and people who have had their civil rights violated, among them victims of police misconduct (most recently *Bradford v. Seattle*, USDC, W.D. Wash., No. C07-365-JPD (July 16, 2008); 2008 U.S. Dist. LEXIS 65648). He is a founding member of the Loren Miller Bar Association (Washington State's African-American bar), a life member of the Association of Trial Lawyers of America, a founding member of Trial Lawyers for Public Justice, an Eagle member of the Washington State Trial Lawyers Association (WSTLA), an advocate member of the American Board of Trial Advocates (ABOTA), and a member of the Damage Attorneys Round Table. Lem has received many awards and honors, among them the Trial Lawyer of the Year for both WSTLA (1986) and the Washington chapter of ABOTA (1994). Lem is also annually listed in America's Best Lawyers and as a "Super Lawyer" in Washington Law & Politics.

Moderation: HOWARD FRIEDMAN is the principal in the Law Offices of Howard Friedman P.C., a civil litigation firm in Boston, Massachusetts. Howard's practice emphasizes representing plaintiffs in civil rights cases. He has represented the plaintiffs in five class actions alleging unconstitutional strip searches at county jails and he has handled about a dozen individual cases alleging unlawful strip searches in prisons, jails and schools. He is the President of the National Police Accountability Project of the National Lawyers Guild. He served as chair of the Civil Rights Section of the Association of Trial Lawyers of America (ATLA) (now the American Association for Justice). He is a graduate of Northeastern University School of Law and Goddard College.

PUBLIC RESPECT AND TRUST

How to Restore and Deserve It

David Ball, Ph.D.
Miller Malekpour & Ball, Durham

David Ball, Ph.D., one of America's most-respected trial consultants, is a three-time best-selling trial advocacy author and jury researcher. His book *David Ball on Damages* has changed the face of American trial advocacy, and he is the country's most in-demand CLE lecturer. In 2002 he received NCATL's Charles Becton Excellence in Teaching Trial Advocacy award. With partners Debra Miller and Artemis Malekpour he consults on civil and criminal cases throughout the US and Canada.

Talk doesn't cook rice.
– Chinese proverb

Deeds, not Words
– Max Roach (American jazz musician and composer)

You know I've heard every line
No baby, not this time
If you want me like you say you want me
Well then, you gotta *show* me
I see you there talking loud
But *you got to show me*.
–Janet Jackson

Please don't explain. *Show me!*
– *My Fair Lady*

Nay, Everyman, I will bide with thee,
I will not forsake thee indeed;
Thou shalt find Good *Deeds* a good friend at need.
– The character Good Deeds in *Everyman*, a medieval drama

The Lord is a God who knows, and by Him *deeds* are weighed.
– 1 Samuel 2:3

Just *do* it!
– Nike

Words are no *deeds*.

– Shakespeare (*Henry VIII*, III,2)

Words to the heat of *deeds* too cold breath gives.

– Shakespeare, (*Macbeth*, II,1)

Talk is gibber-jabber. Action is truth.

– Catherine Walsh, 3rd grade teacher

There is no effective weapon against the persuasive power of good works.

– David Ball

THE PROBLEM

A third of jury-eligible Americans hate and fear trial lawyers. This is because of what they think you *do*. That third “knows” you endanger their well being: their jobs, their health care, their families, their religion. They “know” you make your exorbitant living through trickery and sham cases. They “know” you profit from the misery of others.

A decades-long campaign against you has brought them to this point. That campaign – carefully planned and executed – was unchallenged until a few years ago. By then it was too late to talk our way out of it. The decades-long, one-sided case had convinced a third of Americans that trial lawyers are a serious public menace.

As with all big-lie campaigns, the tort-“reform” campaign has been based on grains of truth in order to make it credible. Some greedy trial lawyers do misuse their power. Some verdicts are or seem outlandish and harmful. Many trial lawyers and their organizations support liberal politicians and judges who threaten the core values of many people. Medical liability insurance, products, services, and personal insurance have indeed gotten more expensive. And a few years ago there was indeed a shortage of flue vaccine. The propagators of tort-“reform” brilliantly and without opposition spun and distorted such truths into a full-blown, nightmarish mix that turned trial lawyers and judges into terrorists – at least in the minds of a third of the public.

Tort-“reform” beliefs are now so firmly embedded – and so firmly supported by a third of every community – that they cannot be changed by anything our side says, no matter how we say it or how often. It’s too late for words. When a trial lawyer or a trial lawyer’s organization uses only words, things get worse.

When a politician you fear and hate talks about justice, decency, and fairness, you hate that politician even more for what you perceive as his or her hypocrisy. That’s what the poisoned third does when they hear us talk about justice or any of our other values. In their eyes, we are a poisoned source - -and no one trusts the words of a poisoned source. Not ever.

For example, try arguing with an extreme believer on the other side of your political fence. As you argue, he will erect a higher fence. If you think you or your organization has ever changed a tort-“reformed” juror’s mind with just words, the only fool in that interchange was likely you.

Worst is when trial lawyers and their organizations rely on shallow platitudes. For example: “*We’re here for the little guy.*” Tort-“reformed” citizen response? “Yeah, you love it when a little guy gets hurt because you make lots of money.”

Or, “*We’re here to protect families.*” Tort-“reformed” translation: “Yeah. *Your families.* Not ours. You’re taking away our health care, our jobs, and our financial well-being.”

Or, “*We’re here for justice.*” Tort-“reformed” translation: “You love justice because you make a fortune from it.”

You can even lose your case simply by starting your opening with, “Ladies and gentlemen, the truck driver’s carelessness hurt my client and *we are here for justice.*” Tort-“reformed” translation? “Here’s one of those greedy lawyers we’ve been warned about.”

When it comes to public opinion, not even facts help us. In every state, a third of the public believes that trial lawyers are driving down the number of physicians in the state. The fact is quite the opposite: the increase in the number of doctors in every state but one is unprecedented. But when we say that, no one believes us, because we are a poisoned source. “When a trial lawyer uses a fact or statistic, it is a lie.”

In our younger years, most of us believed this: “If I just had the chance to sit down and explain to the other side what is wrong with their point of view, they would see the truth in what I say.” Remember when you thought that? Long, long before your first trial, I bet.

Not even Gandhi, Jesus, or Martin Luther King Jr., – extraordinary deployers of words – could rely on words alone. They needed acts and even miracles to persuade. Fortunately, we don’t need miracles. We need just some deeds. Good deeds. Deeds *first*. Then, if still necessary, words, messages, communications. Use the reverse order at your peril. That is the single most fundamental and universally accepted principle of persuasion.

THE SOLUTION

So what do you do? What should your organizations do? What can open the minds of the poisoned third of the public enough to grant admission to our good words, arguments, and facts? How do we regain the ground lost to the decades-long campaign about our supposed evil deeds?

Simple. **We just need to *do things* that help others in ways that do not simultaneously help ourselves. We need to regularly, publically, and selflessly commit altruism.**

In playwriting and screen writing, this foolproof method is called “Save the cat.”¹ The principle: You easily persuade an audience that a character is good by showing the character doing something selfless or even disadvantageous to himself. It works in real life even better than in the movies. (It’s the opposite of kicking the puppy.)

How do we know it’s foolproof? From Shakespeare. From marketing experts. From psychologists. From history. And from those individual attorneys who have already been doing it. Selfless good works is even the prime ingredient of classical oratory, where the focus is always on deeds, never on words – no matter how oratorically soaring the words may be.

Re-read Mark Antony’s “oration” – how he turned the angry Roman crowd that had been cheering Caesar’s assassination. Mark Antony’s brilliance lay not in his words. The crowd did not turn his way until he pointed out what Julius Caesar had *done*.

When WalMart’s reputation was sinking to the point where it affected sales, rather than mounting more sales campaigns, WalMart started *doing good things*, such as improving employee health benefits. And who was first to show up after Hurricane Katrina? WalMart! With three huge 18-wheelers loaded with fresh water. And the same heartless corporation that forced its employees to go to government programs rather than provide health care benefits has now mended its bad reputation by giving out four- dollar prescriptions.

When mid-east terrorists found that their violence was alienating their own supporters, the terrorists started programs of medical help, schools, and other social services for the populace. The terrorists knew better than to rely on words.

All good persuasion uses effective framing, well-chosen words, and active themes. But without a focus on *deeds*, all the framing and words and themes – and even facts – in the world are useless. Just as you can’t win a case by stamping your foot and saying, “My client is right so give us money!” neither can you change the minds of tort-“reformed” jurors by stamping your foot and saying “Trial lawyers are good, so trust us!”

I think I hold the world’s record for the number of tort-“reformed” jurors interviewed in depth. I know every reason for which they fear and loathe you. I know their ugly reactions when they hear our words about how good we are, and about how mistaken their conceptions about us are. They carry their reactions right into trial. Every time.

This kind of information never surfaces in the kind of polling or focus groups our organizations do or sponsor. Such studies are for different – and necessary – purposes. But they illuminate nothing about how citizens influenced by tort-“reform” think and decide when they become jurors. So we had to do our own jury research. As a result, we know what can change the hearts and minds of the public about trial lawyers. We have tried it with the worst of those jurors, and it works. Here’s what we have found out:

¹See Blake Snyder, *Save the Cat*.

THE BIG THREE

Trial lawyers need to do three things.

First, and right now, trial lawyers need to learn how to conduct trials so as to persuade the poisoned jurors to side with the plaintiff. This can seem impossible but the most recent research has shown us how to do it.² If you have a trial coming up, you cannot delay learning this new material.

Second, trial lawyers need more than ever to financially support the legislative efforts of groups such as AAJ and the state trial lawyers organizations to fight anti-litigation legislation. Trial lawyers who do not – yet reap the benefits of those fights – are leeches.

Third, trial lawyers and their organizations must use *effective* methods of changing the minds of the poisoned third of the jury pool. This does not mean words. It means good works. No words or messages – unless accompanied by an equal or greater dose of good works.

We have no need to match the increasing tens of millions the insurance companies, chambers of commerce, and national and international corporations continue spending to wipe out trial lawyers. Unlike any campaign of words, our good works will outweigh every last cent the other side can spend. **There is no effective weapon against the power of selfless good works.**

DOES IT WORK?

Come back with me to the early 1990s. An Atlanta attorney – Don Keenan – is doing some playground injury cases: kids who got mangled or killed because half-ton dead branches will eventually fall, or because jagged pieces of metal fence will poke out young eyes, or because of any other of a number of other common and commonly ignored playground dangers.

Keenan wins the cases he tries, so he's doing right by these kids. But in the dark of night, Keenan finds himself thinking, "Do I really want to lie on my death bed some day thinking that all I've been in my life is the guy who comes around afterwards to clean up? Just the garbage man?" Keenan decided it was not enough. So, he thought, *Why not keep kids from getting hurt in the first place?*

Now there's an act against a trial lawyer's self-interest! Prevent the very kind of harm that provides his cases!

So Keenan printed up a playground safety check-list. He distributed copies all over the place – so parents could take the list to their kid's playground and check off every safety-required item.

² If you are a member of the North Carolina Advocates for Justice (formerly NCATL), you can access its 9/30/08 Med Mal seminar (med mal attorneys only) and its 11/7/08 *David Ball on Damages* seminar. Both explain the new methods that have tilted the playing field in our favor. If you are not an NCATL member, you can purchase DVDs of my AAJ Damages Seminars. Or come to damagesforum.net for other options NB: **Do not use a source more than six months old, since the research is rapidly creating new developments..**

No dead overhanging branches. Check!

No missing rubber safety tips.

No jagged fences.

No broken pavement.

Etc.

Any item on the list that a parent could not check off was to be reported to the principal, then the school superintendent, then – if still necessary – the news media.

In this easy way, Keenan protected innumerable kids. And he showed that he was a caring person. He never stood around proclaiming such counter-productive words as, “I care! I care! Watch me feel how I care!” Instead, he *acted* – and to this day continues to act – to help more and more – in ways *that do not simultaneously enrich himself*.

Because, as everyone knows, saving the cat does not help you when you’re paid to save the cat.

Aside from protecting innumerable kids, Keenan’s good works also gave him a foot in the door of the tort-“reformed” jurors.

Over the years, Keenan did more. His Keenan Kids’ Foundation is a major public force in protecting children in every way they need protecting. And his recent book – *365 Ways To Keep Kids Safe* – carries his work even farther.

Did Keenan’s good deeds help? Well, when he sets foot in trial, there is no tort-“reform.” Jurors know– or quickly find out when they check him out on line, as some on every jury, including yours, do regardless of admonitions from the bench – that Keenan is the guy who protects kids. So when they see him here protecting the child in this particular case, the jurors know he’s doing what he always does: protecting kids who really need protecting.

Not every trial lawyer can start a public service foundation as Keenan did – though you can band together with other lawyers and do it easily. Not everyone can write child safety books that Oprah orders her audience to read, though you can fill your web site with useful safety tips. But every trial attorney can find good and selfless works to do. And even without Oprah’s help, trial lawyers can easily – and inexpensively – let their communities know about their good works. In fact, letting the community know means that others in the community will likely to step forward to help.

THE SPECIFICS

Last year I was explaining the “good works” principle a Los Angeles CLE seminar. “Go do good works!” I pleaded, as I am pleading now. A lawyer raised his hand and asked, “What

good is there we can do?” He was not kidding. The guy lives in the middle of L.A. and could not think of any good that needed doing. The poor guy. Well, in case he’s reading this:

To paraphrase the great 17th-century English poet John Dryden, “*Simply go do the good thing nearest you!*”³ Keenan was doing playground cases. He does kid’s cases. So he did the nearest thing by helping protect playground kids before they got hurt. And now he protects all kinds of kids from all kinds of danger – before they get hurt.

It’s an easy club to join: Do what’s nearest you:. What’s in your world that you can help make safer, or better, or easier for other people – and that does not simultaneously profit you?

Here’s a sampling of what trial lawyers have already done, and what their organizations have done:

2006. Oklahoma. Dangerous heat wave. A trial lawyer is out buying a window air conditioner. Decides to buy two. Goes home, calls a social agency to get the name of someone in danger of dying from the heat. That evening the news on TV features the lawyer installing the air conditioner. Cut to an elderly man inside saying, “I have heard of this kind of thing happening to other people. I never thought it would happen to me.” He goes on to explain how the heat nearly killed him the night before, but that now ... and he begins to cry. One of the more powerful TV moments anyone has ever seen.

That was Saturday.

Monday: Members of the trial lawyers academy in Oklahoma chip in enough to buy dozens of air conditioners. They install them where needed all over the state. Result: lives saved. And great news headlines extolling trial lawyers. Now in Oklahoma, the term “Trial Lawyer” has some new respect – because they called the air-conditioner program “*Trial Lawyers Are Cool.*”

2006: A Connecticut Trial Lawyers Association press release announces that a dozen trial lawyers standing by to provide *free* legal assistance to veterans having difficulty with government agencies. This becomes a leading news story in New York and throughout New England for days. And lots of veterans are being helped.

Years ago: A Midwestern town runs out of money for Fourth of July fireworks. A trial lawyer steps in. To this day he pays the few thousand a year for the fireworks. He dresses up as Uncle Sam and gives the Fourth of July speech. Everyone loves it. He’s become a town hero and institution. Do you think tort-“reform” hurts him when he goes to trial? Nope.

WEB SITES. Smart trial lawyers turn their web sites to good-works use. Rather than the usual transparent-greed sites such as the “*We-are-such-good-lawyers-and-we-will-win-your-case*” site, or the “*Look-at-my- picture-don’t-I-look-professional!*” site, or the “*Here’s me in my library of books I haven’t opened in a decade*” site, or the “*Here’s my great victories where I got*

³ “Do the duty which lieth nearest to thee! Thy second duty will already have become clearer.”

juries to give wads of money that other lawyers wouldn't have gotten," site, lawyers are now transforming their web sites into help centers.

If you do the same, then when jurors look you up – as they will – they'll see you are about caring and good works, not about marketing and greed. So fill your web site with lists of on-line and local injury support groups, books to help victims cope⁴, and other help resources. Facts they need to know about. Your legal wares should be a page they reach by a secondary link. Don't worry; if they need you'll they'll find it. And jurors looking you up will see your attention to good works.

A caring trial lawyer in Wisconsin – Gordon S. Johnson, Jr. – has a good-works web site called *waiting.com*. It is for people who have loved ones in comas. The site comes up on the first or second page of a Google search. It is not the usual greedy, pathetic, and harmful attempt to cram legal services down some poor family's throat. Instead, it is an attempt to ease them, inform them, comfort them, and introduce them to a community of others in their same situation and to experts about comas. It includes Johnson's legal services, but almost as an afterthought.

And yes, he does get cases from it. But he serves the greater good by actually helping people, most of whom are obviously not potential clients.

Another good-works web site: *icanmakeadifference.com*. It's run by the Gary Martin Hayes law firm in Atlanta. And in association with Mothers Against Drunk Driving, Gary Martin Hayes runs public service ads against drunk driving. Hayes is even on the board of MADD. This *shows* (not tells) that he's about safety, not greed. That pays off in every trial. And it helps innumerable people.

A POTPOURRI OF GOOD WORKS

Now, you don't need the list that follows. On your own, you can figure out plenty of good works you can do. But to get your thinking juices flowing:

A number of firms give out bicycle safety helmets.

A rural western firm supplies a staff person every afternoon to serve as school crossing guide.

Your firm can provide free legal services for local social-help agencies or start-up schools. Or serve on the school's or agency's board and publicly seek support for it.

Run an "emergency assistance" hotline on your web site – where people in need can post their needs and people interested in helping can review the site often to see how they can help.

Look into what you can do in your community to help senior citizens, or the homeless, or areas that need neighborhood security programs, or food banks, or ... ad infinitum.

⁴ Such as *Fighting Back, the Rocky Bleier Story* – which has helped countless badly injured folks deal with their agony.

Run a December holidays booth or table at a local mall to collect presents or cash for local underprivileged kids.

Protect the public by providing taxi tokens to intoxicated patrons for a free cab home.

Team with other lawyers to do safety checks of public and business facilities. Report the results on your web site or in a newspaper column.

Become an actively involved supporter and fund-raiser for a worthwhile local charity. (Avoid anything controversial.)

Teach English to immigrants – free. Advertise to attract attendees. (Learn how to teach by Googling TEFL (“Teaching English as a Foreign Language”). You can become an expert in just a few hours.

Teach adult literacy classes.

Tutor kids or any other group that needs tutoring.

Provide continuing help to kids with illnesses, disabilities, or permanent injuries. (For an inspiring example, see the Epilogue to this article.) Team up with a local hospital. Provide help for social workers who deal with these problems. Underwrite in-hospital entertainment for the kids (or do it yourself, if you are entertaining enough to entertain kids). Sponsor in-hospital pet-visitation programs or rehab horse programs (for people, not horses). Help raise money for Sponsor or coach a local Special Olympics team. Provide free tickets to local cultural and sports activities for families that can't afford them. Become a visible advocate for social agencies – MDDD, YM/WCA, shelters, etc.

Post on your web site the fact that hundreds of people needlessly die every day in American hospitals due to safety rule violations. Provide a list of ways people can protect themselves and their loved ones while in the hospital. Or choose any area of public danger. Explain the danger, and give advice in staying safe. For example, you can post safety tips on cars – new and used – for such things as child safety in the back seat. (Some cars are more dangerous than others for kids.)

Post a list of the dangerous streets in your community for bicycles.

Be openly available for free legal help when disaster -- flood, hurricane, etc. – strikes. Organize 25 lawyers across the state who will show up as first responders at the disaster site with the Red Cross or other state disaster relief officials. One state's trial lawyer's academy has already launched this program. The purpose is to help folks with their insurance companies and other legal matters that emerge from the disaster. Free, of course. Just showing people you are there to help soothes one of their greatest worries in such situations.

Get involved with the Bob Woodruff Family Foundation to provide needed support to the overwhelming number of returning brain-injured veterans.

Team up with two or three other trial attorneys to write a regular legal-advice column in a local minority-reader newspaper. (Great for marketing, and you'll provide an essential service.)

Team up with two or three other attorneys to do a weekly drive-time radio show for a local station. Cover topics such as interesting local trials and verdicts, guidance on how to stay safe in various situations (e.g. in hospital), legislative matters that can affect individuals, legal advice people need to know, etc.

Adopt a highway. Keep it spotless.

Help your local children's Guardian ad Litem program, or Friends of the G.A.L. They need and deserve help, your help will change young lives, and you will go to heaven.

If you advertise, 25% of your ads should be helpful, not just marketing pleas. For example, "We do not want to see you as a defendant in court, so please: *Don't text message while driving.*" Or, "If you speed in a school zone we will come get you in trial. So slow down."

If you buy the back page of the phone book, a third of your ad should be a list of emergency numbers or some other useful service..

For a small ad inside the phone book, include a line or two that supports a local cause or delivers a selfless message: "Support Mothers Against Drunk Driving." Or, "Make trial lawyers obsolete: Do everything safely." Or, "Safety First. We already have enough business."

REJECTING CASES: There's a right way and a wrong way to reject cases. The wrong way is how it's almost always done. Debra Miller, one of my partners at Miller Malekpour & Ball, has a better way. It requires more than just saying "no." It requires sending folks away with hope and some real help.

For example, when rejecting someone, provide contact information and descriptive information about no-cost and low-cost support and assistance groups for folks with his or her kinds of injuries. Include area and on-line social and community services, and national resources (e.g., the Anxiety Disorder Association of America or the American Geriatrics Society Foundation for Health in Aging, etc.).

Ask your clients and past clients for other ideas: What has helped them? Relay those ideas to folks you cannot take as clients.

Ask your experts – doctors, psychologists and grief counselors – for ideas. Collect pamphlets, reading recommendations, and other resources. Describe available videos at the local library. Have your staff person compile all this. Have your most empathetic person unhurriedly review it all with the person you have to reject as a client.

Every would-be client comes to you for help. So even when you can't take the case, you still need to help. You have no moral right to waste their time and give nothing in return. You need to stop making people who are in fear and pain audition for you – unless you are prepared to give them something in return more than a chance you'll accept them. Stop the ghastly practice of turning people out without helping them – as if their fear, pain, anger, and loss are beneath your notice except when they can profit you. **When you turn away supplicants without helping in some way, you have made them fruitlessly grovel.** Not a religion in the world allows this.

And obviously, it is not what you intend. But that is exactly how the rejected person and everyone they know perceive it. Result? For each rejectee, you create a small and vocal cadre in *your own community* who now “know” you are made of nothing but greed.

Think about how many such cadres have you created so far.

This means that most trial attorneys — *each one on his or her own* – have turned hundreds and even thousands of folks who were not initially tort-“reformed” into some of the most virulent tort-“reform” jurors. Maybe even on your jury. By the time they get there, you'll have forgotten them. They will never forget you.

So when you reject in the wrong way, you help the insurance companies, the chambers of commerce, and the corporations in the most effective possible way. Because as powerful as your good works can be, *bad works are even more powerful.*

And turning folks away in the wrong way is a profound, inexcusable, and public bad work. Very bad. So please, reject in the right way. Once most firms do that, we'll grow an army of grateful (and surprised) folks in every community – folks who, in return, will help our cause.

More importantly, you'll have done the right thing in the right way.

ORGANIZATIONS

Urge *and help* your state trial lawyers organizations and AAJ to do good works. . Not as minor activities, but as one of their major activities. The organizations will be likely to do so – if you will help. For one of many possibilities:

Debra Miller has created an ambitious but practical plan to help medical malpractice victims. NCATL or some ad-hoc group of individual med mal attorneys would start the North Carolina Patient Safety Fund. It would establish a trust to support meritorious med mal cases that are financially difficult or impossible to pursue without assistance .

The Fund would also generate public awareness of and support for real legal and medical reform, and provide strategic advice on cases from volunteer lawyers and trial consultants. (Our hands are raised.)

NCPSF would help enforce medical safety rules in cases that might not otherwise be affordably prosecutable. Currently there is no such mechanism. So most med mal victims have no recourse, and as a result every future patient is needlessly endangered.

600 people a day die of medical negligence in American hospitals. Countless more are hurt catastrophically in and out of hospitals. Jurors don't know this. Nor do they know the resulting public disability and care costs, lost income, or lost household production values. That is estimated as high as \$29 billion annually. Yet few cases get an attorney because of the expenses of med mal litigation. NCPSF will help offset this, and make it public knowledge.

As an advance source of funds as well as a back-up in case of loss, NCPSF will make it more practical to take these cases. Attorneys will submit cases for the Fund's confidential review board to determine whether the Fund can/should assist. With an attorney's investment of only a single expert evaluation, the review board can see whether the case is supportable and capable of persuading a jury.

This Patient Safety Fund can be funded in several ways. First, by NC lawyers contributing a small percentage of their major wins.

Second, by seeking contributions from clients whose medical cases have resulted in fair verdicts. Often, a client's motive for bringing such a case is to help make sure that what happened to them doesn't happen to anyone else. Ask Wade Byrd (Fayetteville) how this worked with one of his clients. You might be surprised by how willing such folks are to help others get the same level of justice.

Third, by contributions from attorneys whose cases the Fund makes possible.

Fourth, by application to the many philanthropic foundations in NC and around the country that have specific interest in developing this kind of project.

Fifth, by med mal experts who work for plaintiffs. The Fund would be in their interest, because it would result in more assignments for them.

With each successful settlement or verdict, the Fund would publicize the results within the framework of a patient safety campaign.

Ambitious project? Sure. Expensive? Yes – but easy enough to fund. Obviously you can't do it on your own. But there is strength in numbers. If you are interested in seeing such a project, find others who are (Miller Malekpour and Ball, our consulting firm, for example, is readily

available to help develop the project. We even have someone ready to research and write the foundation grant proposals. But you have to join us on the bandwagon.).

It will be a very visible example of how the work of attorneys actually helps.

SHOW THE WORLD. An outstanding attorney in one of America's great law firms heard me teach all of the above. "No!" she said. "My firm has done good works for years – and we still can't win a case!" She gave me an annual report of all their good works. Problem was, the public knew nothing about them. Among Jesus's first recorded words are these: "Neither do men light a candle and put it under a bushel, but on a candlestick; and it giveth light unto all that are in the house." Your good works are your candle, and we have a huge house to light.

Today, that firm lists its good works on its web site. It should be the site's main page, with everything else on sub-pages. But it's a start.

ON LINE: Speaking of web sites: Every political donation you make is easily found on line. Jurors often research this kind of information. No matter what candidate you donate to, it will offend some jurors, leaving them less willing to trust you or want to help you. So make your political donations in your kid's name, or some other name. Your political views are none of a juror's business.

Here's what is their business: Your visible, selfless, good works. They are the only tool that can regain the lost ground of almost 40 years of effective, powerful, well-financed, unanswered tort-"reform" attacks.

We can regain the field, but we'll have to deserve it. So as Nike says, Just do it.

EPILOGUE

Last year a lawyer⁵ cornered me at a conference. "Ball!" He yelled. "You ruined my life!" I felt I needed no more of this conversation and started away. But he grabbed me and continued. He said, "Dammit, Ball, you told us to do good works. Near-at-hand works."

I looked around for accessible escape routes.

He continued: "I do cases for kids who are serious burn victims. I know that the hardest thing – beyond even the pain – is the disfigurement. It's awful for a kid to grow up with. So I started a summer camp for these kids. They get to spend close time with others in the same boat. They gain confidence. They learn how others handle it. The damn idea grew like kudzu. Now I got five burn camps. Takes half my time! I don't earn a cent from it! What the hell?!?"

⁵ See <http://burnadvocatesnetwork.org/>. New Jersey's Sam Davis is the attorney. Send him money to help support the burn camps.

Was he gonna punch me out?

Then he – New Jersey attorney Sam Davis – says, “*And I have never been happier in my life.*”

That gives us the gold standard. If enough trial lawyers get to that level, tort-“reform” in juries and in the legislature will devolve to a barely believable historical oddity. Result: fair settlements. Fair verdicts.

The alternative: If we rely on just the blather of words to try to persuade, in the near future there won't be trial lawyers. Because once the poisoned third grows to half (eight or nine years away at the current rate) your work will be outlawed.

So get busy. Either that or get a book on how to do some other field of law. I assure you, I will not have written it.

Motivating Jurors
Trial Magazine

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Making preponderance work

David Ball, Ph.D.

Almost all jurors expect you to prove your case beyond a reasonable doubt, and you won't change their minds by explaining preponderance. But if you make preponderance a working theme throughout trial, jurors will make preponderance-based decisions about liability and damages.

In most civil trials, one of your most important tasks is to get jurors to make decisions based on a preponderance of the evidence. Throughout your career, you'd probably have won most of the cases you lost if the jurors had decided based on preponderance. But they didn't.

There is a simple and highly effective template you can follow to ensure that jurors will make preponderance-based decisions. Follow the template meticulously. Omit nothing, change nothing, unless forced to. (Because this template works so well, don't use it when a lowered burden will hurt you—such as with a dangerous affirmative defense. Don't do the defense any favors.)

The goal is this: In deliberations, when a defense-oriented juror says, "I'm just not sure," you want the other jurors to say, "We're not here to be sure. We're just here to say whether the plaintiff is more likely right than wrong." Yet pattern instructions and attorney explanations almost never get jurors to say that.

Certainty, not preponderance, is every juror's default standard. But the template will make jurors enforce preponderance in their deliberations.

The template's overriding requirement: All through trial, not just in voir dire and closing, keep the concept of "more likely right than wrong" in front of the jurors. Failure to do this is the most common reason plaintiffs lose and a major reason so many cases do not result in fair compensation. The only remedy is to use the template to make preponderance the lens through which jurors will see and gauge the evidence not in retrospect, but *as it comes in*.

For two reasons, this is essential. First, when you explain preponderance in voir dire and then drop the subject until closing, jurors don't remember it. Second, when you remind jurors in closing, it does no good—because no one can think backwards. You can't even say your own Social Security number backwards. So when you remind jurors

about preponderance in closing, how can you expect them to go backwards and reweigh the evidence? Can't be done.

You must ensure that they keep preponderance in mind throughout trial. Otherwise you cannot topple the juror default standard of certainty.

Following the template is easy. It works—if you do every step, starting with jury selection. Even if you don't get to conduct your own jury selection in your jurisdiction, study the next section to understand the principles you will use in opening.

Jury selection

In voir dire, say this:

In trials like this, jurors make their decisions on the basis of whether my side is more likely right than wrong.

Use those exact words. Don't mess around with them.

HANDS. As you say “more likely right than wrong,” position your hands side by side and close together, palms up, at waist level. Position your right hand a half inch higher than your left.

Do this every time you say “more likely right than wrong” for the rest of trial. This will be over and over and over. The result: Jurors will use that exact hand language on your behalf in deliberations. The judge will probably do it when reading the jury instructions. Sometimes even defense counsel does it in closing.

Don't use the words “preponderance” or “burden” or phrases like “greater weight of the evidence.” Wait until closing to connect these concepts to the language of the law. Jurors neither like nor understand legalese. Many are suspicious of plaintiff attorneys who use it; if you do, they are likely to regard you as arrogant or even comical. Plain English is a great invention, so simply say, “more likely right than wrong.” It's clear, and clarity is your best friend.

Then say:

Some folks think “more likely right than wrong” [*use hands*] is not quite fair—because it makes things a little too easy on my side and a little too hard on the defense, because my side doesn't really have to prove anything.¹ Other folks feel that our having to be only more likely right than wrong [*hands*] is OK.

So, Mr. Juror, are you a little closer to the people who think it's a little unfair, too easy for my side? Or are you a little closer to the people who

¹ This is one of only two times you will use the word “prove” or “proof.” At other times, use the word “show.” When you say “proof” at any other time, jurors think you mean absolute proof. That leads them to decide on the basis of absolute or nearly absolute proof, no matter what you say about preponderance.

think it's OK?²

Don't ask, "Which side do you agree with?" Jurors will more likely respond comfortably to "Which are you a little closer to?" And when Mr. Juror responds, ask him the all-purpose follow-up question: "Please tell me about that."

Don't lead. The only follow-up question to ask is the wide-open "Please tell me about that." And after the juror tells you about that, say, "Please tell me more about that." If you have time, ask Mr. Juror that same question until he has no more to say.

This starts a powerful process that accomplishes the three critical things you need to achieve in voir dire:

It gets you many cause dismissals. Many jurors will not agree to decide on the basis of 80 percent or 70 percent or 60 percent certainty, so they are easy to remove for cause.

It exposes tort "reform" jurors. Jurors who are uncomfortable with preponderance strongly tend to be tort "reform" jurors.

It initiates the theme of "more likely right than wrong" as the lens through which jurors will view each new piece of evidence as it comes in.

After the jurors have their say, tell them:

I had to ask about this because in this case, you will be *required* to make all your decisions on the basis of whether we're more likely right or wrong [*hands*].

We expect to show you far more than that. But by the end of the trial, even if someone has doubts, and even if someone thinks we're only more likely right than wrong [*hands*] on a question, you will be required to decide that question in our favor.

Mr. Defense Attorney agrees that you have to base all your decisions on whether our side is more likely right than wrong [*hands*]. And Her Honor will tell you that "more likely right than wrong" [*hands*] is the law.

Do not omit "Mr. Defense Attorney agrees. . . ." Preponderance becomes the operative rule only when jurors hear that your opposition—not merely the judge—agrees with it.

Then say:

² When you must question the group before asking individual follow-up questions, ask, "How many of you are a little closer to the folks who feel that 'more likely right than wrong' [*hands*] might be a little unfair, a little too easy on my side?" Then, "And how many of you might be a little closer to the folks who think it's OK?" Then, "And how many of you think you might be somewhere in the middle?" Follow up individually.

So, Mr. X [*choose a juror who had trouble with this*], what trouble would you have, even a little, making your decisions on the basis of just whether we're more likely right than wrong [*hands*], not whether we give you total proof?"³

This will probably lead to more cause dismissals than you've ever had.⁴ Any juror who says he or she would not be able to—or would find it hard to—decide on the basis of “more likely right than wrong” is not competent to serve.⁵

Your final two voir dire questions—about jurors' rights—will bolster your preponderance theme:⁶

Folks, jurors have certain rights. It's important for you to exercise these rights when necessary. So I need to ask you about them.

First, you have the right to hear all the testimony. Every word. So if you don't hear something a witness says, will you all be comfortable raising your hand and telling the judge, “Your Honor, I did not hear what the witness said. Could you ask her to repeat it?”

Then:

Second, and even more important: You have the right to clearly understand the law. You have the right to know that every other juror clearly and correctly understands the law. You have the right to know that you are on a jury in which every juror is following the law. So during deliberations, if there's anything about the law you don't understand, or if there's any disagreement among you about the law, or if anyone is refusing to follow the law the judge gives you, will you be comfortable asking your foreperson to knock on the door and tell the bailiff you need the judge to come explain that part of the law again?

Never omit these questions. They become important when you get to closing.

If this kind of questioning is new for you, run a practice session with half a dozen

³This is the second and last time in trial to use the word “proof.”

1.

⁴For a good method for pursuing cause challenges, see *David Ball, David Ball on Damages: The Essential Update*, app. A 314-17 (2d ed., Natl. Inst. Tr. Advoc. 2005).

⁵Show the judge *Wainwright v. Witt*, 469 U.S. 412 (1985). Its first holding is that prospective jurors must be excused if their views could substantially impair their ability to perform their function as jurors and that the impairment need not be shown with unmistakable clarity. Tell the judge you simply want jurors who will follow his or her instructions, which research has shown many jurors will not do.

⁶These questions are adapted from those first developed for plaintiffs by the brilliant California attorney and trial consultant, Dr. Sunwolf.

2.

strangers in your office the evening before trial. You want to be comfortable, not tentative, asking these questions of real jurors.

Opening statement

In opening statement, you will continue to reinforce the “more likely right than wrong” theme. Every time you refer to what a witness is going to say, include this theme. For example: “Heather Witness will tell you the light was green. She’ll also tell you she is more likely right than wrong [*hands*] when she says the light was green—and that beyond that, she is sure.”

When referring to an expert witness, tell the jurors:

Dr. Expert will tell you that her conclusion is more likely right than wrong [*hands*]. She’ll also explain that beyond that, her conclusion lies within a reasonable degree of medical [or engineering or whatever her field is] certainty. And she will explain that when she says “reasonable degree of medical certainty,” she means “that degree of medical certainty that is based on reason.”

Case-in-chief and rebuttal

Remember: A theme is a theme only if it is continuously maintained. So during testimony, continuously do what you promised in opening:

Q: Ms. Witness, when you say the light was green, are you more likely right than wrong [*hands*] about that?

A: Yes.

Q: And beyond that, are you certain?

A: Of course.

And:

Q: Mr. Engineer, when you say that the van was going 34 miles an hour, are you more likely right than wrong [*hands*] about that?

A: Yes.

Q: And beyond that, does your conclusion lie within a reasonable degree of engineering certainty?

A: Yes.

Q: And what do you mean by engineering certainty?

A: I mean that degree of engineering certainty that is based on reason.

If you can’t rely on your expert to answer that question properly, you may need to lead.

So ask, “When you say that your conclusion lies within a reasonable degree of engineering certainty, do you mean that degree of certainty that is based on reason?”

Your frequent repetition of “more likely right than wrong”—like a memory sticker on every piece of evidence—will continually remind the jurors that preponderance is the requirement.

Every so often, precede a question by referring to the jury’s task: “Mr. Beckett, these folks [*the jury*] have to decide whether we are more likely right than wrong [*hands*]. So when you say you waited by the side of the road for more than six hours, are you more likely right than wrong [*hands*] about that?”⁷

In these simple ways, you keep the jurors’ judgments focused on preponderance throughout your case-in-chief. But because the defense lawyer is not likely to mention “more likely right than wrong” during the defense case, the jury will probably default to its “certainty” standard. So during your closing, you must recall the jurors to their preponderance senses.

Closing argument

Via slide, board, or paper, show and tell the essential fragment of the jury instruction on preponderance. Face the jury with the instruction behind you, and recite the fragment verbatim from memory. Don’t turn around and read it. You want the jurors to see that you know the law without having to look at it. Then say:

This just means what we have been saying throughout trial: Are we more likely right than wrong? [*hands*]

We have shown we are far more than just more likely right. [*Raise one hand as high as you can.*] But the law says that even if someone thinks we’re only more likely right than wrong [*hands*]*—even by the smallest amount—then you have to answer that question our way. You can have all the doubts you want on both sides, as long as when you come down to it, you think we are more likely right [*hands*].*

Mr. Defense Attorney agrees that “more likely right than wrong” is the way you must decide. And after I sit down, the judge will officially instruct you that “more likely right than wrong” is the law you must follow.

Next, you’ll do the most important thing you can do in closing: You will arm your favorable jurors to go into deliberations and speak on your behalf. Just as you are your client’s advocate, you must make your favorable jurors into your advocates.

To do this, give your favorable jurors the exact words and phrases they will need in deliberations to advocate for you. Use simple, 5- to 10-word “boil-downs”—shorthand

⁷Some judges may not let you use the first sentence of this question; in that case, use only the second.

versions of each crucial point in the case.⁸ Make sure your favorable jurors can comfortably use these words, phrases, and boil-downs. Use no legalese, no complex sentences or ideas, no big words, no technical language. Use simple phrases and short sentences. You'll say,

Folks, during deliberations, if anyone says ABC, remind them that XYZ.

These may be the most important words you ever say. You must arm jurors in this way for every important matter in the case. And one of the most important matters is preponderance. Do it this way:

Over the course of deliberations, if anyone says they're just not sure [*that's the ABC*], remind them that you don't have to be here for weeks trying to be sure. All you have to do is follow the law: Are we more likely right than wrong? [*That's the XYZ.*] Even just a little more right than wrong.

Then explain what the jurors should do if one of them won't go along with the law:

After you explain it, if a juror is still not willing to go along with 'more likely right than wrong' [*hands*], tell your foreperson to reread instruction number five out loud again.

And here's the enforcer:

If that juror is still not comfortable with 'more likely right than wrong' [*hands*], ask your foreperson to knock on the door and tell the bailiff that you need the judge to come talk to a juror who is refusing to obey her instructions.⁹

If you meticulously follow this model from jury selection through closing, your jurors will decide not on the basis of certainty but on the basis of preponderance. Even tort "reform" jurors will go along with preponderance. They, even more than other jurors, respect rules—and preponderance is a major rule. So if you practice this technique before trial and leave nothing out, you will win the cases you ought to win—even in the

⁸The National Jury Project's Susan Macpherson teaches attorneys to employ these "boil-downs."

⁹If asked, many judges will add the following jury instruction: "Over the course of deliberations, if any juror is disregarding my instructions, your foreperson has the duty to tell me. If the foreperson does not do that, it is the duty of every other juror to do so." Ask the judge to give this as the last instruction. If the judge is reluctant, point out that nothing is more important than that jurors understand and follow the judge's instructions, and that we are in an era when jurors routinely ignore them. Point out that any defense argument not to add this instruction has to be based only on their desire for jurors not to follow the law, which makes this instruction all the more important.

current tort “reform” climate.

Do not underestimate this technique. As simple as it is, it will empower you to help your clients as they need and deserve to be helped.

David Ball is a partner in the Durham, North Carolina, trial consulting firm of Miller Malekpour & Ball. He is the author of *David Ball on Damages: The Essential Update* (2d ed., Natl. Inst. Tr. Advoc. 2005), *Theater Tips and Strategies for Jury Trials* (3d ed., Natl. Inst. Tr. Advoc. 2003), and *How to Do Your Own Focus Groups* (Natl. Inst. Tr. Advoc. 2000). Dr. Ball and his partners Debra Miller and Artemis Malekpour consult on cases across the country.

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Damages and the reptilian brain

DAVID BALL

The ‘reptilian brain’ governs our survival responses. Tort ‘reformers’ have long used these responses dishonestly to their advantage. This introduction to a new kind of advocacy will help you show jurors that the real danger is from the defendant’s misconduct.

FOR nearly four years, three attorneys—Don Keenan of Atlanta; James Fitzgerald of Cheyenne, Wyoming; and Gary Johnson of Pikeville, Kentucky—and I have been investigating a part of the brain neuroscientists call the R-complex, or “reptilian,” brain and how it affects the kinds of decisions jurors are called on to make.

Our impetus came from a beach where Don Keenan has a home. Soon after moving in, Don discovered that his next-door neighbor is Karl Rove, one of the plaintiff bar’s archenemies. During what Rove probably thought was casual conversation, Keenan got him talking about persuasion. Rove particularly praised the work of marketing guru Clotilde Rapaille.¹

Soon after hearing about Rapaille, Keenan propelled us into the adventure of our lives. It took us through evolutionary science, neuroscience, and an extensive series of participant-centered research projects across the country.

We began, as good research demands, with deep skepticism. And we had reason for skepticism: Although Rapaille and other marketers had long demonstrated that enlisting the reptilian brain is marketing’s most persuasive tool, and although Karl Rove and company are only the latest in a line of persuaders who have empirically proved the principle over thousands of

years, marketers need to persuade only a few percent of the population. And political persuaders such as Rove need only a bare majority.

But trial lawyers need to persuade 75 percent to 100 percent of the jurors in a case. Could the reptilian brain get us there? The mere possibility seemed worth the effort of finding out.

Rapaille’s techniques provided our starting point. They derive from the work of National Institute of Mental Health neuroscientist Paul MacLean, who developed the concept of the three-part (triune) brain in humans. MacLean called the most primitive part “reptilian” because it is identical to the full brain of modern reptiles.²

The reptilian part of the brain—which my colleagues and I simply and affectionately call “the reptile”—runs our autonomic life functions. She (an arbitrarily chosen pronoun) creates, directs, and motivates our survival drives, such as hunger, sex, and danger

DAVID BALL is a jury researcher and trial consultant in the Durham, North Carolina, trial consulting firm of Miller Malekpour & Ball. *Reptile: The 2009 Manual of the Plaintiffs’ Revolution*, by Ball and Don Keenan, was released recently by Balloon Press. Ball is also the author of *David Ball on Damages: The Essential Update (2d ed., Natl. Inst. Tr. Advoc. 2005)*, which will soon be in its third edition.

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avoidance. She has no emotion, thought, or memory but enlists those services from other parts of the brain to fight for your—and your genes’—survival chances.

Whenever anything can potentially affect those chances of survival—even a little—this most primitive thing in your head grabs full control of the entire brain. This includes control of your logical, emotional, and other decision-making resources. As soon as a survival danger

And the reptile’s imperative is that safer—even just a little safer—is the only acceptable choice.

Enlisting the reptile

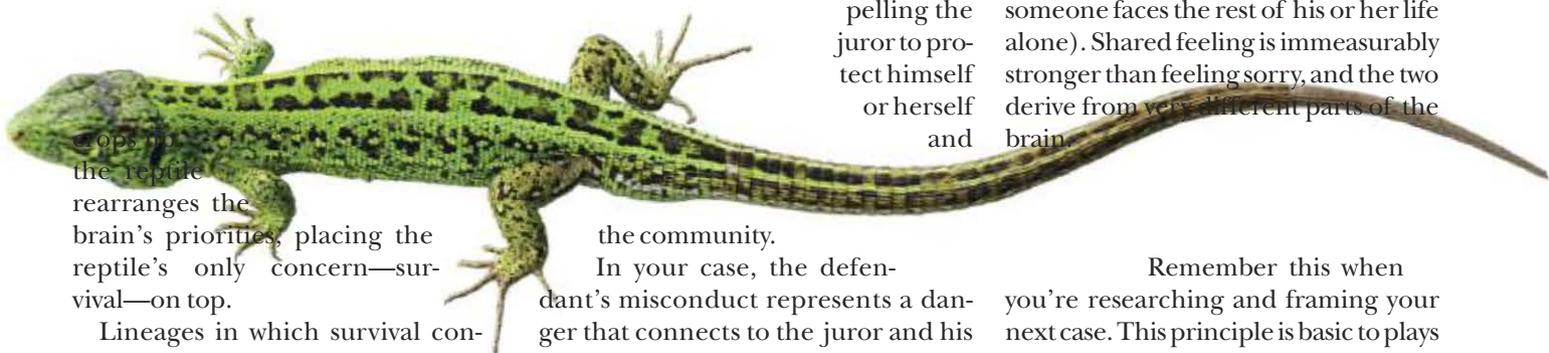
Not only rock-solid logic but also facts, stories, bias-battling, pleas for justice, emotion, and speaking eloquence all are easily defeated unless you get the reptile on your side. To do that, you need to show the reptile two things.

First, you need to show that the reptile is in danger. When she detects a survival danger, the reptile protects

her genes by impelling the juror to protect himself or herself and

an element of damages is nowhere near as effective as showing how the injury has interfered with mobility and resulted in loneliness and isolation. This is because over the course of evolution, pain actually helps us survive, while lack of mobility and being alone are among the leading causes of death.

We usually feel sorry for other people’s physical pain, but we never actually feel their pain. In contrast, we often share the specific feeling of someone’s impaired mobility (can’t get home or can’t escape danger, for example) or loneliness (a lover leaves or dies, the good guy becomes a social outcast, or someone faces the rest of his or her life alone). Shared feeling is immeasurably stronger than feeling sorry, and the two derive from very different parts of the brain.



drops to the reptile rearranges the brain’s priorities, placing the reptile’s only concern—survival—on top.

Lineages in which survival concerns took a lower priority could not have survived the unforgiving macro and micro forces of evolution.³ Lions’ primary survival traits are claws. Cheetahs: speed. Skunks: big stink. Humans: the ability to make decisions using complex input and abstract analysis. This is how we survived eons of precipitously changing environments and hungry creatures stronger and faster than us.

The human brain can perceive, store, gather, weigh, and analyze information. Those sophisticated IT functions enable the reptile to select the safest available decision, which she’ll then force us into.

We like to believe that we base our decisions on rationality and logic. Sorry. Logic is but a fragment of our brains’ functioning. It controls little.

When it comes to survival, logic is subservient to the reptile. When the two conflict, logic either adapts to the reptile’s needs or is ignored. When people make survival-related decisions, they obey the reptile—not logic, emotion, intuition, or abstract notions such as justice.

the community.

In your case, the defendant’s misconduct represents a danger that connects to the juror and his or her family.

The second thing you need to show the reptile is that a full and fair damages verdict will diminish the danger for the juror and his or her family—that the proper verdict will enhance community safety by discouraging that kind of dangerous behavior and, conversely, that an improper verdict will not only allow but also encourage it.

The result: The reptile sees a proper damages verdict as her best available choice for survival, *even if it affects her survival by only a very small amount*. So the reptile helps us in “small” cases as much as she does in “large” ones.

Our research has shown

- the source of antiplaintiff attitudes and biases and how to remove them from the decision-making process
- how to develop new and effective litigation and advocacy techniques the defense cannot fight

- why reptilian trial advocacy throws out little of what you already do. Instead, it focuses and redirects you, like adding a telescopic laser-sight to a rifle.

For just one example, our research revealed that showing physical pain as

Remember this when you’re researching and framing your next case. This principle is basic to plays and movies (few center on physical pain) and should be to trials as well.

Reptilian techniques—dishonestly and cynically deployed—are almost alone responsible for the sickening success of tort “reform” in courtrooms and legislatures. The tort “reform” campaign has persuaded a third of the public—and that proportion is growing—that lawsuits and trial lawyers endanger every family’s medical care, jobs, and safety. These are survival dangers. So until you get the reptile on your side, she will implacably drive the juror to fight you.

Years ago, the work of David Wenner and Gregory Cusimano confirmed that a number of common biases hurt our cases.⁴ For example, many jurors blame our clients for failing in their personal responsibility, as in, “She should have gotten a second opinion.” We have found ways to partly offset this bias, such as by talking about corporate accountability instead.

But even when this works, the tort-“reformed” reptile simply substitutes a different bias or some other equally effective motivating force to control the

juror's decision. As Rapaille says, the reptile never loses. She will instantly deploy five other biases, attitudes, misperceptions, and fears for each one you counter.

Fortunately, the reptile deploys those weapons against you only when she considers a verdict for your side to be a threat to her. As soon as she perceives that a defense verdict would cause a greater or more immediate threat, she deactivates those weapons.

This is true even about experience-based and situation-based attitudes, the deepest of feelings, and core values. The reptile deploys such things only when they help her. She abandons them when they don't. They are not continual conditions like hunger.

After all, the reptile did not survive evolution by allowing attitudes, biases, and core values to interfere with her survival. To the reptile, the only core value is survival, and it trumps everything else.

This is why tort-“reformed” jurors can love *Erin Brockovich*. It's why a white supremacist forgets his racism when he and a black man need each other to get themselves out of danger (as dramatized in *The Defiant Ones*). The racism is not cured; it is merely suspended when it interferes with survival.

Understand this clearly: An attitude, bias, or core value (even the drive for justice) exists solely as a defense mechanism. When it can interfere with survival, the reptile drops it like a hot potato.

How to learn more

The substantial repertoire of reptilian methods is expanding almost daily from our continuing research and new ideas being shared with us by trial lawyers. Here's how you can learn more and be part of the development of new reptilian strategies.

- Read the book I wrote with Don Keenan, *Reptile: The 2009 Manual of the Plaintiffs' Revolution* (Balloon Press 2009).

- Log on to www.ResearchExchange.com.

to. We saw this surprising phenomenon in session after session of our research, and now we have been seeing it in trial after trial.

Revealing danger

At the heart of all this lies fear. Without tort “reform” having profoundly scared a third of the jury pool about their own survival issues, the second-rate defense “experts” and defense lawyers with bogus cases would not so easily outdo excellent plaintiff lawyers

with good cases and highly respected experts. Verdicts would be full and fair, not tokens.

But unlike the purveyors of tort “reform,” we have truth on our side. For example, here's one of an endless number of truths we can make effective reptilian use of: The national death rate from medical error is 15 times higher than the national murder rate, vastly outweighing the supposed survival dangers the tort “reform” movement has fabricated.⁵ Obviously, knowledge of this fact would influence what the reptile would do in a med-mal case.

Without violating the “golden rule” stricture, reptilian advocacy shows that the kind of misconduct that hurt your client is an immediate and ongoing

danger to the juror—a danger that can be diminished by a full and fair verdict. The plaintiff's use of the reptile in this way is exclusive, because the defense

has no way to offer refuge from immediate or ongoing danger. In every case, we—and only we—can. And to the reptile, immediate dangers always trump midterm and long-term dangers, including those fabricated by tort “reformers.”

Once you have enlisted the reptile to your side, the defense has only one practical tactic: attempting to make the judge prevent you from using reptilian methods. For example, some venues in Florida bar community-safety arguments. In such circumstances, you can simply refrain from being explicit, or you can shift to other, equally effective reptilian techniques.

One focus of our ongoing research is to expand the arsenal of admissible reptilian techniques. So, for example, our adaptations of Rick Friedman's and Pat Malone's landmark *Rules of the Road*⁶ provide the basis of one approach (even in stipulated negligence cases) to use the reptile without transgressing local limitations. Properly used, the rules will implicitly and easily elevate defendant error or mistake to a rule violation that endangers the community.

We call one primary technique “spreading the tentacles of danger.” This technique closely connects the defendant's dangerous conduct to each juror. It keeps jurors from seeing the danger as relevant only to other people. Your client's injuries become the concrete manifestation of the community danger represented by the defendant's violation. The injuries show the jury that such a danger is among us.

Here are a couple of ways to spread the tentacles of danger:

Q: Dr. My Expert, not everyone has experience with childbirth. Could you please explain how violating the rule that the defendant violated in the delivery room is a dangerous way to practice medicine?

—DAVID BALL



A: Let me explain by using the example of an older person reporting chest pains to the emergency room staff. . . . [Then have the expert provide examples of how the rule works in additional areas of medicine. This makes the danger a community danger, rather than just a danger to babies and mothers during childbirth.]⁷

Or:

Q: Mr. Driver's Ed Teacher, the defense told the jury that a low-speed crash can't cause serious harm. What do you teach your students about that?

A: I show them the state's statistics of how many people in cars are permanently injured every year in collisions at speeds under 12 mph. And I explain that the same impact could easily maim or kill pedestrians, and it does all the time.

This helps show that low-speed collisions cause harm to people in cars and that everyone is at lethal risk from low-speed impact. So violat-

ing the rule requiring drivers to see what is there to be seen is a community menace. This impels the reptile to use fair compensation to protect herself, even when you are not allowed to make that explicit argument.

Examples for closing: "It's up to you to decide how far someone has to go in breaking the community's safety rules before you—as the community's representatives—decide he must pay full and fair compensation for the harm he's done."

Or (where allowed): "If you give this defendant a pass for what he did, what do you think will happen next? What will others do in this community when they see what this defendant got away with?"

Raleigh attorney and Duke law professor Donald Beskind points out that

almost every venue has a case specifying that public-policy tort law expresses, at least in part, the social need for community safety. This is precisely why the reptile is our ally.

And here is how the reptile and the law are in total agreement: No one exercising ordinary care needlessly endangers anyone. It is not prudent to needlessly endanger. For the same reason, there is no such thing as a stan-

Here is how the reptile and the law are in total agreement: No one exercising ordinary care needlessly endangers anyone. It is not prudent to needlessly endanger.

dard of care that needlessly endangers. Jurors insist on this, and so does the law.

Even the defense has to agree.

So to both the law and the reptile, the only acceptable choice for any particular

goal is the available choice that carries the least unnecessary danger. The second-safest choice, no matter how safe, is negligent, because it carries more danger than the safest. When there's a safer way, any danger is needless.

That is the imperative by which our species (and our laws) evolved and survived. So when a defendant claims that his or her second-safest choice was "safe enough," your proper use of the law in this way should give you a strong negligence win, along with the impetus for a fair verdict.

This is just one of the many reptilian techniques that totally alter the playing field.

Once you have mastered reptilian advocacy, every case—even the smallest—becomes important to the reptile, whose only priority is survival. The reptile will have no survival reason to buy

into bogus testimony from independent medical examiners, to deploy anti-plaintiff attitudes, or to do anything else that has been blocking your client's path to full justice. The shaky hat pegs on which the defense hangs its theories fail because they no longer offer the juror safety.

Instead, safety will lie solely in a full and fair verdict.

We've all been through the long

night of tort "reform" together. Now, working together, we are speaking truth to power in ways that power cannot survive. In a democracy, that is the very definition of justice. ■

Notes

1. See e.g. Clotaire Rapaille, *The Culture Code* (Broadway Books 2007).

2. Paul D. MacLean, *The Triune Brain in Evolution: Role in Paleocerebral Functions* (Springer 1990).

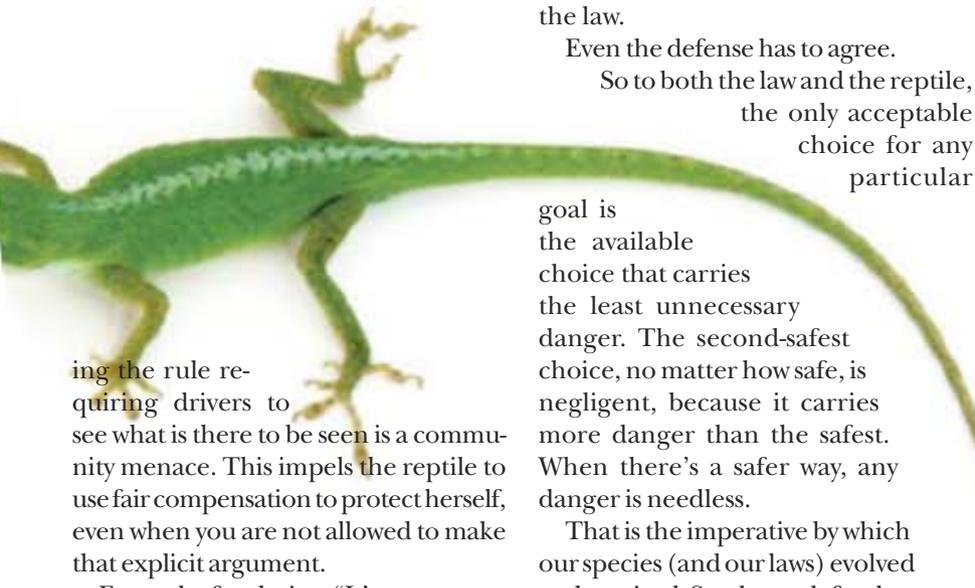
3. See George C. Williams, *Adaptation and Natural Selection* (Princeton U. Press 1967); Richard Dawkins, *The Selfish Gene* (Oxford U. Press 2006). If you prefer, instead of evolution, you can think in terms of intelligent design, as long as you understand my explanation of the nature of the design.

4. Wenner and Cusimano created the Jury Bias Model. See www.jurybias.com.

5. See FBI, *Uniform Crime Reports*, www.fbi.gov/ucr/ucr.htm; HealthGrades, Inc., *Fourth Annual Patient Safety in American Hospitals Study* (2007), www.healthgrades.com/media/DMS/pdf/PatientSafetyInAmericanHospitalsStudy2007.pdf.

6. Rick Friedman & Patrick Malone, *Rules of the Road* (Trial Guides 2007). This book is required reading for every plaintiff attorney—in business, intellectual property, and every other area. See also my and Don Keenan's extension of it in *Reptile: The 2009 Manual of the Plaintiffs' Revolution* ch. 6 (Balloon Press 2009).

7. You need not make an overt community safety argument for this technique to be effective. You are simply educating jurors about how the danger works by analogy to situations they are more familiar with. Analogy is always an acceptable means of explaining concepts.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

KRIS THORNTON,

)

Plaintiff

)

)

)

v.

)

CASE NO. CV-07-S-0438-NW

)

PHILLIP KING; JACKIE RIKARD;
and RONNIE WILLIS,

)

)

)

Defendants.

)

PLAINTIFF’S REQUESTED VOIR DIRE QUESTIONS

1. Please tell me about your job. What is your work day like? Follow-up questions related to work.
2. Please tell me about the work that your husband/wife does. What is a normal workday like for him/her?
3. If you are not married, with whom do you live? Describe the work that they do.
4. Please tell me about your children. How many? What ages? What occupations?
5. Have you or anyone close to you ever been in the military? If yes, what branch and at what rank?
6. Do any of you know the plaintiff, Kris Thornton, or the defendant,

Phillip King, or anyone you believe may be related by blood or marriage to either the plaintiff or the defendant? Who? How well do you know them?

7. Do any of you know any other member of the venire? Who? How? How well do you know them?

8. Do any of you know any of the following people who may be witnesses in this case: Dr. Duff Austin, Melissa McMullin Smith, Annette McCurry, Jim Williams, Tim Taylor, Amanda Skipworth, Chapel King, Brad Skipworth, David Riley, Emerson Gatewood, Wanda F. Cobb, R.N., Kenneth Lemaster, and David A. Hollis, M.D. How? How well do you know them?

9. Have any of you heard of or do any of you know either of the defense attorneys, Daryl Masters and Fred Clements, or any lawyers who work at their law firm, Webb & Eley, P.C., in Montgomery? How? How well do you know them?

10. Have any of you heard of or do any of you know the lawyer for the plaintiff, Hank Sherrod? How?

11. Have you, any member of your family, or anyone close to you ever worked for the City of Florence, Lauderdale County, or the Lauderdale County Sheriff? Who? What was the job?

12. Do you know anyone who was or is employed at or in any way connected with the operations at the Lauderdale County Detention Center? Who?

What was the job?

13. Do any of you have a belief, whether moral, religious, or otherwise, that would not allow you to sit in judgment of another?

14. What are your primary sources of news information?

15. Do any of you listen to Rush Limbaugh? How often?

16. Do you, your spouse, or anyone else living with you have any bumper or car window stickers? What are they?

17. Have you, a family member, or a close friend ever participated in any group concerned with crime prevention or victims' rights? Who? Please describe the nature of the participation.

18. Have you or anyone close to you ever been a victim of crime? Please describe the incident. What was the outcome? Were you satisfied with the result?

19. Who feels that crime is a serious problem in your neighborhood? Please tell me about that.

20. Have you ever moved or considered moving because you thought crime was a problem in your neighborhood? Please tell me about that.

21. Who here has—or knows anyone who has—been in the Lauderdale County Detention Center? Please tell me about that.

22. Who here has—or knows anyone who has—been in jail or prison? Please

tell me about that.

23. Have you, any member of your family, or any close friend ever held a job with an agency or department engaged in law enforcement, including

- a. a state or local police department or agency;
- b. a sheriff's department;
- c. a jail, prison, or youth offender center;
- d. the FBI, DEA, ATF, INS, Department of Homeland Security, or any other federal department or agency involved in law enforcement;
- e. any prosecutor's office;
- f. the military police; or
- g. a parole or probation department or agency.

If so, please identify the person and describe the job.

24. Have you or anyone close to you called on the police for help? Tell me about that.

25. Have you or any member of your family ever belonged to the National Rifle Association?

26. Are you acquainted with any judges or attorneys? Who? How well do you know them?

27. Have you or anyone close to you ever been employed in a security-related job for a private business (for example, as a security guard or investigator)? Who? How well do you know them?

28. Have you ever worked in a job that caused you to work with any law enforcement officer or agency? Please describe the job and the nature of your contacts with law enforcement.

29. Have you or anyone close to you received any training in law, law enforcement, criminal justice, criminology, or the legal system? Please describe.

30. Have you or anyone close to you received any medical or psychological training? Please describe.

31. Have you or anyone close to you worked in a job in the medical or psychological fields? Please describe.

32. Have you or anyone close to you ever had an informal relationship with any law enforcement agency or department, including a ride-along program, crime watch program, or any similar program or activity? Please describe the relationship.

33. Have you or anyone close to you ever been a member of the Fraternal Order of Police? Have you ever made contributions to the FOP?

34. As a result of your experiences with crime or law enforcement is there anything that would cause you to lean in favor of the detention officer defendant in

this case?

35. Would any of you be inclined to give a jail or prison official's testimony about an incident greater weight than another person's?

36. Would any of you be inclined to give a medical doctor's testimony greater weight than another person's?

37. Would any of you be inclined to give a nurse's testimony greater weight than another person's?

38. Some people would have trouble giving money for emotional pain and suffering. Other people think money for emotional pain and suffering is okay. How many of you are closer to people who think money for pain and suffering is okay? How many of you are closer to the people who would have trouble giving money for pain and suffering? Please tell me about that.

39. Some people have strong feelings about lawsuits. How many of you have read about or heard persons in the media or persons you know talk about tort reform, verdicts being too high, lawyers taking advantage, frivolous lawsuits, verdicts hurting businesses or city or county governments, or similar topics? Please tell me about that. How do you feel about lawsuits? What do you think about tort reform? How do you feel about lawsuits brought by inmates?

40. Who here has—or knows anyone who has—ever been a victim of police

or jail misconduct or abuse? Please tell me about that.

41. Who here has—or knows anyone who has—ever been physically assaulted? Please tell me about that.

42. Who here has—or knows anyone who has—ever been grabbed around the throat by someone who was angry? Please tell me about that.

43. Who here has—or knows anyone who has—ever had their head forcefully banged on a hard surface? Please tell me about that.

44. Who here has—or knows anyone who has—ever hit their head hard enough for a knot to form? Please tell me about that.

45. Who here has—or knows anyone who has—ever suffered nosebleeds that persisted for days or weeks? Please tell me about that.

46. Who here has—or knows anyone who has—ever suffered severe headaches? Please tell me about that.

47. Who here has—or knows anyone who has—ever suffered double vision? Please tell me about that.

48. Who here has—or knows anyone who has—ever suffered Bell's Palsy? Please tell me about that.

49. Who here has—or knows anyone who has—ever suffered a closed head injury such as a concussion? Please tell me about that.

50. In addition to whether the defendant violated Kris's constitutional rights, a question on the verdict form will be how much money Kris should get to compensate him. When figuring this out, some folks feel you should only consider the amount of harm. Other folks feel it is important to consider other things, such as how sorry they might feel for the plaintiff, whether the defendant can afford it, whether awarding money would make persons not want to become jailers, whether awarding money might cause Lauderdale County to raise taxes, and whether the money would do any good or would be a windfall to Kris. How many of you are closer to people who would base their verdict amount only on the amount of harm? How many of you are closer to the people who think it's important to take those other things into account? Please tell me about that. The reason I am asking about matters other than the amount of harm is the law requires you to figure out the dollar amount of the compensation portion of any verdict based only on the amount of harm. Nothing else. That is the law. Now knowing that, who might still have trouble factoring out everything except the amount of harm?

51. Kris Thornton did not lose any wages or have to pay for any of the medical treatment he received. There is not going to be any evidence that Kris Thornton lost any money out of his pocket due to the defendant's actions. During the trial we'll tell you about the pain and suffering Kris experienced, but there is

nothing on paper with prices, like medical bills and wage statements. If you decide that the defendant caused Kris's pain and suffering, what problems, if any, would you have including money in your verdict for that pain and suffering?

52. Some people have philosophical or moral opposition to money for pain and suffering. Others don't. Where do you fall between them?

53. Compensation is money to balance harm. Punitive damages are to punish whoever did the harm and to stop their wrongdoing and the wrongdoing of others in the future. Some folks believe that works. Others think that punitive damages don't work. What is your best guess about it? Which way do you lean?

54. How did you or do you punish your children? What consequences did you or do you impose on your children for misbehavior? What made the punishment or consequences necessary? How did you decide the severity of the consequences? What was or is the "ultimate" punishment or consequence for your children? Why did it or does it work? Please tell me about that.

55. In this kind of case you decide based on whether we are more likely right than wrong. You can have doubts on both sides. As many doubts as you want. As long as after you weigh all the doubts you believe we are more likely right than wrong. Since that's all we have to do, some folks think that's not enough because it makes it too hard on the other side, the defense. Maybe even a little unfair. Other

folks think it's okay. Are you closer to thinking it might be a little unfair? Or are you closer to the folks who think it's okay? Where do you come between the two? Who thinks it might be a little unfair? Who is closer to folks who think it's okay? Please tell me about that.

56. Given the kind of person you are, your attitudes, life experiences, opinions, everything about you, what is there about you that might help you, even a little, in being a juror on this kind of case? Other than your ability to be fair and listen to both sides?

57. Given the kind of person you are, your attitudes, life experiences, opinions, everything about you, what is there about you that you think might make it just a little bit harder for you to be a juror on this kind of case?

58. Responsibility means paying enough money compensation to fully equal the losses and the level of harm – without putting anything into the scale except those losses and harms. That's the law. Who here thinks they might have trouble keeping things off the scale that don't belong there?

59. What else is there – anything at all – that you would want to know about you, if you were me standing up here and trying to decide who will be on the jury? Anything? Even if you are not sure it makes any difference?

60. If you are a juror in this case, you will have some rights. It is extremely

important that you understand these rights, and that you will exercise them as often as the need arises. First you will have the right to hear all the testimony. So if a witness says something you don't hear, will you be comfortable raising your hand and telling the judge, "Your Honor, I did not hear what the witness said." Will you do that?

61. If you are a juror in this case you will have a second right, the right to understand the law. Nothing can be more important. But every so often during deliberations, jurors disagree over what the law is. Sometimes a juror is just not sure. Sometimes a discussion will start about what the law really is. So if any of that happens, instead of trying to decide it among yourselves, will you be comfortable telling your foreperson to knock on the jury room door and ask the bailiff to tell the judge that there is something about the law you need to hear about again?

Respectfully submitted,



Henry F. Sherrod III
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following: Daryl L. Masters.



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[REDACTED]

VERY WELL. AT THIS POINT THE COURT WILL
CALL ON COUNSEL FOR PLAINTIFF FOR OPENING
STATEMENT.

MR. BURTON: THANK YOU, YOUR HONOR.

**(WHEREUPON, COUNSEL FOR THE PLAINTIFF
GAVE HIS OPENING STATEMENT.)**

MR. BURTON: GOOD MORNING, FOLKS. AGAIN,
THANK YOU FOR BEING HERE AND PUTTING UP WITH THE
JURY SELECTION.

DURING 2003 THE CITY OF SALINAS POLICE
DEPARTMENT EQUIPPED ITS OFFICERS WITH A RELATIVELY
NEW DEVICE, A TASER M26. IT'S REFERRED TO AS AN

1 ECD OR ELECTRICAL CONTROL DEVICE.

2 THESE DEVICES WERE PURCHASED FROM THE
3 DEFENDANT TASER INTERNATIONAL.

4 THESE ARE MARKETED -- THEY WERE DESIGNED
5 AND THEY'RE SOLD AS A NONLETHAL ALTERNATIVE TO USE
6 TO CONTROL PEOPLE WHO ARE OUT OF CONTROL, WHO ARE
7 IRRATIONAL, FOR WHATEVER REASON, WHO ARE NOT
8 RESPONSIVE TO VERBAL COMMANDS BUT WHO DON'T NEED TO
9 BE STOPPED WITH A FIREARM.

10 THIS CASE IS ABOUT THE MANUFACTURER'S
11 RESPONSIBILITY, THAT'S TASER'S RESPONSIBILITY TO
12 TEST THE DEVICE BEFORE IT'S PUT ON THE MARKET TO
13 MAKE SURE THAT IT'S SAFE FOR HOW IT MIGHT BE USED
14 AND ALSO TO WARN ABOUT DANGERS THAT MIGHT ARISE
15 FROM ITS USE. AND THESE DANGERS ARISE FROM THE
16 EXCESSIVE USE OF THE DEVICE; THAT IS, TOO MUCH
17 ELECTRICITY BEING USED.

18 THIS CASE IS ALSO ABOUT THE
19 RESPONSIBILITY OF A POLICE DEPARTMENT, IN THIS CASE
20 THE CITY OF SALINAS POLICE DEPARTMENT, TO MAKE SURE
21 ITS OFFICERS ARE PROPERLY TRAINED IN USING DEVICES
22 LIKE THE TASER AND ALSO THAT THEIR USE OF THE
23 DEVICE IS PROPERLY MONITORED SO THAT MISUSE CAN BE
24 IDENTIFIED AND CORRECTED BEFORE IT CAUSES HARM.

25 THIS CASE IS ALSO ABOUT THE DUTY OF

1 SUPERVISORS WHO ARE ON THE SCENE, WHO ARE IN
2 CONTROL OF OFFICERS TO MAKE SURE THAT THEIR
3 SUBORDINATES ACT APPROPRIATELY. AND IT'S ABOUT THE
4 LINE OFFICERS THEMSELVES AND FOLLOWING THE
5 GUIDELINES THAT THEY HAVE BEEN TRAINED TO FOLLOW
6 AND THE RULES OF LAW THAT GOVERN THEIR CONDUCT.

7 THE EVIDENCE IN THIS CASE WILL SHOW THAT
8 ALL OF THESE DEFENDANTS FAILED TO MAKE AND MEET
9 THESE RESPONSIBILITIES, AND THEREFORE, WE'RE GOING
10 TO BE ASKING YOU AT THE END OF THE TRIAL TO FIND
11 THEM RESPONSIBLE FOR THE DEATH OF ROBERT C. HESTON.

12 ON FEBRUARY 19TH, 2005, ROBERT H.
13 HESTON, THE GENTLEMAN TO MY LEFT, AND HIS WIFE,
14 BETTY HESTON, CALLED 911 FOR HELP WITH THEIR SON.

15 HE WAS OBVIOUSLY AGITATED AND DELUSIONAL.
16 AND AS YOU'LL HEAR, THIS IS NOT THE FIRST TIME THAT
17 HE HAD BEEN IN THIS KIND OF A CONDITION. IN FACT,
18 HE HAD HAD A SERIES OF PROBLEMS BECAUSE OF HIS OWN
19 HISTORY OF ADDICTION TO METHAMPHETAMINE. HE HAD
20 HAD PERIODS OF SOBRIETY FOLLOWED BY PERIODS OF
21 RELAPSE. HE WOULD HAVE INCIDENTS WHERE HE WOULD
22 BECOME IRRATIONAL AND DELUSIONAL IN THE PAST.

23 ON THIS DAY THEY SAW HIM ACTING STRANGELY
24 AND THEY KNEW THE SIGNS AND THEY CALLED THE POLICE
25 FOR HELP.

1 ROBERT C. HESTON WAS EXACTLY THE KIND OF
2 PERSON THAT THIS TASER WAS DESIGNED TO HELP, TO
3 TAKE INTO CUSTODY SAFELY SO THAT HE COULD GET THE
4 TREATMENT THAT HE NEEDED FOR HIS CONDITION, WHICH
5 AT THIS POINT WAS A MEDICAL PROBLEM AS WELL AS TO
6 SECURE SAFELY THIS OUT-OF-CONTROL INDIVIDUAL AND
7 PRESERVE PUBLIC ORDER.

8 THESE SALINAS POLICE OFFICER DEFENDANTS,
9 AND THAT'S SERGEANT DOMINICI, WHO WAS THE SERGEANT
10 IN CHARGE OF THE OPERATION AT THE HOUSE, AND THERE
11 WAS A SECOND SERGEANT RUIZ WHO CAME DURING THE
12 INCIDENT, AND THEN TWO OTHER OFFICERS WHO FIRED
13 THEIR TASERS, OFFICERS LIVINGSTON AND GODWIN. THEY
14 WERE SENT TO HELP THE HESTONS WITH THIS PROBLEM.

15 INSTEAD OF ONLY FIRING ONE OF THEIR
16 TASERS ONE TIME, WHICH WOULD HAVE KNOCKED
17 MR. HESTON DOWN AND ALLOWED HIM TO BE HANDCUFFED
18 SAFELY, THEY FIRED THREE TASERS. AND INSTEAD OF
19 JUST DISCHARGING EACH ONE TIME, THESE THREE TASERS
20 WERE DISCHARGED A TOTAL OF 25 TIMES, 25 TIMES INTO
21 AN INDIVIDUAL WHO WAS LYING HELPLESSLY ON HIS
22 PARENTS' LIVING ROOM FLOOR.

23 THEY STOPPED ONLY WHEN MR. HESTON TURNED
24 PURPLE AND WENT LIMP.

25 THE REASON THAT HE BECAME LIMP AND

1 UNRESPONSIVE WAS THAT HE HAD SUFFERED A CARDIAC
2 ARREST, HIS HEART HAD STOPPED BEATING.

3 PARAMEDICS WERE CALLED. THEY GOT THERE.
4 THEY WORKED ON HIM, ATROPINE, CHEST COMPRESSIONS.
5 THEY GOT HIS HEART RESTARTED AGAIN, BUT IT HAD BEEN
6 STOPPED FOR OVER TEN MINUTES. AND DURING THAT TIME
7 FRAME WAS DENIED THE OXYGEN, THE BLOOD NECESSARY TO
8 KEEP THE TISSUE ALIVE, AND HE SUFFERED MASSIVE
9 BRAIN DAMAGE.

10 HE WAS TAKEN TO THE HOSPITAL, LA
11 NATIVIDAD MEDIAL CENTER. HE WAS HOOKED UP TO LIFE
12 SUPPORT AND WAS KEPT ALIVE FOR 24 HOURS, BUT ON
13 FEBRUARY 19TH HE WAS DISCONNECTED AND HE PASSED
14 AWAY.

15 NOW, LET ME TELL YOU A LITTLE MORE
16 DETAIL ABOUT THIS DEVICE, THE TASER. AND HOPEFULLY
17 EVERYBODY CAN SEE IT ON THE SCREEN RIGHT THERE.
18 GREAT.

19 AS YOU CAN SEE, IT LOOKS LIKE A PISTOL
20 BUT IT IS NOT A FIREARM. THERE IS NO GUN POWDER
21 INVOLVED.

22 INSTEAD OF HAVING A BULLET COME OUT OF
23 THE BARREL, THERE'S A CARTRIDGE THAT CLIPS ONTO THE
24 END OF THE BARREL AND THIS CARTRIDGE CAN BE CLIPPED
25 ON AND OFF VERY EASILY.

1 THERE'S A WAY THAT IT CAN BE USED WITH
2 THE CARTRIDGE OUT, BUT THAT'S NOT OF CONCERN IN
3 THIS CASE. THESE TASERS WERE FIRED WITH THE
4 CARTRIDGES MOUNTED.

5 AND AS YOU CAN SEE FROM THIS SLIDE, THE
6 CARTRIDGE FIRES THESE TWO PROBES. THEY'RE ATTACHED
7 TO 20-FOOT WIRES, AND AT THE END OF THE PROBE ARE
8 THESE DARTS. THEY'RE SORT OF LIKE FISH HOOKS THAT
9 ARE STRAIGHT LITTLE MINI HARPOONS THAT ARE BARBED.

10 AND THEY STICK INTO THE TARGET, EITHER
11 INTO THE SKIN OR INTO THE CLOTHING. AND ONE THESE
12 TWO DARTS CONNECT WITH THE TARGET OR ARE ABLE TO
13 COMPLETE A CIRCUIT AND PERFECT CONNECTIONS ARE NOT
14 REQUIRED FOR THAT, JUST ENOUGH ELECTRICITY TO
15 TRAVEL, THEN THERE'S A FIVE-SECOND CYCLE OF
16 ELECTRICITY INTO THE HUMAN BEING OR WHOEVER THE
17 TARGET IT.

18 AND THIS IS A VERY PARTICULAR KIND OF
19 ELECTRICITY YOU'LL HEAR A LOT ABOUT. IT'S IN
20 LITTLE TINY PULSES AT A RATE OF 20 PER SECOND.

21 THESE PULSES DO NOT ELECTROCUTE A PERSON
22 LIKE LET'S SAY AN ELECTRIC CHAIR AND STOP THEIR
23 HEART.

24 WHAT THESE PULSES DO IS THAT THEY
25 OVERRIDE THE ELECTRICAL SYSTEM THAT WE ALL HAVE IN

1 OUR BODIES WHERE THE BRAIN SENDS ELECTRICAL
2 IMPULSES TO THE MUSCLE AND TELLS THEM TO CONTRACT.

3 THESE PULSES TELL THE MUSCLES IN THE BODY
4 TO CONTRACT. AND SO THE PERSON, WHILE THE TASER
5 CYCLE IS GOING THROUGH THEM, GOES THROUGH
6 INVOLUNTARY MUSCLE CONTRACTIONS. THE EFFECT IS
7 GENERALLY TO MAKE THE PERSON RIGID AND FALL DOWN,
8 ESSENTIALLY PARALYZE MOMENTARILY AND UNABLE TO
9 CONTROL HIS OWN MOVEMENTS.

10 THE TASER WORKS AS FOLLOVED: WHEN THE
11 TRIGGER IS PULLED THESE DARTS GO OUT AND CONNECT
12 AND THERE'S AN AUTOMATIC CYCLE OF FIVE SECONDS.

13 THERE'S THE DEVICE TO STOP IT SHORT OF
14 THE FIVE SECONDS, BUT THAT WAS NOT USED IN THIS
15 CASE.

16 ONCE THE DARTS ARE IMPLANTED, THE TRIGGER
17 CAN BE PULLED A SECOND TIME OR A THIRD TIME OR A
18 FOURTH TIME, EACH TIME DELIVERING A NEW FIVE-SECOND
19 CYCLE.

20 THE TRIGGER CAN ALSO BE HELD DOWN AND IT
21 WILL CONTINUE TO DELIVER ELECTRICITY UNTIL THE
22 TRIGGER IS RELEASED BEYOND THE FIVE-SECOND BUILT-IN
23 LIMIT.

24 THE TASER HAS A VERY SIGNIFICANT FEATURE
25 TO HOLD OFFICERS ACCOUNTABLE FOR OVERUSE OR MISUSE

1 AND THIS FEATURE IS CALLED A DATAPORT. AND THE
2 DATAPORT IS GOING TO HAVE A HUGE ROLE IN THE
3 EVIDENCE THAT YOU'RE GOING TO HEAR IN THIS CASE.

4 THE DATAPORT HAS SOME SORT OF PLUG AND
5 YOU CAN PLUG IT RIGHT INTO YOUR P.C. THERE'S A
6 CHIP THAT RECORDS EACH TRIGGER PULL WITH THE TIME
7 STAMP BUILT INTO THE DEVICE ITSELF SO THAT WHEN THE
8 DATAPORT INFORMATION IS DOWNLOADED ONTO THE P.C.,
9 THE POLICE DEPARTMENT CAN GET A LINE-BY-LINE
10 INDICATION EXACTLY WHEN IT WAS FIRED DURING AN
11 INCIDENT.

12 AND THAT'S HOW WE KNOW THAT THESE THREE
13 TASERS, SERGEANT RUIZ, OFFICER LIVINGSTON AND
14 OFFICER GODWIN WERE FIRED 25 TIMES BECAUSE IT'S IN
15 THE DATAPORT.

16 WHEN THE DEVICE IS HELD DOWN, AS YOU'LL
17 SEE FROM THE TESTIMONY, THE DATAPORT RECORDS THESE
18 SERIES OF TRIGGER PULLS EXACTLY FIVE SECONDS APART.

19 SO IF ONE WERE TO PULL THE TRIGGER
20 EXACTLY FIVE SECONDS APART, THEY WOULD BE THE SAME
21 PATTERN AS IF ONE HELD IT DOWN AND IT CYCLED FOR 10
22 OR 15 SECONDS OR MORE. AND YOU'LL SEE THAT IN THIS
23 CASE.

24 TASERS CAN BE DEADLY WHEN THEY'RE CYCLED
25 TOO MANY TIMES INTO A HUMAN BEING, ESPECIALLY

1 SOMEONE WHO, LIKE MR. HESTON, IS IN AN EXCITED OR
2 AGITATED STATE.

3 THE OFFICERS KNEW THAT ROBERT HESTON WAS
4 IN A DELIRIOUS AND AGITATED STATE AND THAT'S WHY
5 THEY WERE CALLED.

6 AND THEIR OWN DEPARTMENT TRAINED THEM TO
7 RECOGNIZE THIS AS A HEALTH PROBLEM AND TO CALL
8 PARAMEDICS TO HELP THEM DEAL WITH IT. THEY
9 VIOLATED THAT POLICY, THAT TRAINING, BY
10 ENCOUNTERING MR. HESTON WITHOUT THE PARAMEDICS.

11 RATHER THAN HELP MR. HESTON GET SAFELY
12 INTO CUSTODY SO THAT HE COULD BE TREATED AND
13 PUNISHED IF APPROPRIATE, BECAUSE CERTAINLY
14 INJECTION OF METHAMPHETAMINE IS A CRIME, INSTEAD OF
15 DOING THAT THEY CYCLED THEIR TASERS 25 TIMES AND HE
16 DIED.

17 PLAINTIFF'S EXPERT WITNESS ON THE EFFECT
18 OF THE TASER IS DR. MARK MEYERS. HE'S A BOARD
19 CERTIFIED CARDIOLOGIST FROM SOUTHERN CALIFORNIA,
20 AND HE HAS A SPECIALTY IN WHAT IS CALLED
21 ELECTROPHYSIOLOGY.

22 THERE ARE TWO KINDS OF CARDIOLOGISTS,
23 THERE ARE CARDIOLOGISTS CONCERNED WITH THE
24 STRUCTURE OF THE HEART AND KEEPING THE ARTERY CLEAN
25 AND FLOWING AND THEY'RE THE ONES THAT DO

1 ANGIOPLASTIES AND CORONARY ARTERY BYPASS GRAFTS AND
2 THOSE SORTS OF THINGS. YOU CAN THINK OF THEM AS
3 PLUMBERS.

4 AND THEN THERE'S A WHOLE OTHER KIND OF
5 CARDIOLOGIST THAT IS CONCERNED WITH ONLY THE
6 ELECTRICAL SYSTEM THAT CONTROLS THE PUMPING OF THE
7 HEART SO THAT THE BLOOD GOES THROUGH THE BODY AND
8 PROFUSES THE TISSUES AND KEEPS US ALIVE. THEY'RE
9 LIKE ELECTRICIANS. THOSE ARE CALLED
10 ELECTROPHYSIOLOGISTS.

11 AND TASER HAS DESIGNATED AN
12 ELECTROPHYSIOLOGIST WHO WILL ALSO BE TESTIFYING ON
13 THESE ISSUES AND HIS NAME IS DOCTOR RICHARD LUCERI.
14 AND YOU'LL SEE THAT DR. LUCERI AND DR. MEYERS'
15 OPINIONS MATCH MORE THAN THEY DIVERGE IN THIS CASE.

16 AND THEY'RE THE IMPORTANT MEDICAL
17 EXPERTS, BECAUSE THE QUESTION THAT YOU'RE GOING TO
18 BE ASKED TO DECIDE IS WHAT CAUSED THIS CARDIAC
19 ARREST, WHAT CAUSED ROBERT HESTON'S HEART TO STOP
20 BEATING ON FEBRUARY 19TH.

21 DR. MEYERS WILL EXPLAIN TO YOU THAT WHEN
22 MUSCLES CONTRACT, WHEN WE CONTRACT OUR MUSCLES
23 THERE'S A WASTE PRODUCT PRODUCED. IT'S LIKE WHEN
24 WE DRIVE OUR CARS THERE IS AUTOMOBILE EXHAUST, IT'S
25 A WASTE PRODUCE OF MUSCLE CONTRACTIONS AND IT'S

1 CALLED LACTIC ACID OR LACTIC ACID BUILDUP.

2 AND WE HAVE ALL EXERCISED AND WE ALL FELT
3 THE BURN OR THE SORENESS THE NEXT DAY. THAT'S
4 LACTIC ACID.

5 AND WHEN THE TASERS CONTRACT THE MUSCLES,
6 THAT ALSO PRODUCES LACTIC ACID.

7 WHEN LACTIC ACID IS PRODUCED, IT GOES IN
8 THE BLOODSTREAM AND THAT'S HOW IT'S ELIMINATED FROM
9 THE BODY. THE BLOOD THEN FLOWS THROUGH THE LUNGS
10 AND BREATHING IS THE PROCESS THAT NEUTRALIZES THE
11 LACTIC ACID.

12 IF SOMEONE EXERCISES TOO HARD, FASTER
13 THAN THE BODY CAN COMPENSATE FOR IT AND THAT'S
14 CALLED ANAEROBIC EXERCISE, THE BLOOD ACID IN THE
15 SAME BUILDS UP.

16 WHEN THE BLOOD ACID BUILDS UP, THE
17 MEASURE OF THE BLOOD ACID, WHICH IS CALLED PH,
18 DROPS. BLOOD ACID GOES UP, PH DROPS.

19 NOW, VIGOROUS EXERCISE WILL LOWER A
20 PERSON'S PH. IT ONLY BECOMES DANGEROUS IF IT DROPS
21 TOO FAR, TOO FAST. BUT IF THE PH DROPS TOO FAR,
22 TOO FAST, THAT ALONE STOPS THE HEART. THIS
23 CONDITION OF ELEVATED BLOOD ACID, WHICH IS MEASURED
24 AS LOWER PH, IS CALLED ACIDOSIS. AND YOU'LL BE
25 HEARING A LOT ABOUT ACIDOSIS IN THIS CASE.

1 AND THE SOURCE OF THE ACIDOSIS IS THE
2 LACTIC ACID PRODUCED BY THE MUSCLE CONTRACTIONS.

3 PEOPLE DON'T NORMALLY EXERCISE THEMSELVES
4 INTO CARDIAC ARREST FROM ACIDOSIS. IT ACTUALLY
5 HAPPENS, OCCASIONALLY PEOPLE WILL DROP DEAD DURING
6 A MARATHON OR A TRIATHLON OR SOMETHING, IT ACTUALLY
7 DOES HAPPEN BUT IT'S VERY, VERY RARE AND THE REASON
8 IS IS SIMPLY THAT THE BODY HAS MECHANISMS THAT TELL
9 US, HEY, YOU'RE GETTING FATIGUED, YOU'RE WORKING
10 TOO HARD, WE HYPERVENTILATE, WE SLOW DOWN, WE SIT,
11 WE REST, WE ALLOW OUR BLOOD ACID TO RETURN TO
12 NORMAL.

13 WHEN SOMEONE IS HOOKED UP TO A TASER AND
14 THE TASER IS TELLING THE BLOOD, THE MUSCLES TO
15 CONTRACT OVER AND OVER AGAIN, THE BRAIN IS NO
16 LONGER IN CONTROL. THAT RECUPERATION IS OUT OF THE
17 EQUATION AND THE BLOOD ACID CAN BE RAISED, THE SAME
18 WAY SAYING THAT THE PH CAN BE LOWERED TO CRITICAL
19 LEVELS AND UNDER CIRCUMSTANCES WHERE THE PERSON IS
20 IN EXCRUCIATING PAIN FROM THE TASER AND UNDER A
21 GREAT DEAL OF STRESS BECAUSE OF THE OVERALL
22 SITUATION AND THAT IS THE RECIPE FOR CARDIAC
23 ARREST.

24 NOW, BEFORE SELLING THIS NEW REP -- THIS
25 TASER M26, TASER INTERNATIONAL TESTED IT ON PIGS.

1 BUT THEY ONLY TESTED IT TO SEE WHETHER OR NOT THE
2 ELECTRICAL CURRENT WAS STRONG ENOUGH TO STOP THE
3 HEART. WHAT IS CALLED ELECTROCUTION.

4 AND IT WASN'T. THE -- FROM TASER'S POINT
5 OF VIEW THOSE -- THOSE PIG EXPERIMENTS WERE QUITE
6 SUCCESSFUL. AND THEY PROMOTED THEIR DEVICE AS VERY
7 SAFE BECAUSE THE CURRENT WAS SIMPLY NOT STRONG
8 ENOUGH TO GO IN THROUGH ALL THE TISSUES, THE
9 MUSCLE, INTO THE HEART AND THEN KNOCK THE HEART OUT
10 OF IT'S NORMAL ELECTRICAL RHYTHM IN SOME DEADLY
11 ALTERNATIVE RHYTHM.

12 BUT TASER, AS YOU'LL HEAR TODAY, DID NOT
13 TEST THE EFFECT OF LONGER DURATION EXPOSURES,
14 ESPECIALLY ON THE ACID LEVEL OF THESE PIGS.

15 TASER DID NOT WARN, WHEN IT BEGAN SELLING
16 THIS DEVICE TO SALINAS AND OTHER POLICE
17 DEPARTMENTS, WATCH OUT FOR REPEATED EXPOSURES
18 BECAUSE PEOPLE MIGHT BECOME TOO ACIDOTIC AND DIE.

19 BEGINNING IN 2003, THE U.S. MILITARY
20 BEGAN STUDYING THE TASER. IT VOICED CONCERN OVER
21 WHETHER TOO MANY, TOO LONG EXPOSURES WOULD CREATE
22 ACIDOSIS. A DOCTOR NAMED JAMES JAUCHIM -- AND
23 YOU'LL HEAR A LOT ABOUT DR. JAUCHIM IN THIS CASE --
24 CONDUCTED AN EXPERIMENT. HE TOOK A NUMBER OF PIGS
25 AND PUT THEM UNDER ANESTHESIA BECAUSE THE

1 CRUELTY-TO-ANIMAL PEOPLE DEMANDED THAT AND MEASURED
2 THE EFFECT OF WHAT DIFFERENT TASER DOSAGES WERE ON
3 THE PH LEVEL AND THE LACTIC ACID PRODUCTION OF
4 THESE ANIMALS.

5 AND WHAT HE DETERMINED, AND WHAT YOU'LL
6 SEE IN THE CASE GRAPHICALLY PRESENTED TO YOU, IS
7 THAT THE MORE SOMEONE IS SHOCKED WITH A TASER, OR
8 IN THIS CASE AN ANESTHETIZED PIG, THE MORE THE
9 LACTIC ACID IS DISTRIBUTED IN THE BLOODSTREAM, THE
10 HIGHER THE LACTIC ACID, THE LOWER THE PH.

11 ONE SHOCK, ALTHOUGH IT CREATES A
12 STATISTICALLY SIGNIFICANT CHANGE IN LACTATE, DOES
13 NOT CREATE ANYTHING NEAR A DANGER OR A CLINICALLY
14 SIGNIFICANT CHANGE.

15 THREE, A MORE PROFOUND CHANGE, BUT STILL
16 WITHIN THE REALM OF SAFETY.

17 BUT 18, 18 DOSES, WHICH IS ABOUT
18 TWO-THIRDS OF WHAT MR. HESTON RECEIVED, PUT THESE
19 PIGS RIGHT INTO THE DANGER ZONE WHERE CARDIAC
20 ARREST FROM ACIDOSIS IS LIKELY.

21 WHEN WORD OF DR. JAUCHIM'S STUDY GOT TO
22 TASER INTERNATIONAL AND TO ITS CEO PATRICK SMITH,
23 WHO IS PRESENT IN COURT AND WE WILL BE PLAYING YOU
24 AN EXCERPT FROM HIS DEPOSITION LATER TODAY. WHEN
25 THEY FOUND OUT ABOUT DR. JAUCHIM'S STUDY, THIS WAS

1 SOMETIME IN 2004, THEY DECIDED THEY BETTER FINALLY
2 WARN THEIR CUSTOMERS, THESE POLICE DEPARTMENTS,
3 ABOUT THE DANGER OF EXTENDED DURATION OF TASER
4 APPLICATIONS.

5 THEY ISSUED A WARNING, BUT IT WAS BURIED
6 AS SLIDE 108 IN A 1 -- LET ME GET THE RIGHT NUMBER
7 HERE -- AND 174 POWER POINT PRESENTATION MAILED OUT
8 SOMETIME BETWEEN JANUARY 2004 AND JANUARY 2005.

9 THE SALINAS POLICE OFFICERS INVOLVED IN
10 THIS INCIDENT NEVER SAW THIS WARNING. IT WAS NEVER
11 RELAYED FROM TASER THROUGH THE SALINAS POLICE
12 DEPARTMENT TO THEM. THEY ALL WILL TESTIFY THEY
13 WERE UNAWARE OF ANY HEALTH RISK ASSOCIATED WITH
14 THEIR 25 TASINGS OF MR. HESTON.

15 NOW, LET ME TELL YOU WHAT HAPPENED IN
16 THIS INCIDENT IN A LITTLE MORE DETAIL, WHAT THE
17 PLAINTIFFS SAY THE EVIDENCE WILL SHOW. AND THERE'S
18 GOING TO BE SOME CONFLICTS IN THE EVIDENCE.

19 ON THIS DAY, FEBRUARY 19TH, THE
20 PLAINTIFFS ARE WORRIED ABOUT THEIR SON. HE'S ONLY
21 BEEN OUT OF PRISON LESS THAN A MONTH. HE'S BEEN
22 DOING WELL. HE'S BEEN WORKING WITH HIS FATHER IN
23 HIS CONCRETE BUSINESS. HE'S BEEN ATTENDING
24 PROGRAMS AND ALL OF A SUDDEN HE'S ACTING VERY
25 STRANGE AND IRRATIONAL. HE THINKS THERE'S SOMEBODY

1 IN THE ATTIC WITH A GUN THREATENING THE FAMILY.
2 HE'S AGITATED.

3 THEY HAVE BEEN THROUGH THIS BEFORE, THEY
4 KNOW WHAT THIS MEANS. HE HAS RELAPSED.

5 THEY CALL THE POLICE DEPARTMENT. SEND
6 OVER SOMEONE TO HELP. OFFICERS ARE DISPATCHED.
7 CURT KASTNER, THEIR SON-IN-LAW, THAT'S MISTY'S
8 HUSBAND, COMES OVER TO HELP, AND A FRIEND NAMED
9 CLIFF SATREE COMES OVER TO HELP.

10 THE OFFICERS COME, THEY TALK TO THE
11 FATHER, THEY TALK TO THE SON. THE SON TELLS THE
12 OFFICERS ABOUT SOMEONE IN THE ATTIC WITH A GUN
13 THREATENING THE FAMILY.

14 THE OFFICERS BELIEVE THAT HE'S -- HE'S ON
15 DRUGS. THEY CONCEDE HE'S DELUSIONAL AND
16 IRRATIONAL, BUT THEY DECIDE TO TAKE NO ACTION AND
17 THEY LEAVE. THEY'RE THERE FOR 10, 15 MINUTES AND
18 THEY LEAVE.

19 NOT FIVE MINUTES AFTER THEY LEFT THE SON
20 BECOMES EXTREMELY AGITATED AND EXCITED. HE BEGINS
21 POUNDING ON THE CEILING. HE'S OPENING THE DOOR AND
22 BEGINS THROWING THINGS OUT OF THE DOOR. HE KNOCKS
23 HIS FATHER DOWN. 911 IS CALLED AGAIN, HIS FATHER
24 CALLED 911. YOU'LL HEAR THE CALL. CURT KASTNER
25 CALLS 911 AGAIN, "YOU HAVE TO COME BACK RIGHT

1 AWAY," AND HE CALLS AND HE'S OUT OF CONTROL AND
2 CLIFFORD SATREE CALLED 911.

3 AND THE THING ABOUT CLIFFORD SATREE'S 911
4 CALL, WHICH YOU'LL HEAR PLAYED TODAY, IS THAT HE
5 STAYS ON THE LINE AND DOES A PLAY-BY-PLAY OF
6 EXACTLY WHAT HAPPENED NEXT AND SO YOU'LL BE ABLE TO
7 HEAR IN REALTIME EXACTLY HOW THESE EVENTS UNFOLDED.

8 OFFICER DOMINICI, SERGEANT DOMINICI AND
9 SERGEANT FAIRBANKS ARE THE FIRST TO RETURN.

10 THEY SEE MR. HESTON AT THE DOOR. THAT'S
11 THE SON, THROWING THINGS OUT. IN FACT, HE THROWS
12 SOMETHING, A PIECE OF WOOD, MOLDING, WHATEVER IT
13 WAS, AND IT HITS SERGEANT DOMINICI IN THE CENTER OF
14 HIS BULLET PROOF VEST AND IT BOUNCES OFF. SERGEANT
15 DOMINICI IS NOT INJURED.

16 HE FIRES HIS TASER AT MR. HESTON.

17 SERGEANT DOMINICI HAS HAD LESS THAN
18 TWO HOURS OF TASER TRAINING AND HAS NEVER FIRED THE
19 PROBES BEFORE, EVEN AT A TARGET.

20 ONE OF THE PROBES MISSES AND GOES IN THE
21 DOOR JAM. SO THERE'S NO COMPLETED CIRCUIT. THE
22 TASER HAS NO EFFECT OTHER THAN TO FURTHER AGITATE
23 ROBERT HESTON.

24 SERGEANT -- OFFICER FAIRBANKS FIRES ONLY
25 A FEW SECONDS AFTER SERGEANT DOMINICI'S

1 UNSUCCESSFUL FIRING, BUT HIS IS UNSUCCESSFUL, TOO.

2 HE'S STANDING NEAR THE MAXIMUM RANGE OF
3 THE TASER. REMEMBER, THE WIRES ARE ONLY 21 FEET,
4 LESS THAN THE DISTANCE FROM ME TO YOU.

5 AS -- AS MR. HESTON FALLS BACKWARD FROM
6 THE TASER, THE WIRES BREAK OR THE DARTS COME OUT,
7 THE DEVICE LOSES ITS EFFECT. AND HE'S TASED AGAIN.
8 AND YOU'LL HEAR CLIFFORD SATREE SAY HE'S PULLING A
9 DART OUT. HE WAS ACTUALLY ABLE TO PULL A DART OUT
10 BECAUSE HE WASN'T GETTING ANY CURRENT.

11 SERGEANT RUIZ RETURNS ALONG WITH OFFICER
12 LIVINGSTON AND OFFICER PAREDEZ.

13 RUIZ TRIES TO ENGAGE ROBERT HESTON IN
14 SOME CONVERSATION. "HEY, MAN, WHAT IS GOING ON?"
15 CALM HIM DOWN. HE'S STILL TALKING ABOUT THE GUY IN
16 THE ATTIC WITH THE GUN. STILL.

17 SERGEANT RUIZ FIRES HIS TASER. AT THE
18 SAME TIME -- AND EVERY WITNESS WHO COMES IN WILL
19 SAY IT'S VIRTUALLY SIMULTANEOUS -- OFFICER
20 LIVINGSTON FIRES HIS TASER, EVEN THOUGH THE
21 TRAINING FOR THE CITY OF SALINAS IS THAT ONLY ONE
22 DEVICE SHOULD BE USED AT A TIME AND THE SECOND
23 SHOULD BE USED ONLY IF THE FIRST IS UNSUCCESSFUL AS
24 BACKUP.

25 MR. HESTON STUMBLES BACKWARDS FROM THE

1 EFFECT OF THE TASER. SERGEANT RUIZ AND OFFICER
2 LIVINGSTON FOLLOW HIM INSIDE OF THE HOUSE. THEY
3 WANT TO KEEP HIM IN VIEW. THEY WANT TO KEEP THE
4 WIRE SLACK SO THAT THEY DON'T BREAK OR COME OUT SO
5 THAT THE TASERS WILL HAVE THEIR EFFECT.

6 THEY CYCLE THE DEVICES OVER AND OVER
7 AGAIN. MR. HESTON GOES TO THE FLOOR. HE HITS HIS
8 HEAD ON A COFFEE TABLE.

9 OFFICER PAREDEZ COMES IN RIGHT BEHIND
10 THEM AND BEHIND OFFICER PAREDEZ IS OFFICER
11 FAIRBANKS, WHO CLEARS THE WAY, THE GRANDFATHER
12 CLOCK THAT MR. HESTON HAD KNOCKED DOWN AND THEY SEE
13 MR. HESTON ALREADY ON THE FLOOR. THE ESTIMATE IS
14 JUST A FEW SECONDS AFTER THE FIRING.

15 HE'S ON THE FLOOR PRONE, FACE DOWN, WITH
16 HIS ARMS SORT OF CURLED UNDERNEATH HIM, A POSITION
17 THAT IS CAUSED BY THE CYCLING OF THE TASERS. HE'S
18 ON THE GROUND. THE OFFICERS CONTINUE TO CYCLE
19 THEIR TASERS.

20 OFFICER LIVINGSTON IS HOLDING THE TRIGGER
21 DOWN.

22 ANOTHER OFFICER COMES IN THE ROOM,
23 OFFICER GODWIN. HE FIRES HIS TASER INTO MR. HESTON
24 SO THAT NOW MR. HESTON IS HOOKED UP TO THREE
25 TASERS. SERGEANT RUIZ'S DATAPORT SHOWS SIX

1 DIFFERENT FIVE SECOND TRIGGER PULLS.

2 OFFICER GODWIN'S SHOWS SIX DIFFERENT
3 TRIGGER PULLS.

4 OFFICER LIVINGSTON'S SHOWS 13 FIVE-SECOND
5 BURSTS. THAT'S A TOTAL OF TWO MINUTES AND
6 FIVE SECONDS OF TASER SHOTS ALL SQUEEZED INTO A
7 PERIOD OF ABOUT FIVE SECONDS, ALMOST ALL OF WHICH
8 WAS AFTER HE WAS LYING ON THE FLOOR.

9 ON HIS RIGHT ARM IS OFFICER FAIRBANKS
10 WAITING FOR THE TASER TO STOP SO HE COULD BE
11 HANDCUFFED AND ON HIS LEFT ARM IS OFFICER PAREDEZ,
12 WAITING FOR THE TASER TO STOP SO HE COULD BE
13 HANDCUFFED.

14 AT HIS HEAD IS SERGEANT DOMINICI.

15 ANOTHER OFFICER COMES IN THE ROOM, THIS
16 IS THE SEVENTH OFFICER NOW, TIM SIMPSON.

17 AT THIS POINT OFFICER GODWIN THINKS MAYBE
18 HIS TASER IS NOT WORKING RIGHT AND TAKES THE
19 CARTRIDGE OUT, PUTS IN A NEW ONE, SHOOTS MR. HESTON
20 IN THE BACK, THIS IS THE SIXTH TIME, AND AS SOON AS
21 THAT FIVE-SECOND CYCLE ENDS, THERE ARE NO MORE
22 TASER CYCLING, MR. HESTON IS TURNING BLUE, HE'S
23 LIMP. THEY PUT HIM IN HANDCUFFS.

24 OFFICER FAIRBANKS IMMEDIATELY CALLS FOR
25 AN AMBULANCE. THEY ROLL HIM OVER. OFFICER PAREDEZ

1 CHECKS HIS CAROTID PULSE AND FINDS NOTHING. HE
2 CHECKS HIS BREATHING, FINDS NOTHING.

3 THEY DON'T TAKE MR. HESTON OUT OF HIS
4 HANDCUFFS.

5 OFFICER SIMPSON, WHO PUT HIM IN THE
6 HANDCUFFS, IS TOLD TO GET HIS CAMERA AND START
7 TAKING PICTURES. MR. HESTON IS LEFT IN HANDCUFFS.
8 THE PARAMEDICS ARRIVE. THEY WORK ON HIM. BY THIS
9 TIME HE IS TAKEN OUT OF HANDCUFFS AND THEY'RE ABLE
10 TO START HIS HEART AGAIN, BUT IT'S TOO LATE.

11 TOMORROW YOU WILL HEAR FROM A DOCTOR
12 NAMED TERRY HADDIX. SHE IS A STAFF PHYSICIAN, A
13 FORENSIC PATHOLOGIST AT STANFORD. SHE DOES
14 AUTOPSIES. AND SHE'S THE DOCTOR WHO DID THE
15 AUTOPSY FOR MONTEREY COUNTY FOR ITS CORONER'S
16 OFFICE TO DETERMINE WHY ROBERT HESTON DIED.

17 NOW, HIS ACTUAL CAUSE OF DEATH WHICH
18 OCCURS 30 HOURS LATER, IS FAIRLY SIMPLE. IT'S THE
19 MASSIVE ORGAN FAILURE THAT FLOWED FROM BEING BRAIN
20 DEAD FOR 30 HOURS. THE REAL ISSUE HERE IS NOT THE
21 CAUSE OF DEATH BUT THE CAUSE OF THE CARDIAC ARREST
22 THAT OCCURRED ON FEBRUARY 19TH.

23 AND DR. HADDIX, WHO IS THE ONLY
24 INDEPENDENT MEDICAL EXPERT YOU'RE GOING TO HEAR IN
25 THIS CASE, NOT BROUGHT IN BY EITHER SIDE TO RENDER

1 OPINIONS, DID WHAT FORENSIC PATHOLOGISTS, MEDICAL
2 EXAMINERS DO.

3 SHE AUTOPSIED THE BODY, LOOKED AT WHAT
4 EVIDENCE THERE WAS THERE. SHE FOUND OUT AS MUCH AS
5 SHE COULD ABOUT WHAT HAPPENED IN THE TIME RIGHT
6 BEFORE HE DIED, AND SHE ALSO WENT TO GREAT LENGTH
7 TO LEARN ABOUT THE TASER AND ITS EFFECTS. SHE
8 ACTUALLY CORRESPONDED WITH TASER INTERNATIONAL AND
9 LOOKED AT THE ARTICLES THAT SHE WAS REFERRED TO.

10 AND SHE CONCLUDED THAT THE REPEATED TASER
11 DISCHARGES ON A PERSON WHO IS IN AN AGITATED STATE
12 ON METHAMPHETAMINE CAUSED THIS DEATH.

13 SHE LOOKED AT THE TOXICOLOGY REPORTS,
14 WHICH ARE THE LEVELS OF FOREIGN CHEMICALS IN THE
15 BODY. HE HAD JUST A TRACE OF ALCOHOL, WHICH IS
16 .01, SO .08 IS THE LEGAL LIMIT FOR DRIVING. SO
17 ALMOST NOTHING. HE DID HAVE .64 MILLILITERS PER
18 LITER, .64 METHAMPHETAMINE IN HIS SYSTEM AND THAT
19 WHAT APPEARS TO BE RESPONSIBLE FOR THIS ERRATIC
20 BIZARRE BEHAVIOR THAT BROUGHT THE POLICE THERE.

21 NOW, AS I MENTIONED TO YOU BEFORE,
22 DR. MEYERS, THE PLAINTIFF'S CARDIOLOGY EXPERT, WILL
23 EXPLAIN TO YOU WHY IT WAS THE REPEATED TASER
24 APPLICATIONS THAT CAUSED THIS CARDIAC ARREST,
25 THROUGH THE METABOLIC CHANGES, THROUGH THE CHANGES

1 IN THE BLOOD ACID THAT WERE CAUSED BY THE REPEATED
2 MUSCLE CONTRACTIONS.

3 YOU WILL HEAR THAT DR. MEYERS BASES HIS
4 CONCLUSIONS ON DR. JAUCHIM'S STUDY FOR THE U.S.
5 MILITARY AND WHAT IT SHOWS ABOUT PH CHANGES CAUSED
6 BY THE REPEATED TASER APPLICATIONS, WHICH IS JUST
7 REALLY COMMON SENSE.

8 THROUGHOUT THE TRIAL YOU WILL HEAR SOME
9 ALTERNATIVE HYPOTHESES AND ALTERNATIVE THEORIES,
10 ALTERNATIVE SUGGESTIONS AS TO WHAT CAUSED THIS
11 CARDIAC ARREST. DR. MEYERS WILL EXPLAIN TO YOU WHY
12 NONE OF THEM APPLIED TO THIS CASE.

13 THE FIRST IS THAT THERE WAS SOME
14 PREEEXISTING HEART CONDITION THAT WAS DISCOVERED IN
15 MR. HESTON DURING THE AUTOPSY. HE HAD A MILDLY
16 ENLARGED HEART. DR. MEYERS AND DR. LUCERI,
17 REMEMBER, TASER'S CARDIOLOGISTS, AGREED THAT THIS
18 IS NOT AN UNUSUAL CONDITION FOR A 40-YEAR OLD
19 AMERICAN, AND THAT IT IN NO WAY EXPLAINS THIS
20 DEATH.

21 IN FACT, DR. LUCERI, AND THIS IS TASER'S
22 EXPERT, SAID THAT ATTRIBUTING THIS DEATH, THIS
23 CARDIAC ARREST TO THE ENLARGED HEART IS, AND I
24 QUOTE, "NONSENSE."

25 THE SECOND IS THAT MR. HESTON DIED OF A

1 METHAMPHETAMINE OVERDOSE; HE JUST TOOK TOO MUCH
2 METHAMPHETAMINE AND THAT STOPPED HIS HEART. THAT
3 CAN HAPPEN; HOWEVER, AS BOTH DR. MEYERS AND
4 DR. LUCERI, TASER'S EXPERT, WILL EXPLAIN TO YOU,
5 WHEN THAT HAPPENS THERE'S A DIFFERENT MECHANISM,
6 THERE'S A DIFFERENT KIND OF HEART ARRHYTHMIA THAN
7 WHAT WAS PRESENT IN THIS CASE.

8 AND I'LL WAIT UNTIL THE DOCTORS ARE UP
9 THERE SO I DON'T MESS UP, BUT IT'S LIKE THE
10 DIFFERENCE BETWEEN VENTRICULAR FIBRILLATION AND
11 ASYSTOLE, WHICH COMES OUT AS COMPLETELY DIFFERENT
12 KINDS OF LINES ON THOSE GRAPH PAPERS THEY HOOK UP
13 TO PEOPLE'S HEARTS TO SEE HOW THEY'RE BEATING.

14 THE THIRD HYPOTHESIS IS THAT MR. HESTON
15 DIED FROM SOMETHING THAT THE DEFENSE EXPERT IS LIKE
16 TO CALL EXCITED DELIRIUM SYNDROME; THAT HE
17 BASICALLY EXERCISED HIMSELF TO DEATH BECAUSE OF THE
18 EFFECTS OF THE METHAMPHETAMINE.

19 NOW, THIS IS A VERY CONTROVERSIAL AND NEW
20 THEORY ABOUT CAUSE OF DEATH. I DON'T WANT TO GO
21 TOO FAR INTO IT NOW, BUT IT'S WHAT IS CALLED A
22 DIAGNOSIS OF EXCLUSION.

23 IN OTHER WORDS, ONE CAN ATTRIBUTE DEATH
24 TO EXCITED DELIRIUM SYNDROME, ACCORDING TO CERTAIN
25 PROPONENTS OF THE THEORY, ONLY WHEN THERE ARE NO

1 ALTERNATIVE EXPLANATIONS.

2 FOR EXAMPLE, IF YOU HAVE SOMEBODY WHO IS
3 IN AN EXCITED AND AGITATED STATE AND HAVE SOME
4 METHAMPHETAMINE IN THEIR SYSTEM, AND THEY'RE DEAD,
5 AND THEY HAVE A BULLET WOUND IN THEIR HEAD, YOU
6 DON'T SAY THAT THAT'S EXCITED DELIRIUM SYNDROME.

7 SIMILARLY, IF SOMEBODY HAS BEEN TASED 25
8 TIMES AND IS SEVERELY ACIDOTIC AND GOES INTO
9 CARDIAC ARREST, YOU DON'T SAY THAT THAT IS EXCITED
10 DELIRIUM SYNDROME. IT'S ONLY WHEN THERE IS NO
11 OTHER EXPLANATION.

12 MR. AND MRS. HESTON ARE SUING TASER
13 INTERNATIONAL BECAUSE THEY DIDN'T DO THEIR RESEARCH
14 BEFORE THEY MARKETED THEIR PRODUCT AND THEN EVEN
15 AFTER THEY FOUND OUT, THEY DIDN'T DO WHAT THEY WERE
16 SUPPOSED TO DO TO MAKE SURE THE WARNING GOT OUT.

17 THEY'RE SUING THE POLICE OFFICERS BECAUSE
18 THEY SHOULD NOT HAVE TASED MR. HESTON AFTER HE WAS
19 KNOCKED TO THE FLOOR.

20 THE PLAINTIFFS WILL BRING IN AN EXPERT TO
21 EXPLAIN THAT TO YOU. HIS NAME IS ERNEST BURWELL.
22 HE TRAINED, BEFORE HIS RETIREMENT, LOS ANGELES
23 COUNTY SHERIFF'S DEPUTIES IN THE USE OF THE TASER
24 DURING SORT OF THE FIRST FOUR YEARS OF THE
25 IMPLEMENTATION OF THIS STILL RELATIVELY NEW DEVICE.

1 AND MR. BURWELL WILL TELL YOU -- BUT,
2 AGAIN, IT'S JUST COMMON SENSE -- THAT ONCE THE
3 PERSON IS KNOCKED TO THE GROUND AND THE DEVICE HAS
4 DONE ITS JOB OF ALLOWING A SAFE TAKE-DOWN FROM A
5 DISTANCE, THE OTHER OFFICER IS PRESENT, AND THERE
6 WERE OTHER OFFICERS PRESENT IN THIS CASE, SHOULD
7 MOVE IN AND HANDCUFF THE PERSON, QUICKLY AND
8 SAFELY; THAT CONTINUING TO SHOCK THE PERSON ONCE
9 HE'S DOWN IS ACTUALLY COUNTERPRODUCTIVE BECAUSE --
10 BECAUSE IT MAKES THE MUSCLES RIGID AND MUCH MORE
11 DIFFICULT TO PLACE BEHIND THE BACK INTO HANDCUFFING
12 POSITION.

13 BEING SHOCKED WITH A TASER, YOU'LL HEAR,
14 IS EXTREMELY PAINFUL. IT IS A USE OF FORCE. AND
15 SO ANY INDIVIDUAL UNNECESSARY CYCLING OF A TASER,
16 IF IT IS UNNECESSARY FOR A LAW ENFORCEMENT
17 OBJECTIVE OR A PUBLIC SAFETY OBJECTIVE, IT IS
18 EXCESSIVE FORCE.

19 NOW, DURING THE TRIAL THE DEFENDANTS WILL
20 CLAIM THAT THEY DID NOT KNOW THAT THESE EXTRA
21 CYCLES WILL KILL ANYBODY. MAYBE THAT'S TRUE. IT
22 DOESN'T MATTER.

23 THE LAW HOLDS PEOPLE RESPONSIBLE FOR THE
24 CONSEQUENCES OF EXCESSIVE FORCE, WHETHER THEY
25 INTENDED IT TO BE DEADLY OR NOT.

1 MR. HURLEY: OBJECTION. LEGAL ARGUMENT.

2 THE COURT: YES, MEMBERS OF THE JURY, I
3 ALLOW THIS TIME FOR THE PARTIES TO TALK ABOUT WHAT
4 THE EVIDENCE WILL SHOW, AND I WILL INSTRUCT YOU ON
5 THE LAW AND I'LL ASK YOU TO CONFINE YOUR COMMENTS
6 TO WHAT YOU BELIEVE THE EVIDENCE WILL SHOW AND WAIT
7 UNTIL LATER TO MAKE ARGUMENT ABOUT THE LAW.

8 MR. BURTON: THANK YOU, YOUR HONOR.

9 SERGEANT DOMINICI DID NOT USE HIS TASER
10 AFTER MR. HESTON WAS ON THE LIVING ROOM FLOOR.
11 HE'S NOT RESPONSIBLE IN THE SAME WAY; HOWEVER, HE
12 WAS IN CHARGE OF THIS OPERATION AND YOU WILL HEAR
13 FROM A SECOND EXPERT IN POLICE PRACTICES FROM
14 PLAINTIFF, A RETIRED LIEUTENANT FROM THE LOS
15 ANGELES COUNTY SHERIFF'S DEPARTMENT NAMED ROGER
16 CLARK, WHO ONCE LEAD A VERY ELITE UNIT WHICH
17 ARRESTED DANGEROUS CRIMINALS.

18 AND LIEUTENANT CLARK WILL EXPLAIN TO YOU
19 HOW IMPORTANT IT IS FOR THE COMMANDER IN A TACTICAL
20 SITUATION TO EXERCISE CONTROL TO MAKE SURE THAT
21 EACH OF HIS SUBORDINATES UNDERSTAND WHAT HIS ROLE
22 IS TO BE OR WHAT HER ROLE IS TO BE AND TO EXECUTE
23 THAT PLAN AND TO STOP SUBORDINATES IF THEY BEGIN
24 DOING THINGS THAT ARE COUNTERPRODUCTIVE, SUCH AS
25 USING EXCESSIVE TASER SHOCKS.

1 FINALLY, PLAINTIFFS ARE ASKING THAT THE
2 CITY OF SALINAS POLICE DEPARTMENT BE HELD
3 RESPONSIBLE BECAUSE IT CHOSE NOT TO BUY THE
4 SOFTWARE, \$150, TO DOWNLOAD THE DATAPORT DATA.

5 PRIOR TO THIS INCIDENT THE CITY OF
6 SALINAS POLICE DEPARTMENT, YOU'LL SEE FROM THE
7 EVIDENCE, DID NOT CHECK THE TASERS OF OFFICERS
8 AFTER AN INCIDENT TO FIND OUT HOW MANY TIMES THE
9 DEVICE HAD BEEN FIRED TO SEE WHETHER OR NOT WHAT
10 THE OFFICERS REPORTED ACTUALLY MATCHED WHAT
11 HAPPENS.

12 IN THIS CASE THEY HAD TO GO GET THE
13 SOFTWARE BECAUSE NOW THEY HAD A DEATH ON THEIR
14 HANDS AND THEY FOUND THAT THE OFFICERS REPORTED FAR
15 FEWER TRIGGER PULLS THAN THE DATAPORT RECOVERED.

16 HAD THEY GOTTEN THIS \$150 SOFTWARE WITH
17 THEIR ORIGINAL ORDER, SET THE CLOCKS ON THE
18 DATAPORTS CORRECTLY AND MONITORED OFFICERS AFTER
19 THEY USED IT, IT WOULD HAVE BEEN AWARE OF THE
20 PROBLEM WITH THE EXCESSIVE TRIGGER PULLS AND BEEN
21 ABLE TO CORRECT FOR IT.

22 THE EVIDENCE WILL ALSO SHOW THAT THE CITY
23 OF SALINAS DID NOT REVIEW THE TASER TRAINING THAT
24 WAS DISSEMINATED TO THEM WITH THE WARNING OF THE
25 EXTENDED DURATIONS.

1 LET ME JUST CONCLUDE BY TELLING YOU ABOUT
2 THE DECEDENT IN THIS CASE, ROBERT HESTON. HE GREW
3 UP IN SALINAS. HE LIVED THERE HIS ENTIRE LIFE
4 ALMOST. HE ACTUALLY WAS AN OUTSTANDING ATHLETE IN
5 HIGH SCHOOL AND WON AN AWARD AS THE MOST
6 OUTSTANDING FOOTBALL PLAYER IN THE CITY.

7 HE WENT TO FRESNO STATE TO PURSUE
8 FOOTBALL BUT COLLEGE DIDN'T AGREE WITH HIM. HE
9 LEFT SCHOOL AND WENT TO WORK AT HIS FATHER'S CEMENT
10 BUSINESS.

11 BY THE TIME HE WAS IN HIS MID TWENTIES,
12 HIS FAMILY BECAME AWARE THAT HE HAD THIS SEVERE
13 SUBSTANCE ABUSE PROBLEM AND THERE WAS A FAMILY
14 HISTORY OF SUBSTANCE ABUSE.

15 BY ALL ACCOUNTS THAT YOU'LL HEAR, THERE
16 WERE TWO ROBERT HESTONS. WHEN HE WAS CLEAN AND
17 SOBER, AS HE WAS FOR MANY SIGNIFICANT STRETCHES, HE
18 WENT THROUGH REHABILITATION MANY TIMES, HE WAS THE
19 WORLD'S NICEST GUY.

20 HIS FATHER WILL TELL YOU HOW THEY LOVED
21 TO FISH TOGETHER, WORK SIDE-BY-SIDE IN THE CEMENT
22 BUSINESS, GO TO CHURCH ON SUNDAYS AND THEN THE
23 MEN'S BREAKFAST AFTERWARDS.

24 IT JUST -- FRIENDS LOVED HIM. HE WAS THE
25 KIND OF GUY THAT WOULD GIVE YOU THE SHIRT OFF OF

1 HIS BACK.

2 AND THEN HE WOULD GET INVOLVED WITH THIS
3 DRUG AND YOU'LL HEAR ABOUT -- ABOUT ALL OF THE
4 STRUGGLES THAT THE FAMILY HAD WITH THAT.

5 THIS WAS NOT THE FIRST TIME THAT THIS
6 HAPPENED. THERE WAS AN INCIDENT AT A HOTEL. THERE
7 WAS AN INCIDENT WHERE HE WAS BITTEN BY A POLICE
8 DOG. HE WAS ACTUALLY TASED ANOTHER TIME. THERE
9 WAS ANOTHER INCIDENT WHERE HE WAS ACTUALLY THROWING
10 STUFF OUT OF HIS PARENTS' HOUSE. THERE WAS EVEN AN
11 INCIDENT WHERE HE GOT INTO A PHYSICAL ALTERCATION
12 WITH HIS MOTHER WHERE SHE KICKED HIM IN THE GROIN
13 AND WHERE HE RETALIATED AGAINST HER AND PUNCHED HER
14 AND GAVE HER A BLACK EYE.

15 BUT YOU WILL ALSO HEAR THE POSITIVE TIMES
16 HE HAD WITH HIS FAMILY, THE TIME WITH HIS NIECES
17 AND THE PIE BAKING CONTEST WITH HIS FATHER, THE
18 HOLIDAYS, THE FACT THAT THE FAMILY NEVER EVER GAVE
19 UP ON HIM AND HE NEVER GAVE UP. HE WAS STILL
20 STRUGGLING TO FIND THE PATH TO SOBRIETY.

21 HE WAS A VERY RELIGIOUS PERSON. HE WENT
22 12-STEP PROGRAMS AND SO ONE OF OUR LAST WITNESSES
23 NEXT WEEK WILL BE A DOCTOR NAMED NATHAN LAVID. AND
24 NATHAN LAVID IS A PSYCHIATRIST AND HE TREATED
25 SPECIAL ADDICTIONS.

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AND HE DID A PSYCHIATRIC AUTOPSY OF
ROBERT HESTON WHERE HE TALKED TO THE FAMILY AND
REVIEWED MEDICAL RECORDS, AND HE'LL EXPLAIN TO YOU
WHY ROBERT HESTON WAS A GOOD CANDIDATE FOR ULTIMATE
RECOVERY.

THERE ARE SOME PEOPLE WHO ARE HOPELESS.
THERE ARE OTHER PEOPLE WHO TRY AND TRY AND TRY OVER
AND OVER AGAIN TO DEFEAT THIS THING AND HE WAS IN
THAT SECOND CATEGORY WITH THE MATURITY OF AGE, WITH
THE SUPPORT OF HIS FAMILY, WITH THE RIGHT SORTS OF
INTERVENTION FROM HIS CHURCH, FROM 12-STEP
PROGRAMS, WITH MEDICAL AND -- AND INTERVENTION THAT
IS -- THAT IS BECOMING MORE AND MORE COMMONPLACE,
ROBERT HESTON MAY WELL HAVE REALIZED REDEMPTION AS
MANY DO, BUT THAT'S NOT GOING TO HAPPEN BECAUSE HE
PASSED AWAY. AND SO AT THE END OF THE CASE WE'LL
BE ASKING YOU TO AWARD AN APPROPRIATE AMOUNT OF
MONEY DAMAGES.

THANK YOU VERY MUCH. THANK YOU, YOUR
HONOR.

[REDACTED]