The Neuroscience of Storytelling

How Shifting Facts and Focus Can Affect A Trial

By: Robyn Wishart

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As you complete your case discovery and the relevant documents start rolling in, have you ever stopped to question what is controlling your trial story? Have you ever considered how neuroscience could make your trial story more effective?

Visualize this sentence: "The girl was lawfully in the crosswalk when she was hit by the car." Close your eyes. Say out loud what you see with as much detail as you can imagine.

The picture you see in your mind is a cognitive interaction between your language and visual systems. Unlike a camera or video recorder your brain "sees" more than the image of a girl in a crosswalk hit by a car — it automatically and unconsciously creates a richer story from the memories of your own personal experiences. From the image your mind creates, your inner voice starts asking questions about what is happening and why. (Was it dark? Was she wearing dark clothing?) Who you are forms the building blocks of the image that you see and the basis of the questions that your inner voice asks. I have coined this term the I-brain.

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A lawyer's I-brain does not see the same image or ask the same questions as the juror's I-brain.

Let me show you more specifically how this scientific principle works. Consider this fact pattern.

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It is 9:30 p.m. in January. A girl with a broken leg is standing on the curb of a pedestrian crosswalk. The car to the right of the girl stops to let her cross. The girl leaves the curb on her crutches. Halfway through the last lane of traffic, a van is fast approaching from the opposite direction. The driver of the stopped car flashes his lights to warn the driver of the van to stop, but the driver's speed is not slowing. At 55 km/h the driver clips the girl's knees, knocking her up into the air and on to the hood of the car.

The driver of the van tells police he was texting and did not see the girl until it was too late to stop.

The lawyer's I-brain is seeing a slam-dunk win.

Who do you think the juror's I-brain will blame?

While the law in Canada prevents lawyers from ever asking jurors the rationale behind their judgments, lawyers can gain insight into how jurors think by running a mock trial called a focus group. (A legal focus group typically involves presenting a trial story to eight to 10 people, and then over a three- to four-hour period asking the mock jurors to share their opinions, criticism and feedback about the story of wrongdoing or damages.)

When this fact pattern was shared with a recent focus group, the jurors made the following comments:

- "I" would have waited for all the cars to stop before "I" left the curb, especially if "I" was on crutches.
- Why did the girl not see the van coming and get out of the way?

The jurors related more to the driver of the van than to the pedestrian.

None of the jurors had ever been hit by a car, but all of the jurors had at one time or another nearly missed a pedestrian or not seen a pedestrian in the roadway.

Justified in terms of "what they would do," the focus group put 20 per cent of the blame on the girl in the crosswalk, even though she had the right of way.

Do you think the jury will still blame the pedestrian if we focus on the driver?

It's 9:30 p.m. on a Thursday night in January. Mr. Smith has run out of cigarettes. Laid off from his job three weeks ago, Mr. Smith has spent the afternoon with some friends playing video games. It's only three blocks to the convenience store, but it's easier to drive than walk. Mr. Smith's phone is in his lap when he hears a text notification. Mr. Smith looks down: "We need more Coke." With one hand on the wheel and one on his phone Mr. Smith gets halfway through texting, "anything else" when he launches a girl on crutches up and over the front of his van.

When this fact pattern was presented to the focus groups the jurors focused their deliberations on the driver of the van.

Comments made by the focus group included the following statements:

- I bet that the driver of the van and his friends had been smoking pot all day.
- What condition was the van in? Did the brakes even work?
- I text when my car is stopped but I would never drive and text, that is different.

There was no evidence that the driver was smoking pot and no evidence that the van was mechanically unsound, but the image of the driver formed by the words in the I-brain of the juror persuaded the focus group to blame the driver.

The legal elements of the pedestrian MVA did not change, but the focus on the driver created an impression of wrongdoing that altered the image of the connection between the jury and the driver and what wrongdoing occurred to cause the crash.

The second trial story is more than just shifting the focus on to the driver's conduct. There are always going to be two trial stories presented in any one case — one for the plaintiff, and the other for the defendant.

The second trial story is loading the jurors' minds with a more salient image of wrongdoing. Focusing their minds on the actions of the driver becomes a cognitive marker for comparing and contrasting the actions of the girl to the actions of the driver. Even if both trial stories are presented to the jury, a juror cannot think about and judge the first trial story separate from the second trial story. The information is judged in its totality. The mind focuses on the moments it is primed to remember, and compares the "good" or "bad" information in making a judgment. This is called a focusing illusion.

Neuroscience can change how you tell a trial story and the questions you ask in examination for discovery. Understanding the science behind how we see and hear is the key to unlocking the way we think and speak the new language of "neuropersuasion."

Robyn Wishart is a personal injury lawyer with an interest in neuroscience. She is the founder of Wishart Brain and Spine Law in Vancouver.