

CASE THEMES WITH IMPACT:

“IT’S A GREAT TIME TO FLY”

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I. INTRODUCTION

“It’s a great time to fly” because repeatedly the face of that slogan, billboard sign or magazine advertisement, whether it’s on the way to the airport, on the side of a bus, or printed in the newspaper, is angled for our attention. The key to the advertising effort is not only that we remember the statement, but that we act on the message.

The music from a movie is repeated over and over. From the trailer to the credits, I hear that tune – the *theme* music. That’s the intent. The competition for an Academy Award is fierce for “best original score,” which really means best music theme that stays with you when you ride the subway to work or walk the dog or wash your hair in the shower. Better yet, the juror who whistles your theme to the other eleven in deliberations has given you the advantage. That is the objective for the trial theme – one that has staying power. It grows and then matures over the length of the trial.

II. IDENTIFYING CASE THEMES

The themes of cases are born when we listen to the potential client’s version of the story during that first telephone call. Then those messages are refined by focus groups jurors, strangers riding the elevator who hear the case summary, or by friends

and relatives. We know how that happens on the plaintiff's side. When does the defense reveal its themes? During discovery, particularly at depositions, is when the defendant's themes are unveiled.

For example, in a failure to diagnose cancer case, the defendant general surgeon says at deposition: "Even if the cancer was identified at that early date, the outcome, unfortunately, would not have been different because *this cancer* is so devastating". We could label this defendant's theme as the "medical science defense". The opening statement solution is to counter the defendant's theme with a simple visual or diagram of the real science, supported by your expert's upcoming testimony, which will again refer to those same visuals. It is well-known that people remember more of what they see than what they hear.

Another repeated defendant theme might be that the doctor was present, available and even worried about the patient (plaintiff). Jurors would expect their own doctors to respond to their illnesses similarly. In trial, the defendant's lawyers repeat as often as practicable the message that the doctor was dutiful and available at all times. The facts of the case, the medical chart, the testimony of the nurses and others will either support or discredit the proposition that this doctor, although perhaps worried, was responsible for the death of this plaintiff, because she chose to worry rather than prescribe the correct treatment

In one recent case, the defendant general surgeon actually wrote this piece in answer to a supplemental interrogatory which asked whether a third party or the plaintiff may have caused or contributed to the cause of her injury.

ANSWER: “That is not to say that Nancy necessarily would have had any better outcome if she had in fact been diagnosed in December 2002 or January 2003. Early diagnosis would not have changed the pathology of her lesion. Some breast cancer metastasizes as early as the 13th cell doubling . . .”

At this defendant’s deposition, he turned and looked into the video camera as his counsel asked this rehearsed question and answer: “Doctor, in the case of Nancy, did you do those things that a reasonably careful surgeon ordinarily would have done in like cases and circumstances?”

ANSWER: “Yes. As a matter of fact, I wish Nancy were here today. When she came to me on that day, most people would have looked at that sonogram and physical examination and would have felt it’s a fibrocystic disease and would have sent her home. But I didn’t. Instead, I referred her immediately to try to get an appointment with the breast center . . .”

So here, plainly, the defendant’s recurring theme is this defendant *cares* about his patient, even though he overlooked ruling out the most deadly of the symptoms that were presented to him. Also highlighted in this same deposition is the defendant theme that fault lies with the patient. “If only she called me back when she couldn’t get that early appointment at the breast center,” where she was referred by this defendant doctor.

III. NEUTRALIZING DEFENDANT THEMES: DIFFUSING, DISARMING AND DEBUNKING

“It’s a fender bender.” “The plaintiff has a whiplash.” “The plaintiff’s neck pain of a day or two after the low impact incident cannot be the cause of a herniation diagnosed

two months later.” These are the often heard themes accompanying a low impact auto crash.

The punch of a theme or themes of the case is enhanced by repetition, consistency and links to testimony throughout the case. The themes are repeatedly spoken or displayed from voir dire through closing argument. Most case themes will not arise for the first time during the progress of the trial. The themes of defendants are knitted together long before trial. In depositions of defendant medical experts, the motifs often heard are: (1) the patient didn't follow up with the doctor when instructed to do so; (2) the patient didn't seek out a second opinion that was referred to her; or (3) under these very difficult emergent circumstances, the doctor gave the patient the best medical care available, even though the result was not good. The more we understand the defendant propositions, the better able we are to lodge our case story in the minds of the jury. When multiple defendant themes are presented, they can be compared to the Groucho Marx remark: “Those are my principles, and if you don't like them, . . . well, I have others.”

The simple choice of language may disarm the defendant's theme. For example, the doctors would excuse themselves from fault because the brain tumor, a *disease* with an ominous future, was the reason for the patient's death. The plaintiff's attorney's opening statement might stress the term “prevention” to show how the radiologist's precautionary report and MRI scans demonstrate overwhelmingly the presence of a large, but also treatable, benign mass. Under the dark shadow cast by that illustrative scan showing the obvious swelling, the defendant doctor chose instead to discharge the patient to a certain death. Then he says he helped the patient by finding another doctor

for a later appointment. The defendant's use of the term *disease* serves as a gloomy prediction of the story's end. Let the focus group jurors be a guide for language use. Often, focus group jurors' deliberations wring this language out of their discussions, like water from a wet towel.

"Safety at the XYZ Corporation takes a back seat, where profits, commerce and money are in the driver's seat". Furthermore, the evidence will show that safety was taken seriously at plaintiff's employer who organized regular safety meetings, mandatory for all, including the plaintiff.

In a motor vehicle crash, the defendant's position may be that the plaintiff wasn't attentive when making that intersection turn. The counterweight is when driving a truck, the driver is specially positioned not to hurt anybody. Indeed, the professional driver, who logs many more miles than other drivers, whose tractor sits well above traffic, has a better view and is trained to have skills superior to the average driver.

IV. DIFFUSING, DISARMING AND DEBUNKING IN OPENING STATEMENT

Since opening statements are really the first time the jury is allowed to hear the full story from the parties, it is imperative to explain to the jury what the rules of good driving are about. This is not about the law, but about basic human conduct. Make a list of those human conduct rules that were broken. Use the list in voir dire, opening statement, direct, cross examination and closing to remind the jury of the violations. The defendant doctor chose to discharge the patient when he knew that her condition demanded urgent and immediate care. A professional driver is trained to watch where he is going when he is driving his truck. This is a case of cover-up, deception and concealment. These types of arguments are exploited because we know that the

defendant's opening statement will stress themes about good medical practice, about truck drivers who obey all laws and about forklift drivers who are well-trained. When the defendant stresses the tireless attention paid to his patients, the defusing rejoinder may be the conscious choice of breaking the rules (standard of care) that the doctor was obligated to follow.

You can emphasize in opening arguments what testimony will be heard from the experts. The professional engineer will speak to the engineering society's rules of safety that apply to forklift operators. Keep the explanation of the rules simple. After the rules are explained, fill in the story by explaining how the broken rules impacted plaintiff and the consequences the harm caused to him.

Finally, at the end of your opening statement, you may explain how the jurors could fix or balance the consequences of harm that have fallen on plaintiff by awarding money damages. "Justice is done when people get what they 'deserve,' when moral debits and credits cancel each other out."¹

Attack the defendant's themes before the jurors have time to adopt them. "If the plaintiff wasn't informed about the consequences of her hospital discharge, why is her signature on that form that lists these complications?" The defendant may say he did all he could, but sometimes complications are obscured and difficult to differentiate. Here the evidence will show the doctor chose discharge over immediate surgery when all of the tangible evidence demanded it. At the outset of trial, you will know the themes of the defendant. Make sure that you make it clear in your opening statement that the defendant was in control at the time of the plaintiff's injuries. Emphasize in your

¹ George Lakoff, *Moral Politics: How Liberals and Conservatives Think*, The University of Chicago Press, 2002.

illustrations the missteps of that defendant. List those poor choices taken by the doctor that you know the evidence will support that caused the plaintiff's injuries.

V. EFFECTIVE THEMES COUNTER DEFENDANT'S THEMES

Themes serve as the backbone of the case. If your theme resonates in the jury deliberations, jury research confirms that the jurors will search for and dig out the evidence in the case that is consistent to the theme. Like the catchy slogan, the bell ringing theme is one that allows the jury a clear memory of the weighty evidence in the case. The jurors hanging onto the story line will raise their own arguments to support that theme in deliberations.

Themes must be effectively communicated. The case should be set up like a story, rather than a news report. If the plot is made interesting, there is a greater chance that the evidence will be remembered. Many cases have multiple themes, making a kind of layering of the story line.

VI. USING VISUALS TO HIGHLIGHT THEMES

An enlargement of the medical chart, photographs of the scene, animations, summary charts and timelines, all bring to life the plaintiff's theme. Another board laying out the rules that apply, with clear markings showing each rule broken by defendant is effective for closing argument to disarm the defendant's themes.

Defendant lawyer can use a PowerPoint presentation, like a board of directors meeting in making his closing argument. Here is an excerpt from a defendant's attorney's closing argument blaming plaintiff for his injuries (try to image the blue screen and the lawyer saying "next slide"):

“I told you, ladies and gentlemen, at the beginning of this case, that Mr. Porter was not a bystander. He was in fact, the *captain of the ship*. He was *responsible* for what happened on his truck. The *buck stopped* with him. This was not a duty that he could delegate to someone else. It was his *responsibility*. He was in the best position to make sure that the repositioning of his freight be carried out safely. It was his *responsibility*, not the *responsibility* of some forklift operator.”

Most of the defendant’s case themes for this two week trial are listed in this single paragraph. The jury was to buy into the plaintiff being the “captain of the ship” that sunk him. Plaintiff was “responsible” for his own injuries. “The buck stopped” with plaintiff’s own conduct.

Defendant themes are debunked by the presentation of the evidence. For example, testimony that the driver, an employee of defendant, has taken responsibility for plaintiff’s injuries because he was in a hurry or rushing, support the theme of safety in the back seat, with profits, commerce and money up front. Furthermore, plaintiff could disarm the defendant theme by using the theme of personal responsibility throughout the case, making it clear that plaintiff has always been self-reliant, but with this defendant’s irresponsible acts and plaintiff’s resulting injuries, plaintiff’s ability to persevere on his own has been drastically limited.

VII. CONCLUSION

Theme use in trial is imperative. Themes are needed to build the story. The slogan of the case must be repeated out loud by the lawyer, those testifying and by a variety of illustrations.

Permit the jury to catch your theme, hold onto it and then whistle it to other jurors in deliberation. It really is a great time to fly.

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