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Making Your Damages Argument Persuasive Trial Theme Development

Presented at Defense Research Institute Conference on Damages

Although the American public is more sophisticated today about jury trials than it was ten or even five years ago, damage awards continue to be an issue about which the public is unsure. The amount of damages to award in many cases fits all of the characteristics of an ambiguous situation for jurors. They do not know how much money is right and they have little in the way of experience or external reality checks to judge the value of a claim.

One example of the dilemma of an ambiguous situation occurs when people drive through a heavy fog. Drivers in this situation usually drive faster than they think they are driving because they do not have any external references on which to base their true speed. In many foggy locations in England where this phenomenon was discovered, yellow strips were painted on the road closer together than normal to provide an external referent to slow drivers down. In a sense, drivers were tricked into slowing down because the road strips were placed closer together than they usually were.

Social psychology researchers have examined the impact of an ambiguous context in a phenomenon called the "autokinetic effect." It occurs when an individual looks at a tiny point of light in a totally darkened room. At the beginning of the experiment, subjects are told that they will be asked to evaluate how much the dot of light moves, and are told to concentrate on the dot. Although the dot does not move, as the person stares at the dot of light, it appears to move, often erratically. In this ambiguous situation, where there is no external referent, people are easily influenced by the information they receive at the beginning of the experiment suggesting that the dot will move.

Knowing that jurors are in an ambiguous situation and are subject to being influenced, it is important that attorneys arguing damages take advantage of strategies for influence. The simple fact that the jurors have been called to the courtroom means that there is an expectation that someone has been damaged and some money is to be awarded. Effective damages themes must overcome this expectation from the outset of voir dire,



and be reiterated throughout the trial. In deliberations, the jurors should no longer find themselves in an ambiguous situation as they are confronted with the decisions they will need to make on damages.

Two Views on Damages

Discussions with plaintiff and defense attorneys about damages being awarded by juries reveals an uncommon agreement. Both sides feel there is a problem, some say a crisis. However, whereas plaintiff attorneys feel the crisis is the difficulty in winning monetary damages from juries, defense attorneys feel that juries today are awarding astronomical sums of money to plaintiffs.

Plaintiffs feel jurors are unwilling to award damages for personal injuries. They point to the fact that in soft tissue motor vehicle cases it is getting more difficult to get the same amount in damages. Defense attorneys focus more on the large awards and the risks defendants run in the face of a possible runaway jury.

Whichever side is correct on the issue of whether too few or too many awards are being made by American juries, both sides point to the concern all attorneys have with the uncertainties and risks they face with regard to the amount of damages jurors will award.

Two Dilemmas: Sympathy and Anger

Sympathy

In order to prevail on damages and liability there are two common juror reactions to a case that need to be examined: sympathy for the plaintiff and anger toward the defendant. In cases with loss of a family member, crippling injuries, or financial ruin it is natural for jurors to feel sympathy for the injured party. It is the defendant's challenge to acknowledge and remove sympathy associated with a tragedy.

Most often elimination of sympathy begins in voir dire and is repeated in opening statement and closing argument. Post-trial interviews with jurors in successfully defended cases often illustrate the fact that jurors wrestled with the issue of sympathy but were able to set it aside. In a case involving major personal injury:

- ▶ “We all felt sympathy for the plaintiff, she lost her husband. Sympathy came up in deliberations, but we discussed how that was not the issue.”



- ▶ “The defense attorney mentioned about ruling out sympathy, and the judge kept reminding us of our duty.”

Anger

There is no doubt that anger toward the defendant fuels damage awards. Whereas for sympathy, it is socially acceptable for a defense attorney to argue that everyone will feel sad and have sympathy for the plaintiff, there is not an easy way to block feelings of anger that might emerge in a trial. We are all familiar with the inflammatory arguments that plaintiff attorneys can make in response to allegations of corporate misconduct. In terms of mitigating jurors’ anger towards a company, it is important that the jury not only see the bad acts of the company, but also learn about the ways in which the company has taken responsibility for its actions regarding issues such as employee safety, product safety, fair employment practices, and compliance with regulatory agencies.

Anger flows from beliefs about responsibility and blame for a problem. According to the “just world theory,” (Lerner, M.J. & Meindl, J. R. “Justice and Altruism.” In J.P. Rushton and R. M. Sorrento (eds.) *Altruism and Helping Behavior*, Hillsdale, N.J.: Erlbaum: 213-32 (1981)) people have difficulty accepting the injustices of life and have a strong need to believe that the world is just. If the world is just, it means that our own outcomes are controllable. In other words, people who do good deeds can expect rewards or profits. Jurors, therefore, will have a tendency to want to even out inequities and seek justice. They wish to assign responsibility for injustice and bring about restitution to injured parties. It is therefore incumbent on the defense to persuade the jury that justice sometimes means that the plaintiff (typically considered the underdog) goes home without money.

Case Themes

What are case themes and why are they important?

Research in a variety of applied fields has demonstrated the significance of themes for organizing information and making decisions. Every experienced trial attorney understands that jurors need to be able to have some way of organizing all the information they are exposed to during a trial. To persuade a jury, an attorney needs to develop case themes that help organize the diverse case facts and convey the case theory. Case themes can provide a bridge and a way for jurors to understand what they are learning during a trial. For many cases, themes are as important for damages decisions



as they are for liability. To affect damages awards, attorneys need to influence jurors on the issues of responsibility, blame, and justice.

Three Approaches to Theme Development

There are techniques which can be used to develop case themes. While these approaches may be used intuitively by attorneys, there is a research tradition that supports and explains why these approaches work.

Attribution Theory/Choice Theme

When a plaintiff engages in a certain behavior, one of the critical ways of looking at that behavior is whether the individual had a choice. When judgments of responsibility and blame are being made, it is important to know whether or not there was any choice involved. Attribution theory looks at the choice factor and supports the notion that when someone chooses to do something, they are then seen as responsible for the consequences of that choice. To the extent that the plaintiff is seen as having a choice in their conduct or to the extent the defendant is seen as having a choice, then jurors will feel they are responsible for the consequences of that choice. Some examples of choices:

- ▶ The plaintiff chose not to wear the required safety gear when working with a specific piece of heavy machinery.
- ▶ An individual chose to exclude listing preexisting conditions in his/her application for insurance.
- ▶ The manufacturer made a choice to ignore the recommendations of its safety engineer in designing the product.
- ▶ A company made the choice of not asking for increased coverage on the contents of its warehouse.

Most attorneys use a version of the choice theme when they introduce the notion of personal responsibility. Jurors reach conclusions about personal responsibility when a decision is presented using the choice theme. In other words, if someone chooses to do something, he/she is more likely to be seen as personally responsible for what happens. The difference between presenting the theme as a choice or as personal responsibility is that with the choice theme, jurors will conclude on their own that the individual is responsible rather than being told that he/she is responsible by the attorney.

It has been our experience that jurors are more accepting of the choice approach rather than the personal responsibility approach, and that the choice approach is more



persuasive. For example, in a case involving the inability to agree on a settlement value, jurors decided the plaintiff chose to make a non-negotiable demand and chose not to engage in any discussions of the realistic value of the claim. The policy holder's choice to not negotiate resulted in a lengthy arbitration process which caused the delay in settlement. In that case, jurors felt the plaintiff was responsible for the delay because of the choices made.

In an employment case involving a claim of age discrimination, the plaintiff alleged that the defendant terminated his employment in order to hire a younger employee at lower pay. The defendant argued successfully that the plaintiff chose not to avail himself of training available to improve his computer skills, even though he was told that he would have to do that in order to be keep his job following a move to a new accounting system.

Counterfactual Thinking

Another way of approaching theme development is to use counterfactual thinking. Counterfactual thinking occurs when a person evaluates an event by how easily it could have been undone to create a different outcome, usually a more positive outcome. The ease with which a juror can undo the negative event with a counterfactual affects the amount of blame he/she attributes to a party. In a premises liability case, the question raised is what could either side have done to prevent this problem from occurring. If it is hard for jurors to develop reasonable counterfactuals, "if only" statements, it will be harder for them to attribute responsibility, and thus blame, to the person/company. On the other hand, the more counterfactuals a juror can create to prevent the negative outcome, the stronger their opinions of blame on the party who they feel could have changed the outcome of the event.

The question answered by a counterfactual usually takes the form "if only..." or "what might have been..." An example of a counterfactual would be, "If only there had been a window on the swinging door allowing the employee to look out before opening the door," or "If the door was cordoned off to prevent the public from coming too close to the door, the plaintiff would not have been injured." A counterfactual creates an alternative way of looking at a situation, an alternative reality.

The way to use counterfactuals to look at case themes is to consider what "if only" arguments the plaintiff and defendant could make in a product liability case. It is often the case that the plaintiff will have several "if only" arguments. Examples include:

- ▶ If only the cheap plastic wedge had been installed...
- ▶ If only the manufacturer had issued a recall in a timely manner...



- ▶ If only the product had undergone more testing before release to the public...

The manufacturer defendant, of course, can develop its own themes by employing arguments using the “if only” form. For example, “If only the driver had not parked on an incline without using the required blocks...” and “If only he had curbed the wheels of the truck...”

One way for the defendant manufacturing company to defend against counterfactuals is with an “even if argument”. For example, “Even if the wedge had been installed, we could not have prevented this accident, caused by the inebriated driver kicking the gear shift out of position...” Another example is “Even if we had recalled the part, it would not have prevented the truck from rolling.”

Counterfactuals and the choice theme are two different ways of thinking about blame and judgements of responsibility. Since they both focus on responsibility, they often deal with the same set of facts. For example, in a securities case:

- ▶ Choice Theme: “The plaintiffs assumed the risk involved in investing in limited partnerships when they purchased a share of the venture.”
- ▶ Counterfactual: “If only the plaintiffs had more carefully read the prospectus and the accountant’s report, they would have been aware of the problems faced by the company in the next fiscal year.”

The Story Model

The story model assumes that jurors organize the evidence of a case into a coherent explanation or story. This narrative structure is then compared to the verdict categories to determine the best match (Hastie, R. (Ed.), *Inside the Juror*, New York: Cambridge University Press: 3-37 (1993)). Trial attorneys have used the story model for years in crafting case presentations. The point is that jurors actively engage in creating their own story about a case and that may or may not include the attorney’s version of the story. The story model, in the hands of most attorneys, is a way of presenting case themes, metaphors and analogies. This short hand version tells what happened and why it happened. Counterfactuals and arguments based on the choice theme can be integrated within the case story.

Some attorneys are gifted story tellers. Creating and fashioning a story for most of us takes time and effort. Questions to raise about the story of the case are: Does it make



sense? Does it convey themes? Does it explain what happened and why? Is it compelling?

The Process of Theme Development

Developing case themes and arguments can be assisted by the three approaches described above. However, the creative aspect of case theme development should not be overlooked. Arguments, metaphors, analogies, and imagery to use for argument can come from a variety of sources. Cab rides, taking a shower, and brainstorming sessions are often the sources of the best ideas. The process of developing ideas is not scientific, but is often critical to develop case winning themes.

On the other hand, testing case themes, to determine how effective they can be, is scientific. Mock trials, and in some cases, community surveys, can be used to evaluate and determine the effectiveness of various approaches to case argument.

Obstacles to Juror Acceptance of Themes

Juror Confusion and Anxiety

At the beginning of a trial, jurors are often anxious about having to serve on a jury because of the effect jury service will have on their personal life, and concern about the job they will have to do. This confusion about their role is enhanced if they feel they do not understand what the case is about. Confused and overly anxious jurors are often lost during a trial and often become so frustrated that they give up trying to understand the case (Graeven, D. "Juror Anxiety." *The National Law Journal*, September 26, 1994: A21). Since this confusion can interfere with acceptance of case themes, it is important that jurors understand what their role will be. Attorneys need to do what they can to facilitate juror understanding of their role and the decisions they have to make. At a minimum, case issues should be pointed out during voir dire, and the verdict form should be discussed during closing arguments.

Hindsight Bias

Hindsight bias is one of the psychological concepts that affects jurors' decision making when attributing cause and responsibility to an individual for an event. Hindsight bias is an individual's tendency to see events as expected after they have occurred, even when they were seen as unlikely prior to their happening. This tends to increase feelings of confidence in judgement after the fact, and can lead to continued use of faulty decision



strategies. (Heath, L. & Tindale, S. "Heuristics and Biases in Applied Settings." In: L. Heath, R. S. Tindale, J. Edwards, E. Posavac, F. Bryant, E. Henderson-King, Y. Suarez-Balcazar, J. Myers (Eds.), *Applications of Heuristics and Biases to Social Issues*, New York: Plenum Press: 8-10 (1994)).

Most defense attorneys are well aware of 'Monday Morning Quarterbacking' and the way it can be used to second guess a decision by a defendant. A number of studies have been done which show that hindsight bias is very difficult to overcome, even among sophisticated decision makers. If hindsight bias is present in a case, one of the few things that can be done is to educate jurors about hindsight bias: "If something bad happens, we have a tendency to think that we should have known it would have happened." The hope would be that at least one juror understands that idea and could use it in deliberations.

Failure to Understand the Law

Jurors often spend a considerable amount of time in deliberations trying to understand the laws that apply to a case. Research on jury deliberations has shown that the most common source of jury error is not difficulty understanding the facts, but trouble understanding the legal instructions (Ellsworth, P. "Are Twelve Heads Better Than One? *Law and Contemporary Problems*, 55: 204-224 (1989)). Since defendants often benefit from jurors use of the law, there are several things defense counsel needs to do to improve juror understanding of the law.

It is important that the verdict form be clearly explained to the jury in closing arguments. It is not uncommon in complex cases for jurors to be confused about which way they should vote on a certain issue if they favor a certain side. That confusion needs to be eliminated.

Another approach to improving juror understanding of the law is for defense counsel to ask the court to pre-instruct the jury on the law prior to hearing any evidence. Pre-instruction of the jury maximizes the effect of the law on the reaction of the jurors to the case arguments.



Conclusion

Jurors come to the issue of damages often lacking guidelines as to what is appropriate. In an ambiguous situation, such as the one jurors confront on the issue of damages, attorneys have an opportunity to persuade jurors by using case themes. Case themes are the frontline of defense and can be an effective tool that can be used to help frame jurors' reactions to issues of responsibility and blame.