

Developing and Using Themes in Products Liability Cases

Products Liability Seminar, March 31, 2000

by Lawrence R. King & Shawn M. Raiter

I. INTRODUCTION

Experienced trial attorneys know that telling their client's story at trial is the key to success. This is especially true in cases involving complicated legal or scientific issues. Because product liability cases often involve complex scientific evidence, counsel should dedicate time to develop case themes that allow the scientific evidence to be presented in a simple, plausible and persuasive story.

We all know that jurors often criticize trial attorneys for failing to explain and simplify complex legal or factual issues. Because the trial attorney is often so close to the case, he or she may not even realize that they take for granted the fact that a jury will understand their case. Because of this, early in the case, counsel should begin developing a narrative story that makes sense and which members of the jury can remember even when they forget some of the complex details of the case.

II. DEVELOPING A THEME

There is obviously no "right way" to develop themes in every case. Because every case is different, the trial lawyer must carefully consider what themes he or she can support with the evidence and which themes will be most persuasive with the jury. One rule that should be followed is that the themes should be developed early in the case.

When sitting down with a new case, the trial lawyer should begin developing themes from the outset. In a products liability case, the themes may be readily apparent. For example, a common theme from the defense of a products case may be product misuse. On the plaintiff's side, the theme may be "foreseeable misuse." Whatever themes the lawyer believes will be most persuasive, the themes should be developed early to assist with the focused development of evidence which best supports the chosen themes.

Like most other civil cases, the products liability case will almost always involve general liability and damages themes. However, both plaintiff's and defense counsel may develop themes based on the following general concepts:

- Useful life manufacturing defect, alternative designs, testing, industry standards, instructions and warnings, state of the art, accident history, foreseeable or unforeseeable product misuse
- Product alteration (foreseeable or unforeseeable)
- Compliance or non-compliance with applicable standards or regulations

a. Explaining and Reinforcing Your Theme.

The trial lawyer is constantly challenged to translate extremely complex concepts from the language of science to the jurors' common experiences. Because of their familiarity with the case, lawyers often become so conversant with the vernacular of the science that they fail to explain the concepts and terms the jury can understand. Similarly, it is quite common for lawyers to misjudge the sophistication of jurors. As a result, the safe approach is to assume the jury will not understand complex scientific concepts unless they are explained and analogized.

1. Stories.

Psychological research indicates that jurors intuitively use a highly schematic approach to assimilate, comprehend, store and retrieve information. Similarly, the "story" format is the most universally popular and efficient way that jurors achieve these purposes. Blending a good trial story and theme allows the jury to lock into a basic understanding of the primary issues in the case. The trial story should incorporate the primary thematic messages and should also outline all of the facts in a chronological, step-by-step fashion. If done properly, the jury will then subconsciously use the theme to look for evidence that fits into the trial story and will subconsciously disregard evidence that does not.

2. Primacy and Recency.

We all know that research has established that the concepts of primacy and recency play an important role in the trial of any case. What people hear first, they generally remember longer while things people hear last, are typically remembered better. In a products liability case, trial counsel can use these concepts to his or her advantage in numerous places during the trial. For example, primacy can be exploited by clearly establishing the case theme in voir dire and the first part of the opening statement. In addition, using strong witnesses for testimony the first part of a day or immediately after lunch often provides a similar effect.

On the other hand, recency can be used by saving pointed cross-examination questions until the end of the day or until just before a break. Quite often, counsel will put up a strong witness just before the end of a day or before a weekend break so that the jurors' most recent recollection of the trial remains with them until the trial resumes.

3. Rhetorical Tools and Techniques.

Jurors often use what can only be described as unusual approaches to handle information presented during trial. Because of this, the use of repetition, analogies, metaphors, similes, tone of voice and other non-evidentiary techniques have a powerful affect on a juror's subconscious approach to processing information and reaching a decision. Because of this, affective trial lawyers will use various rhetorical tools and techniques during the trial of an otherwise boring case.

Rule of Three. Communications research shows that an idea must usually be repeated at least three times before it is remembered. People remember better and agree more when they hear something three times. Martin Luther King's "I Have a Dream" speech, for example, used both a strong theme and the Rule of Three to create a speech that people still remember and revere nearly four decades later.

Expectancy Statements. By foreshadowing evidence for a jury trial, counsel will often cause the jury to anticipate and wait for important information in the case. For example, in an opening statement, counsel may state: "You can expect the evidence to show that the manufacturer in this case spent a great deal of effort testing this product." By doing so, the jurors will anticipate and wait for this information and will unconsciously look for information that supports this argument and they will disregard information that does not.

Analogies and Metaphors. Analogies and metaphors are persuasive tools a lawyer should consider in presenting a products liability case. Jurors appreciate and place emphasis on analogies even though the analogy may have no relationship whatsoever to the case. Indeed, Freud said that "analogies prove nothing but they make us feel right at home."

Double Binds. Using "either/or" terms that are both negative is one way to minimize a jury's sympathy for the opposing party. Defense counsel might ask "Did the plaintiff injure himself because he was inattentive, or because he was careless?" Plaintiff's counsel, on the other hand, might ask, "Was my client injured because the

manufacturer did not properly design this machine or because it failed to warn my client about the dangers associated with the use of the machine?"

Rhetorical Questions. Research indicates that introducing issues in a counter-attitudinal fashion causes a juror to more intensively process the content of the message than if the message had been simply introduced by way of a statement. For example, in a case involving a theme of product-user responsibility, counsel might use the rhetorical question: "Would we even be here today if Mr. Smith had acted responsibly in his use of the Acme product?" From the perspective of a plaintiff advancing a cost-savings theme, counsel might state: "Why would a manufacturer fail to provide a one dollar guard on this machine?" The answer, of course, in that plaintiff's case would be the manufacturers desire to make a larger profit.

Colorful Language. Jurors better remember language that is vivid and colorful. The use of such language in telling your client's story and emphasizing the trial themes will result in a better recollection by the jury of your main points.

III. ADVANCING THEMES AND TELLING A STORY IN THE PRODUCTS LIABILITY TRIAL.

a. Voir Dire

An attorney trying a products liability case should begin advancing his or her main themes during voir dire. For example, in responsibility cases, defense counsel may ask voir dire questions like: "Do you believe an individual should take responsibility for his or her actions?" The plaintiff's lawyer may ask questions like: "Do you believe the manufacturer of a product has a responsibility to ensure that the product is safe when people like my client use it?"

Doc. No. 14733

[Back to Resource and Publication](#)