

IMPRESSION FORMATION AND THE CREATION OF MEANING IN JURY TRIALS

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I initially wrote this article during my Ph.D. studies. I revised it and included portions of it in my book. I have again revised it for this publication. While my book contains examples of trial work by contemporary lawyers, this particular article contains examples of trial work by some of the truly great American trial lawyers from past years. In recently reading and revising this article I found the quotes from these great trial lawyers just as incredible, interesting, and inspiring as when they were made years ago. I hope you enjoy their work.

Introduction

All jury trials may be characterized as a process of impression formation and the creation of meaning.. Both sides of the case, through the use of communication, present opposing views of reality to jurors, who are then asked to decide which view of reality is the "correct" or "just" view of reality. For example, in a product liability case, the plaintiff claims a defective product caused serious injury, while the defense claims that the negligent use of a safe product caused the injury. The final decision that jurors make about these conflicting views of reality will depend upon the impressions, opinions and meanings they form of the lawyers, litigants, witnesses, facts, and laws involved in the case. As will be demonstrated in the following article, successful lawyers are successful because they are good communicators and are skillful in shaping juror impressions and creating meaning.. In order to better understand the analysis of successful trial technique, an overview of the communication and impression formation process will be presented.

Communication and Symbols

Humans approach the world with a desire to create order. Since the world is a confusing place, humans create order through communication and the creation of meaning. Things are placed in categories, and symbols are attached to these categories of things. When all things have symbols that refer to them, humans can then order and organize these symbols, hold them in their minds, and bring order to the world. Thus, rather than a confusing jumble of things, there are humans, animals, minerals, liquids, etc. Time and space are controlled with the creation of symbol systems that account for hours, miles, etc. In the legal system, people who bring lawsuits become plaintiffs, and people who defend lawsuits become defendants. As the world becomes more orderly, it becomes less confusing.

The Meaning of Symbols Resides in People

As trial lawyers, one of the most important things we must always remember is that the meaning of symbols does not reside in symbols, but in people; that is, symbols are arbitrary, and in themselves have no meaning. A "lawyer" could just as easily be called a "saint," but by agreement, we refer to lawyers with the symbol, "lawyer." Once the symbol is attached to the thing, humans then interpret the thing and provide the meaning for the symbol. Thus, the meaning of symbols is the meaning that individuals give to them. For example, to some people, lawyers are the protectors of society, champions of justice, and pillars of the legal system. To others, lawyers are slick, fast-talking shysters. As lawyers trying jury trials, we must always be aware that each juror will provide his or her own interpretation and meaning for the symbols used in the trial. One juror may interpret plaintiffs as good, deserving people who have been wronged, while another juror may interpret plaintiffs as greedy people who will cause their insurance rates to go up. One juror may see a personal injury claim as a way to adjust interests in society, while another may see it as a threat to the business system. The fact that jurors will assign different meanings to the various elements of the trial means that jurors will have differing attitudes toward the various elements of the trial.

Once aware of the fact that each juror will have differing attitudes toward the various elements of the trial, the skillful trial lawyer must use voir dire to discover each juror's attitudes and opinions toward the important aspects of the case so as to select the jurors most inclined to form a favorable impression of his or her case. Once jurors are selected, the skillful trial lawyer will then communicate in such a way as to shape juror meaning, and hence, shape juror impressions.

Meaning Is Open

The fact that meaning resides in people means that meaning is open; that is, since meaning resides in people, each juror will provide his or her own meaning for symbols and things. Just as fingerprints are different, the interpretations that each person provides for things are different. Thus, meaning is open and always subject to interpretation. A cigar may be interpreted by one person as a foul pollutant, and by another person as an aromatic experience. Lawyers must remember that one juror will view medical malpractice suits as beneficial to medical consumers, while others will view them as harmful to the medical system.

Awareness of the fact that meaning is open becomes even more important when dealing with abstract concepts such as "justice," "negligence," and "pain and suffering." These concepts do not exist in concrete form that we can see directly or quantify precisely. Jurors will all have different meanings, which may be vague and hazy, for these legal concepts. To one juror, "justice" is compensating the plaintiff, while to another juror, "justice" is not damaging a doctor's reputation.

To some people, the fact that meaning is open may produce confusion and anxiety. However, to the skillful lawyer, the fact that meaning is open may be used as an advantage. Rather than passively accepting the meanings for the trial as already determined or set, the skillful lawyer takes an active role in shaping meanings, attitudes, and impressions. The skillful lawyer uses his or her communication skills to create meaning for the jurors and for the trial. For example, rather than being merely a plaintiff, the lawyer's client may be characterized as an innocent victim who has in some way been deprived of his or her dignity or who has been deprived of some basic human right as a result of the defendant's improper conduct. When a working man has been crippled, he may be characterized as having been deprived of his ability to work and support himself, and, therefore, as having been stripped of his dignity. The trial, and finally, the verdict, become a way in which the jury may make the injured victim whole and restore the plaintiff's dignity. For example, a verdict for the plaintiff will allow the plaintiff to support himself and to lead a productive life in society. A verdict for the parents of a deceased child will provide a decent burial for the child and will insure a lasting final memory of the child.

Skillful lawyers create meaning for litigants, opposing lawyers, trial strategies, legal concepts, and elements of the trial process. By creating this meaning, skillful lawyers shape jurors' impressions and, hence, their verdicts.

The Sources of Meaning

In order to create meaning, we must understand the factors that give rise to meaning. Meaning is based on two factors, personal construct systems or models of meaning and context.

Personal Construct Systems

As noted earlier, because the world is confusing, humans approach the world with a desire to create order. One of the ways humans order the world is through a system of personal constructs. In growing up, through perception or communication with other people, humans develop systems of interpretation on or understanding of things known as personal constructs. These constructs are based on people's experience with things in the world. For example, based on a person's experience with lawsuits, he or she develops constructs about lawsuits and the legal system. If a person's mother was injured and had to file a lawsuit in order to recover damages to pay her medical bills and compensate her for lost wages, that person will form an understanding of civil lawsuits as being a means to compensate deserving victims of negligence. On the other hand, if a person's father had his business bankrupted by a large civil judgment, that person will form an understanding of civil lawsuits as being abusive means for greedy people to damage respectable businessmen. Thus, our constructs are based to a large extent on our past experiences.

When humans approach new and different experiences, they provide meaning to these experiences based on their personal construct systems. In the same way, when jurors enter the jury system, their personal constructs provide meaning to the persons and things involved in the jury process. For example, in an automobile negligence case, a juror who has never driven an automobile may view an automobile as a dangerous instrumentality that must be handled with great care. Jurors who have never driven motorcycles generally feel that motorcycles are dangerous instrumentalities, and that motorcycle drivers who are injured get what they deserve. Jurors whose parents have had negative experiences with lawyers view lawyers with distrust. Jurors who have respected doctors as relatives view medical negligence cases with disdain. Jurors who have seen their loved ones damaged by the negligence of another and then helped in

some way by the legal system view civil lawsuits as a positive way to remedy wrongs committed by negligent parties.

Thus, lawyers must always be aware that jurors will bring their personal constructs to the jury process, and that these constructs will determine the meanings that they will give to people, things, and concepts involved in the trial. This knowledge can be used in two very important ways to shape juror impressions. First, voir dire must be used to discover juror constructs. By discovering juror constructs, predictions can be made about how jurors will view the case, and, hence, how they will decide the case. I discuss the discovering of juror constructs and meaning models in other articles. At this point, suffice it to say that if we can discover juror constructs on voir dire, we can use that information to predict how they will decide the case, and, thus, can make meaningful decisions about peremptory challenges and challenges for cause. In the past, I tried a damage suit arising out of a dispute with respect to an employment contract. I probed all jurors about whether they had been employed on the management side or the labor side of business. For those employees who had been employed on the management side of business, I probed for experiences with employee-employer disputes. I then questioned all jurors who had been involved in management disputes about their ability to be fair and impartial. One juror readily admitted that he had a dispute pending at work and that he felt he would be unable to keep this out of his mind, and, therefore, asked if he could be excused.

Once jurors are selected, knowledge of their constructs will allow the lawyer to make meaningful choices about how evidence and strategies will affect them. A housewife who relies on her factory worker husband for support may be receptive to an argument to the effect that manufacturers of machines must attempt to foresee and protect against hazards to machine users.

Context

In addition to being based upon personal constructs, meaning is also created by the context in which communication occurs. When humans encounter new experiences, the meaning provided by their personal constructs depends on the context in which the experience occurs. More simply stated, meanings are context-dependent. When humans engage in new experiences, they bring their constructs with them and provide meaning based on their constructs. However, each time a person experiences something new, the context of the experience determines how the construct will be applied, and in some situations will alter or refine the meaning of the construct. For

example, the statement "I love you," is ambiguous when stated in the abstract, without reference to context. In each context in which that statement is made, the statement means something different. If it is said by a father to a child, it means one thing; if it is said by a wife to a husband, it means another thing; and if it is said by a man to a woman he has known for only two hours in a bar on Saturday night at midnight after he has had many drinks, it means something altogether different. A person with negative personal constructs of lawyers could have those understandings modified, if placed in a situation in which he or she encountered an honest, sensitive lawyer. The new context of the honest lawyer would create new meaning and modify the personal constructs.

Thus, humans create context and meaning through communication. When people meet they have constructs about the world. For example, suppose that two people meet in the morning and that they have both just read an article in the newspaper about a person who has received a verdict of \$1 million against a soft drink company because the bottle cap prematurely released and blew off the bottle into the person's eye, causing blindness in that eye. They then engage in communication about this verdict, and through this communication they create context and meaning for the trial. The first person thinks that the verdict appeared to be excessive and that this was bad for business. However, the second person informs the first person that she had read an article in the Wall Street Journal that documented that the soft drink company in question had been knowingly making defective bottles over the past five years and that some 5,000 people had been injured from prematurely released bottle caps. She further informs her friend that a simple warning on the bottle to point the bottle away from the user's face would have prevented most, if not all, of the injuries, but that the manufacturer had considered, but then refused to place the warnings on the bottles for fear of losing profits to the competition, and that the bulk of the verdict was for punitive damages for knowingly causing injuries. This explanation places the trial and the verdict in a different context and creates a new meaning of the trial for the first person. Thus, context shapes meaning already existing by virtue of our constructs, and in many cases alters and refines our constructs.

Creating Meaning for the Trial

The fact that meaning is context-dependent has important implications for the trial lawyer. Many aspects of the trial situation are unfamiliar to jurors. They don't know anything about the law, the facts, the litigants, the lawyers, or the trial process. Their

understanding of these aspects of the trial process is vague. Lawyers may use communication to create context for the jurors with respect to these aspects of the trial, and, thus, create meaning for the trial. By creating meaning, the lawyer will be shaping juror impressions. In fact, much of the trial process is simply creating context and meaning. By taking an active role in creating context, the lawyer can control meaning and ultimately juror impression formation.

In order to create meaning, lawyers must be aware of the various elements of the trial of which the jurors will be forming understandings that will be crucial to forming ultimate verdict decisions. Some of these elements of the trial are the nature of the civil process, juror purpose, assessments of the credibility and personas of the lawyers and litigants, the facts of the case, and the law of the case. The trial lawyer may begin creating meaning for these elements of the trial in voir dire and will continue throughout the trial.

Juror Purpose

Jurors are uncertain of their roles and functions as jurors. They are told by the judge that they will decide the case and that they must do justice, but these are vague and poorly defined roles. If left to their own interpretations, jurors would probably form differing ideas about the nature of their role and function as jurors. However, the role and function that jurors adopt will determine the type of verdict that they render. If they feel that they are simply to behave as computers or accountants, they will probably return small judgments based solely on economic losses. If they view themselves as protectors of the status quo, they will render conservative verdicts. However, if they feel that they are to be agents of change with the responsibility of preserving the rights of the individual, they will render liberal verdicts.

Creating juror purpose is an extremely important element in the trial. Lawyers must have a sense of the purpose that they wish to have their jury adopt, and must take an active role in creating the meaning for jury purpose by creating context. The obvious basic role for the jury is to evaluate the case and return a verdict for the plaintiff. The lawyer can sow the seed for this purpose at the outset of the trial in voir dire by telling the jury that he or she will be asking them to evaluate this case and return a verdict for the plaintiff and by then asking if they all agree that they will return a verdict for the plaintiff if it is justified by the evidence.

Two different categories of juror purpose may be identified. The first is the more basic juror purpose which includes performing various functions of the general trial

process. This includes, evaluating evidence, determining credibility, determining who is telling the truth, evaluating injuries and damages, and returning a verdict for the plaintiff. Credibility assessments form a major role in the trial. Jurors should be told that they will need to listen to the testimony and determine what to believe and not to believe. Jurors may be told that they will be called on to evaluate credibility. Jurors should be told that you will take issue with the defendant's witnesses and that they will have to determine who is telling the truth. You may tell the jury that there are conflicting claims being made by the parties or the experts and that they will be asked to decide which who is telling the truth. You may tell jurors that you claim that your client has suffered certain injuries and damages and that the defendant is claiming that these injuries do not exist and that they will have to listen to the doctors and determine which doctor is testifying accurately and truthfully. You should tell the jurors that they will be called on to listen to the medical testimony and evaluate injuries and damage. Jurors should be told that they will be required to determine damages and place a monetary value on the injuries and damage. This process of creating juror purpose should be started in voir dire and continued through opening and closing statement.

Another category of juror purpose is a higher purpose which benefits not only the plaintiffs, but also places the jurors in a certain role in the justice system. The jurors may be cast as champions of justice, protectors of society, protectors of the plaintiff's dignity, judges of credibility, and agents of reintegration. One way to create juror purpose as the champions of justice might be by the following questioning to an individual juror on voir dire:

LAWYER: Mr. Smith, our society is based on our constitution, which guarantees a right to a fair and impartial trial. Do you understand that in our system of justice, that for the system to work properly, that justice must be done in all cases, including this case?

JUROR: Yes.

LAWYER: Do you understand that if individual jurors and juries decide not to follow the law and decide not to do justice, our system fails?

JUROR: Yes.

LAWYER: Can you tell us that you will follow the law and do justice in this case? Any problem in playing by these ground rules?

JUROR: No.

This line of questioning creates a context for trial and the juror's role in the trial. Jurors who adopt this function will be less inclined to rule against a plaintiff simply because they feel sorry for the defendant or because they are worried about the impact of their verdict on a doctor's reputation. This theme may be carried throughout the trial. The great Moe Levine once told a jury in closing, "This is a very important case. A great principle is involved here aside from the case itself. The principle is whether the little people haven't the same rights in law that the big people do."

Jurors may be placed in the role of the protectors of the plaintiff's dignity. They may be told that the plaintiff, due to the negligence of the defendant, has been injured and prevented from working and from being self-sufficient, and has, therefore, been stripped of dignity, and that a verdict providing full compensation for this loss will allow the plaintiff to lead a productive life, and, therefore, will restore his or her dignity. In his closing argument in a case in which he was representing an injured cleaning woman many years ago, Melvin Block argued as follows:

"Now, Katherine Tompkins has been working since fifteen years of age as a domestic. At the time of the accident and at the time of this occurrence she was 39. For a period of twenty-four years she was working consistently, with brief times off here and there, as a domestic. She has given you the names and as near as she can recollect, the addresses of the various hotels and the persons by whom she was employed; and all through this she never averaged higher than \$40.00 a week, a dollar an hour plus meals. This was her lot in life and she accepted it. She believed she would be making the same \$40.00 a week plus meals at the time of her last room she would clean. You saw her. She can't bend, she can't walk straight, she can't get down under the furniture and clean and dust, she can't stand up on her toes to get rid of the dirt in out-of-the-way places. What is she to do, this woman, ruined in the prime of life, whose position as a domestic mind you, gave her dignity, and who is now unable to scrub a floor, a position which meant so much to her; mind you, a person living on \$40.00 a week for the rest of her life. Let us assume that she was to work to the age of sixty-five. At \$40.00 a week for twenty-six years, let's say roughly it comes out to \$2000 a year; for the next 26 years it would be \$52,000. We're not talking about inflation, we're not talking about meals, we're not talking about the fact that a dollar is

less than the minimum wage paid in this City and State and many parts of the country. This is all she asks, this is what was taken away from her."

"But what of herself? That is only the out-of-pocket expense-- the money that would have been rightfully due her, which has been taken away by the City through its wrongdoing. What is she herself to do? How is she to live? How is she to exist? How is her house to be taken care of? With what pain does she do things that she is able to do? She has told you about the many things, from basic necessities of life to the myriad things that she must do in passing 24 hours of the day. You have lived. She is now 44. Is this injury disabling? Does it not go to the very essence and existence of a person? What is she to do? Get a girl? She was the girl, and I do not say that in a derogatory manner. She knows that the only time that she would have been in a courtroom before would be if she were lucky enough to pass a Civil Service test; and her education has not been that far advanced to take one; or if she were lucky enough to have a politician appoint her to this great, big political plum of cleaning the floors of the Courthouse. She is a person who would probably meet you only if you had someone in like her to clean your floor."

"I ask, in behalf of Katherine Tompkins, for a verdict at your hands in the sum of \$175,000 without apology, without lawyer's talk, straight on the level, as we have been talking all along. Do not demean her. I asked certain questions when I questioned you on the voir dire during your selection. I asked one or two questions on a certain subject and I said I would not refer to it, and I do not feel that I have to again. All I say is, don't demean her as a human being. I ask for her what I would ask for anyone. This is the here and now for Katherine Thompkins. She has waited five years. The burden is no longer mine. You cannot consign her to ask Heaven what has been denied her here on earth. It is yours to do justice, and no one else. For Katherine Tompkins and myself, God bless you in your deliberation."

The jurors may be cast as agents of reintegration. The plaintiff has been injured and damaged by the defendant and has been deprived of something, such as the ability to work, which has separated the plaintiff in some way from society. One of the jury's functions will be to render a verdict that will in some way reintegrate the plaintiff back into society. A verdict compensating plaintiff for lost working capacity will allow the plaintiff to carry on a productive life, thus restoring his dignity.

Jurors should be cast as helpers to the plaintiff. The plaintiff's future may be placed in the jurors' hands, with a verdict for the plaintiff being the means to a decent, fair, or

proper future. For example, in arguing the need for a verdict in favor of the plaintiffs for the death of their child, James Dempsey once told the jury, "This is their only day in court, ladies and gentlemen. They can't come back next month or next year or any other day in the future, before any other court and jury for redress in this case. This is their only opportunity. See that they get an ample and adequate award for the loss of this boy. I leave that question with you. Mr. and Mrs. Marianiello and their future, with respect to the loss of their boy Carmine, I leave in your capable hands. From you they will get adequate and ample justice, sufficient for the rest of their days. May I thank you on their behalf and mine for your manifest attention and consideration."

In arguing a wrongful death case, Moe Levine suggests that a verdict for the surviving heirs will give the decedent a proper burial:

"This man is gone. He will not be talked about in a public place ever again, I hope. Let us put him to rest finally, forever. But, only with a verdict under the law, without any inflammation, without any prejudice, without any feelings of hatred, which don't belong in this case; but under the law. You twelve judges without robes, and that's what you are, will have to make your decision on that basis."

In punitive damage cases, the jurors may be told that the case has significance beyond the issues in the case between the plaintiff and defendant, in that they will be allowed to render punitive damages and send a message that certain behavior will not be tolerated in our society.

Jurors may be told in closing that they have an opportunity by their verdict to make their city a better place to live.

Persona and Credibility

Lawyers must create meaning for the personas and credibility of the various actors in the trial; that is, the lawyers must use communication to create desirable images for themselves, their clients, and witnesses, and undesirable images for their opponents, when appropriate. When jurors come to the jury process, as a rule they will not know any of the actors in the trial, and the passive lawyer risks being categorized with all the other stereotypes that the jurors hold about lawyers. The same holds true with respect to the litigants and witnesses. Thus, as lawyers, we must work to create meaning in the minds of the jurors for ourselves, our clients, and our witnesses. As

will be discussed later, credibility is something that is developed during the trial, and lawyers must work to develop credibility.

Lawyers should always adopt the role of the champion of justice, and should always align themselves with justice. This creates a positive persona and creates credibility. This may be accomplished by always asking for justice, and defining justice as a verdict for the plaintiff. Moe Levine once told the jury in closing:

"Can you stand upon ivory towers and look down upon these little people and say they are so far beneath us that we will not consider their rights? Or instead of that, will you do what you have dedicated yourselves to do, by agreeing to serve as jurors, to say to yourselves that there is no class, there is no creed, there is no color, there is only the principle of abstract justice to which we are dedicated When I prayed for my own strength and eloquence, I prayed for yours, because that which is required of you here is to apply the law strictly, without permitting any of these extraneous matters about which passion was raised to interfere with your judgment. . . No censure of anyone, please! Simply desire to do justice. . . . I knew at the beginning that we would come to the time when we had to discuss abstract principles--justice, truth, love, life. . . .This man is gone. . . . Let us put him to rest finally, forever. But, only with a verdict under the law, without any inflammation, without any prejudice, without any feelings of hatred, which don't belong in this case, but under the law. . . . So please render a verdict that will permit you to leave the courtroom with a feeling that you have participated in the administration of justice and that the verdict is one of which you can be proud."

The defense lawyers, when appropriate, should be cast as attempting to subvert justice, and their bad personas should be juxtaposed with the good personas of the plaintiff's lawyers. If the defense lawyers make claims not supported by the evidence, attempt to withhold evidence, or treat the plaintiff rudely, they should be exposed as trying to subvert justice. Thus, the plaintiff's lawyer becomes the champion of justice and the guide to the truth, while the defendant's lawyer becomes the subverter of justice. In the same way, lawyers must create a positive image for their clients. In his case involving the death of a child, James Dempsey develops a negative image for the defendants and their lawyers:

"Now think of that! Think of that. The attorney representing the defendants here in this case served a paper, in which he said this little boy lost his life through his own negligence. Here's a child, playing in his own back yard. . . . It is a defense in the case

that is concocted and conceived in the mind of a lawyer in an effort to deprive these parents of their just due or to put a stigma upon the memory of the child, who lost his life, by saying it happened because it was his fault."

Moe Levine creates a negative image for the defendant by pointing out how one of the defendant's employees took his time walking to the aid of the deceased, who laid on the train tracks, unconscious, while a train approached, when he tells the jury:

"The station agent is told a man is lying on the tracks. He knows the schedule of trains. He knows they are coming. Does he rush to the tracks to stop the train? Not this man. This man first closed up his booth--his of course was to avoid the pilfering of the tokens and the change. This is the first step--he locked the booth up. This of course, presuming that somebody was lurking there waiting for him to leave for a moment or two, so they could rush in and steal everything and be off."

"Never mind that. Here was knowledge brought home to the station agent of a man in dire peril, facing death. He waited to close the booth. You might excuse that. You might say he is an old time railroad man. Maybe he is chargeable with the tokens and the money. He doesn't want to have to make good for a possible loss, so he closes the booth."

"He got a flashlight, fine. But he walked to the tracks! He walked! Doesn't that stagger your imagination? He knows that a man is lying on the tracks. He knows a train is coming. He walks to the tracks."

In referring to the defense attorney's remarks about the character of the deceased, Moe Levine states:

"The children had a right to their father. They had a right to their father. The arrogance of the defendant's counsel to talk about what kind of parental care and guidance did they lose! How dare they say that? What does he know about it? Does he think now that they are better off with no father? What does he know about the tenderness and gentleness and kindness of this man? What does he know about him at all?"

The Facts and the Law

The facts of the case are not facts with universal meaning. Lawyers must always be aware that, due to their personal constructs, the jurors will, if left to their own

interpretations, all view the facts differently. Plaintiffs' lawyers must take an active role in creating context and meaning for the facts of the case.

The same is true for the legal principles applicable to the case. As noted earlier, since these principles are abstract concepts, they will not have universal meanings, and each juror will have a vague and differing understanding of their meaning. The plaintiff's lawyer must create meaning for these concepts. For example, to some jurors, negligence may mean only active, conscious acts, and therefore, the lawyer must create the understanding that negligence also includes passive, unconscious omissions as well.

Since the creation of meaning is so important to the trial, the next sections will be devoted to a review of communication strategies that may be used to create meaning.

Strategies for the Creation of Meaning

Successful trial strategy must be geared toward the creation of meaning. In the typical trial situation, the lawyers have a short period of time to prevail upon an uninformed jury. Strategies that will help accomplish this task are the use of a narrative or storytelling structure, storytelling themes, labels, figurative language, and common sense appeals.

Storytelling or Narrative Structure

In the typical trial, uninformed jurors are bombarded with an overwhelming mass of facts and legal concepts, and are then asked to form a decision. In order to be successful, the lawyer must integrate this mass of information into a coherent whole that can be easily understood by the jurors. This is best accomplished by using a storytelling or narrative structure. With a narrative structure, the lawyers become storytellers, presenting human dramas to the jury.

The storytelling structure is effective for several reasons. First, stories organize information in ways that help the jurors perform interpretive operations. A storytelling structure helps the jurors locate the central action of the trial. Jurors may have various concerns about the legal system and the trial. One juror may be concerned about the damage to the plaintiff, while another juror may be concerned with the impact of a large verdict on the defendant. The storytelling structure may be used to create the

central focus of the action for the jurors. For example, for the plaintiff, the central action is the negligence of the defendant and the damage to the plaintiff.

The storytelling structure provides inferences that the jurors will need to make in order to render a verdict. When the facts unfold, there will be various elements of the story that will require interpretive inferences in order for a decision to be reached. The storytelling structure provides these inferences. For example, in a product liability case, the plaintiff seeks punitive damages for willful and wanton negligence. The plaintiff proves that over a period of years the product in question has injured thousands of people, and that these injuries could have been avoided with a simple warning on the product, but that the manufacturer failed to provide the warning. The plaintiff also demonstrates that competition is keen between the defendants and its rivals in the field. The chairman of the board of the defendant corporation testifies that neither he nor the board of directors had any intention of injuring the plaintiff or any other consumer with their product, and that no other producers of the product in the field used or use warning labels, and, therefore, that the defendant is simply following industry standards. With the use of a narrative structure, the plaintiff can draw inferences from the evidence which tells a story of corporate greed in which a group of greedy corporations are competing for consumer dollars and are unwilling to place a simple warning on a package for fear of losing profits to a rival company. The narrative structure is used to draw inferences that are not specifically made by the witnesses on the witness stand.

Finally, the storytelling structure adds drama and emotion to the trial. Clarence Darrow once said, "Jurymen seldom convict a person they like, or acquit one they dislike. The main work of the trial lawyer is to make a jury like his client, or at least to feel sympathy for him. Facts regarding the crime are relatively unimportant." The storytelling structure is one of the ways to create sympathy and liking for the client. In the same way that an author or playwright evokes sadness or joy in the reader or audience, the skillful trial lawyer evokes sympathy and indignation in the jury. Clients are not simply plaintiffs bringing product liability claims, but must be cast as real life people with feelings, hopes, and dreams that become affected by the acts of the defendants. For example, using this type of structure, Moe Levine presented the case of a deceased alcoholic who became drunk and passed out on railroad tracks and was killed by a train. The defendant maligned the character of the deceased and Levine skillfully used a storytelling structure to rehabilitate the image of the decedent:

"You heard about it. There was no concealment. She loved him, she said. She had a right to. Women are strange about their emotional reactions to the men with whom they live. They love the ones less likely to be loved, and dislike the ones they should love. These are the vagaries of women's reactions. She had three children with him. She knew his weaknesses. I could see within this a form of mother complex. He was the weak one and she the strong one. She had to keep the home together.... You have felt yourselves on occasion in the scheme of eternity, that even the smallest sparrow doesn't fall without his passing being marked, and William Stevenson was a very small sparrow indeed. He was, in all probability, as unimportant a man as you will ever meet in your life, except that he forms a part of a little group. You know that he wasn't bad. You heard nothing bad about him. If he perpetrated crimes you would have heard about them. You heard nothing bad. You heard of weakness. You heard of no evil."

"He might have reformed from these weaknesses with a wife who was tolerant and understanding enough to keep pressing him to remain as part of this family group."

"He was removed from it needlessly. This is the basis for the request for damages. . . . This is not a case for a token verdict. This verdict must compensate according to law for the deprivation to a woman of her husband whom she wanted. Never mind whether you think she should have. She had a right to want him. This was her Man. As he was, weak, she wanted him. She was deprived of him, and if she was deprived of him under such circumstances as the law says, it gives her actionable rights, and then she must be compensated."

"Did he play with his children? Did he take them to church with him? When they had problems did he answer their problems? He was growing up. He was growing up. Remember that for three years he had not been away from home."

"He had flitted about. Women attracted him and he attracted them. He was weak. He was a child, yet he was growing up. He had reached 39, and he had these three children whom you've seen and I'm sure, if he had lived, he would have been proud of. He was growing up and he might have matured had he lived. In any event they had a right to his being there to comfort them, and to guide them. They had a right not to have to say to other children, "I have no daddy."

"You must say what loss this represents to the children, and how it should be compromised. They don't know anything about his weakness. To them he was just a big, strong, happy, laughing daddy."

The storytelling structure allows the lawyer to present background information about the plaintiff such that the jury is able to get to know and like him or her. The jury is allowed, through the story, to experience that plaintiff's trials and tribulations.

Themes

The plaintiff's story is made up of various themes that state and prove the case. The storytelling structure integrates these themes. Some themes are more appropriately dealt with in opening and some in closing. In this article I will simply outline some of the themes that may be used in trial. In another articles that I will post later I will present a more detailed analysis of themes with examples used by lawyers in actual cases.

The obvious theme for the plaintiffs is that the defendant was negligent. Within this theme, the plaintiff's claims of liability are detailed. A related theme is that, due to the defendant's negligence, the plaintiff suffered permanent injuries and damages. Within this theme, causal connection and the nature and extent of damages are developed.

That the plaintiff has been wronged by the defendant's acts and that the jury must or can act to rectify this wrong is an important theme. The jury must be convinced that the plaintiff has been separated from or deprived of some right or ability, and that the jury by its verdict can rectify this wrong.

A theme that develops credibility is that the plaintiff was a good or noble person and that the defendant behaved improperly. In this theme, the good and bad characters of the parties are developed and the plaintiff's goodness is juxtaposed against the defendant's badness.

An important theme for creating meaning for the nature of the case is that the issues in the case are simple. A jury will be hesitant to assess fault and large damages in a case that it feels it does not understand. Thus, the lawyer must convince the jury that, in the final analysis, the issues are simple and the jury is competent to hear and decide the case.

The pursuit of justice is a theme that the plaintiff must always try to develop. The jury is told by the judge that its function is to render justice, and, therefore, the lawyer

must convince the jury that the plaintiff's case embodies and is consistent with the pursuit of justice. Ultimately a verdict for the plaintiff must be conceptualized as the rendering of justice. For example, in concluding his closing statement, Moe Levine equates a verdict for the plaintiffs as the rendering of justice when he states:

"Nothing will ever replace him, and so within the framework of what we ask, award a sum that will adequately compensate them for the loss of this little man. Yours will be the final determination. Please render a verdict based upon the law So please render a verdict that will permit you to leave this courtroom with a feeling that you have participated in the administration of justice and that the verdict is one of which you can be proud. Thank you very much."

Jury purpose is an important theme. As noted above, jury purpose is important in that a jury will render a verdict based upon its understanding of its purpose. If a jury views its purpose as maintaining the status quo, it will react one way, while if it views its purpose as effecting change, it will react in an entirely different way. Thus, an important theme will be jury purpose. Important jury purposes for the plaintiff will be to judge the evidence, to judge the parties and their actions, to render justice, to return money damages, and to rectify wrongs. In developing jury purpose in a wrongful death case, James Dempsey told the jury:

"Actually the sole function of this jury, in this case, ladies and gentlemen, is perhaps the greatest distinction that can be afforded any jury anywhere, to sit in judgment as to the pecuniary loss to the parents for the death of their child."

Use of Words and Labels

Language affects the way people perceive reality. That is, the way we react to the word by which things are labeled can affect the way we react to the things themselves. For example, in an experiment conducted in a department, the store manager placed identical piles of high quality linen handkerchiefs in two separate piles on opposite ends of a counter. He labeled one pile with a sign that read, "Fine Irish Linen-50 cents," and he labeled the other pile with a sign that read, "Nose Rags-3 for 25 cents." The "Irish linens" outsold the "nose rags" five to one. Thus, the symbol people attach to a thing will affect the meaning people give to the thing, and different symbols used for the same thing will trigger different perceptions and meanings in people.

An understanding and appreciation of the impact of language on perception can provide a powerful tool to the trial lawyer. As lawyers, we can affect juror perception

by our selection of the labels and words we use to describe our clients and our cases. Labels and words may be used strategically to pin certain positive or negative associations on processes, persons, or things by calling them a certain name. Labels and words may be used to provoke emotions, attitudes, and beliefs in the minds of the jurors. The lawyer must never walk into court and tell the jury in voir dire that they are going to hear a "product liability case in which the plaintiff was injured." The lawyer must package the case by deliberately selecting labels that will provide the appropriate positive impact. Plaintiffs must never be referred to as plaintiffs, but by name or by some other label that creates a favorable image. The plaintiff becomes an "innocent victim" and a deceased child is referred to as a "little boy." The defendant, on the other hand, is always the "defendant" and its acts are always "wrongful," "negligent," "irresponsible," etc. The jury's role is not simply to render a verdict, but rather, its role becomes a "great responsibility."

I was once called for jury duty and was placed in the jury pool for voir dire on an automobile claim in which the plaintiff suffered soft tissue injuries. I knew I would be stricken because I had tried several cases against the defense attorney, but thought I would enjoy undergoing the voir dire process as a juror. The plaintiff's lawyer introduced himself and in describing his case told the jury that the case involved an automobile collision, and in describing his client's injuries told the jury, almost apologetically that his client had suffered "soft tissue" injuries. My reaction to this was this lawyer had no chance of winning his case. We were in a conservative county in which jurors were known to be suspicious of "whip lash" and "soft tissue" injuries in which there was no "objective" proof of injury. I started my career trying soft tissue automobile injury claims and I know first hand how difficult they are to win, and have written an article about the issues inherent in trying these case. One of the things I learned is that you have to be able to use words and phrases to describe soft tissue injuries in a way that are more believable as an actual injury. Words and phrases may be used to describe a soft tissue neck injury as a severe and permanent injury to the muscles, tissues and tendons that stabilize and hold the spine in place, You must be familiar with the anatomy and be able to explain what happens when the supporting muscles, tissues, and tendons are traumatized, stretched or crushed, how they suffer internal hemorrhaging causing them to deteriorate, shrink and atrophy, and how these conditions affect their ability to provide support and stability.

I once watched an attorney try a case involving injuries to a child from a toy involving a toy company in mainland China. One of the claims in the case was that this company had no quality control department, but simply copied designs of other

popular toys and used cheap inexpensive processes to make these toys with no thought or effort put into determining whether the toys were safe. The lawyer crafted a great theme based on greed and corporate competition. Throughout the trial, the plaintiff's lawyer referred to the toy manufacturer as being from "Communist China." After a while the defendant's attorney began objecting to the use of the "Communist" label, but the plaintiff's lawyer justified it by saying he wanted to make sure the jury know the company was not from Taiwan. While the use of this label may not have been a politically correct thing to do, there was no doubt in my mind that the use of this label triggered thoughts in the jurors' minds of companies that did not have the interests of consumers, people, safety, and goodness in mind in producing their products and I had no doubt that the use of the label was effective.

In the introduction of his closing argument, in which the defense attorney has made a joke, The great Mel Block illustrates the power of using labels when he states:

"Neither will I tell you jokes such as concerning "two Irishmen having a cup of coffee," nor will dance a little jig for you to show you the mobility of the leg, and believe me, I will take second to none when it comes to having a sense of humor; but I will not profane this house of the law with a cheap, elementary tactic known to every freshman law student--that is, to divert the jury from the sober and serious task at hand--that is your decision whether the time is here and now, for retribution against the City of New York in the form of compensatory money damages for the plaintiff Katherine Tompkins, or your decision that she has no reason to be here. I sincerely hope and pray that the vaudeville act of Mr. _____ was as obvious to you in its intent and purpose as it was to me. At the expense of a cripple he wanted to cripple her case by telling you a few tawdry jokes so as to divert you--so as for you to be in such a frame of humorous mind as to reject her claim; so that the atmosphere of this courtroom would be that of a gay and hilarious nightclub routine having no place for the legitimate business of evaluating a severe, serious and permanent destruction of a human being's future happiness and life. And let me say this at the outset: If he has, and I am quite sure he has not succeeded in purpose, then not only will Katherine Tompkins not have that which the law provides her when she has been wrongly maimed and disabled in the form of compensation, but also she will not have enough to pay a Mr. _____ to dance a jig for her and tell her a few jokes in the confines of whatever home she has in the future to assuage her pain and distract her mind from her awful, lonely and bleak existence."

By carefully selecting labels and words, the lawyer can shape juror impressions.

Use of Figurative Language

Another important and powerful communication tool available to the trial lawyer is the use of figurative language. Figurative language consists of the use of examples, analogies, metaphors, and allusions to create meaning and support their arguments. Figurative language involves the use of imaginative comparisons between things, events, and persons that are not obviously alike at all, but that resemble each other in some way. Figurative language is powerful because it grasps and defines the intangible qualities of experience" and because it illustrates and holds the listener's attention. As such, it can be used to explain or illustrate difficult laws and concepts such as negligence, justice, and pain and suffering. Further, figurative language contains compacted lines of argument that invite inductive and deductive leaps. After first presenting facts and arguments in straightforward terms, lawyers may use figurative language to move to higher levels of analysis.

An example is a case or an instance, real or hypothetical, detailed or undetailed, used to illustrate an idea or to prove that a particular kind of event has happened or could happen. It is the presentation of a single instance of a phenomenon in order to illustrate or support an argument. Examples are important and powerful because they illustrate ideas, contain compacted lines of argument, and because they invite identification and prompt inferential leaps from a single example to a generalization. For example, in his closing argument in a medical malpractice case, Mel Block attempts to convince the jury that the defendant hospital was negligent because in diagnosing the plaintiff's hip injury, it took only a one-angle view of the hip with x-rays and therefore failed to find a fracture which was present. As a result of this failure, the plaintiff was allowed to leave the hospital and as a result of walking on the hip, developed crippling arthritis. In arguing that the doctors were negligent for failing to take several x-ray views of the hip, he used two examples which dramatically proved his point:

"I told you that I don't think I had to call a doctor in this case, and here is why: The care they gave Katherine Tomkins was less than they would give in selecting a five-cent apple. When you and I buy an apple from a fruit peddler or in a fruit store, do we plunk down the nickel right away and accept or grab any apple? No, we turn it around and we look at it at all angles and from perspectives and make sure it doesn't have a bad portion or a blemish or a rotten part that is visible. Only a nickel; we make

a bad purchase, we can buy another one for another nickel. In a hip joint, you can't get another hip, you can't make whole that which is crippled. And yet, they only took an A-P view, which you know is a front to back view. They couldn't tell whether it was cracked on the side or cracked at an angle. And yet this is what they try to tell you is the proper thing to do. Proper for a hip, improper for an apple?"

"You go into a store to buy a suit, or a jacket, or a coat. You stand before three-way mirrors, and looking into it becomes a complete hall of mirrors, each mirror reflecting the images in the other mirrors. I remember when for a few bucks I would purchase a suit with two pairs of pants, and judging from what clothes cost these days the price was cheap and inexpensive indeed. But yet I would turn and turn and turn to make sure that each crease, each seam was in place; that there were no bulges or puffs. I didn't expect the suit to make me an Adonis, and I didn't expect to look like a movie star. Why I looked was to see that what I was paying for at least was presentable. And I turned and the tailor would come over and would look. And perhaps a relative along with me would look, and if we made a mistake we could always bring the suit back for an alteration; we could always buy another suit. Not so with a hip, ladies and gentlemen. And yet they say taking one view of a hip is proper. Proper for a hip, improper for a suit? I ask you."

This example illustrates and supports his argument that the hospital failed to conduct a proper x-ray examination. It further invites inductive and deductive leaps in that the examples invite the jurors to inductively arrive at the generalization that whenever inspecting something for flaws and defects, more than one view of the article should be examined. The examples then invite the jurors to move from this generalization deductively to the conclusion that since the doctors failed to inspect more than one view or angle, they certainly conducted an inadequate inspection and were, therefore, negligent.

Analogies are likenings or comparisons between things, processes, persons, or events. By use of analogies, the lawyer can present a situation familiar to the juror, which helps the jury to form generalizations about certain situations that can then be applied to the unfamiliar situation that is involved in the trial. For example, in Mel Block's malpractice case involving the failure to properly read x-rays, Block argues that the doctors were negligent in that they attempted to read a wet x-ray plate. In providing support for this argument, he points out that one of the doctors testified that attempting to read a wet x-ray plate was like "riding a car in a rain storm without the windshield wipers working." The analogous situation of riding an automobile in a

rain-storm is familiar to jurors and allows them to easily grasp and understand the situation of attempting to read a wet x-ray plate.

Metaphors are figures of speech that function like examples and analogies in that they connect what is known and familiar with what is unknown and unfamiliar. They reflect attitudes and evaluate. For example, Mel Block uses the metaphor of a prison in describing how his client is limited by the arthritis that has developed as a result of the negligence of the defendant when he tells the jury, "The still has to live 24 hours a day, and all that is in pain now. She is as much entombed and encased in a prison of bone as any inmate of any penitentiary or prison is."

Allusions are references to historical events, literature, mythology, or some other source of cultural wisdom. Humans store knowledge in their minds that is linked to some historical, mythological, cultural, or literary event or reference. When the speaker alludes to this event or reference, the allusion calls up the stored knowledge, which can be used to support the argument being made. Like analogies, allusions allow the listeners to generalize from a familiar situation to a new and unfamiliar situation. For example, in his medical malpractice case, Mel Block was arguing that the hospital in question was negligent in that it allowed the plaintiff to leave the hospital and walk about on a broken hip, which resulted in permanent damage. In supporting that argument, he alluded to the Boy Scouts in order to provide support for his argument when he stated:

"Now, you and I have learned very young, as every Boy Scout knows, that you don't move a person with a fractured bone. Why? Because it gets better, because it stays the same? No, of course not. Because it gets worse, it deteriorates and disintegrates; and that is what happened here."

At this point Block has won over any juror who subscribes to this Boy Scout belief.

Common Sense Arguments

Common sense arguments are some of the most persuasive arguments because they rely on shared knowledge; that is, as humans, we have stored knowledge called common sense, knowledge that is based on what we as humans all know or feel to be true about the world. It is called common sense because we assume that all others share these beliefs or understandings. In actuality, common sense knowledge is based on each individual's personal experience. Thus, it is persuasive, because if a speaker makes an argument that we know to be true based on our personal experience, we will

support the argument, but if the argument goes against our personal experience, we will reject it. I will discuss common sense arguments in greater detail in an article to be posted later that will also provide examples used by trial lawyers in actual cases, and, therefore, suffice it to say at this point that in creating meaning for the trial, common sense appeals operate to link arguments to the shared knowledge that jurors hold to be true, thus creating favorable juror impressions.

Nonverbal Communication

The nonverbal communication that goes on in and out of the courtroom is just as important as the verbal communication. Jurors will form impressions about the lawyers, litigants, and witnesses based on their observations of the nonverbal communication. Therefore, the lawyer must give consideration to what is being communicated nonverbally, and he or she should keep in mind that juror impressions can be shaped by nonverbal communication.

Dress

Jurors will form impressions about lawyers, litigants, and witnesses based on their dress. Jurors have role expectations about the people involved in jury trials. They will expect the lawyers, litigants, and witnesses to dress in certain appropriate ways. The parties to the lawsuit will be expected to dress in a way that demonstrates respect for the jury process. If jurors perceive that the plaintiff is dressing in a way that shows a lack of respect or seriousness for the jury process, then the jurors will probably not take the plaintiff's claim seriously. Therefore, clients should be counseled to dress in appropriate ways for the trial proceeding. They should not overdress or dress in a way that is clearly out of character for their situation, because this will cause them to feel out of place and uncomfortable and may cause them to send nonverbal signals to the jury that may be interpreted as deceptiveness.

Counsel clients and witnesses not to wear loud clothing that will detract attention from the focus of the trial. They should not wear excessive or gaudy jewelry or makeup. Beware of pins, labels, or other paraphernalia that link the wearer with a particular group or philosophy. This is not to say that they should not be worn, but the lawyer should be aware of who he or she is winning or losing by wearing such labels. An appearance of sloppiness should be avoided.

The rule of thumb is that the dress should fit the situation. A garage mechanic called away from his job to testify would be accepted in a pair of greasy overalls. However, a garage mechanic as plaintiff should wear the type of clothing he would wear when going to church or on other serious occasions.

Nonverbal Behavior In And Out Of The Courtroom

The jurors will observe the lawyers and litigants throughout the trial. Over the course of several days, it will be apparent whether the husband and wife plaintiffs truly love each other or are simply putting on a show for the jury. It will also be apparent whether or not the lawyer really believes in and cares about his clients or whether he or she is simply putting on a dog and pony show for the jury. If the jurors perceive that the lawyer does not like or does not care about the clients, they will have difficulty getting emotionally involved in the case themselves. Clients should be carefully counseled prior to trial about the importance of their nonverbal behavior during the trial.

The jurors will also be looking at the lawyers and litigants outside of the courtroom. Jurors will take note of the lawyers who fight in the courtroom, but laugh and joke during breaks. In the same way, the jurors will take note of the plaintiff who looks sad or serious in the courtroom, but changes demeanor outside of the courtroom. The rule of thumb here is consistency. The behavior outside the courtroom should be consistent with the behavior inside the courtroom in order for the jurors to feel that the lawyers and litigants are presenting themselves in an honest and straightforward way.

Eye Contact

Eye contact is one of the most important elements of nonverbal communication. The failure on the part of witnesses to make eye contact will result in the jurors perceiving the witnesses as being deceptive. Therefore, you must insist that your clients and witnesses make eye contact with the jurors. If they find making eye contact difficult, it should be practiced in your office prior to trial. Clients must be told that their failure to make eye contact will hurt their case. Tell clients that the jury will be made up of people like them who are anxious to hear their story and who should be considered as friends. If they are nervous, questions can be asked, such as, "Have you ever testified before?" and "Are you nervous?" in order to diffuse the nervousness. When one side of the case presents witnesses who make eye contact and the other side of the case presents witnesses who do not make eye contact, the jury will tend to find the witnesses who made eye contact more credible than the witnesses who did not. While

making eye contact with the jury does not guarantee that your client will be believed, but without question. failing to make eye contact with the jury will detract from your client's credibility and the impact of what is being said.

Conclusion

Communication affects perception. Thus, lawyers can affect the way the jurors perceive the trial by the way they communicate with the jurors. The successful lawyer will be the lawyer who understands this fundamental aspect of communication and takes an active role in shaping juror impressions.

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