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By Jeffrey J. Kroll

Using Themes and Analogies to Persuade in a Personal Injury Trial

In law school and throughout our careers, we have been taught the importance of developing a theme for our case. But, what do we mean when we speak of a theme? Where does it come from? How does a theme work? How do I choose a theme? Bottom line, does a theme really have any value for a case?

A theme is the one concept that unifies a case. In essence, it should explain why one party should prevail and why the other party should not. It should relate a pivotal element of your liability theory or the claimed damages. A theme can be viewed as a short, memorable expression of some of the key elements supporting your theory... whether it relates to damages or liability.

We live in a world full of themes. We have theme parties, theme parks, theme songs and holiday themes. If you are invited to a theme party, you know immediately what the celebration is about. At trial, a theme personalizes issues and helps jurors form lasting impressions of what the case is about.

The purpose of the case theme is really three-fold. First, you need to convey the essence of the case to the jury. You want to show what the defendant did wrong and what is the resulting injury/impairment. Second, your theme should create an understanding on the part of the jurors. The message must reach the jurors at a level they can translate into their own life experiences. A non-universal theme is akin to an inside joke. Therefore, a theme must have universal application. A theme will be ineffective when it is not universal. The final purpose of the theme is to motivate the jurors to take action. A theme can generate juror responses based on empathy, fairness or even anger. It is the trial lawyer's job to tap those emotions.

A good theme is easy to remember; it is something a favorable juror can readily use to convince others during deliberations. A good theme will make sense as it is consistent with a jurors concepts of fairness and justice, so long as it carries a strong causal implication. Realistically, constructing a strong, compelling case theme can be a long, challenging journey for the trial attorney. The road map leads from various ideas to the ultimate key phrases. In the end, the result is worth the effort.

A theme is a phrase that brings a vision to jurors. Themes are the anchors around which the jurors visualize the case. Sound bites can make for effective themes. As such, your theme must be limited to a "ten word telegram" that explains your story. No matter how complex the case is, your theme must be conveyed in ten words or less. Simple, right? Try it... it's not that simple.

I. Why is a theme important? Can a theme really help my case?

When it comes to final deliberations, some jurors take notes, others do not. Many will rely on their memory of what occurred during the trial. Themes will assist jurors in recalling information in a variety of ways. For example:

- a. A theme may assist jurors in remembering key bits of evidence... key bits of information important to your theory of the case.
- b. A theme will allow key elements of liability and damages to become more familiar to jurors and assist them with their ability to recall pertinent information.
- c. Hopefully, your theme will incorporate a value system that will allow jurors to identify with.

When you think about it, every effective advertisement includes some type of short statement to describe the product, what the product characteristics or something about their company. Themes/slogans sell products.

Marketers use themes on a daily basis to influence our buying decisions. Their task is to connect their product to some admirable human condition or circumstance. All of these “themes” which are marketed to us are safe harbors which we rely upon and allows us to connect a human value with the theme.

For example:

<u>PRODUCT</u>	<u>THEME</u>	<u>HUMAN VALUE</u>
Nike	Just Do It	Fearlessness, Impulsivity
Budweiser	King of Beers	Supremacy
Prudential	Get a Piece of the Rock	Stability, Security
McDonald's	You deserve a break today	Compassion, ease
Army	Be all that you can be	Success, Goals

By creating a case theme, you control the definition of the case. When you control the definition of the case, you control the dialogue in the jury room. When you control the dialogue in the jury room, a favorable result is attainable.

A theme provides guidance for the jurors *throughout* the trial. Provide jurors with your theme early and often. If you have created a good case theme and organized your case consistently around that theme, you have given the jurors an excellent guide through the maze of a trial. When you have created a good theme and have organized your case succinctly, you have become the guide... not your opponent. When you are the guide, jurors will follow your lead.

II. What are the various means of communicating a theme?

Let's face it, we are a visual society. Statistics dictate that when someone hears something, he/she has a 20 percent memory retention; showing him/her something give him/her a 50-70 percent memory retention... showing and telling him/her produces an enhanced 85 percent retention level. You need to find a way to show and tell your theme. Sometimes, that is easier said than done.

People process things differently. However, all of us do rely on one of three models at any given time:

- . Feelings
- . Picture or
- . Words

Therefore, in order to be effective, you need to attempt to hit on all three so you do not alienate any jurors.

You need to advance your theme with each and every witness at a trial. There are two questions you need to ask yourself before and after a witness testifies:

1. Before a witness testifies, you need to ask yourself: What am I going to do with this witness to advance my theme?
2. After the witness testifies, you had to ask yourself: What did I do with this witness to advance my theme?

Below are some examples of themes that I have used, have known others to use, or that are found in the literature:

“A hospital is supposed to help, not hurt.” (Easy to use when patient goes in with one condition and comes out with a more serious problem.)

“A moment of carelessness caused a lifetime of misery.” (Universal theme which can be used whenever a defendant is negligent because of a moment of carelessness, ie., rear-ends plaintiff; fails to use proper barricades, etc.)

“A lane change that caused a life change.” (Where defendant changes lanes and causes collision.)

“Broken bones and broken dreams.” (Good when damages are really the only issue.)

“A machine that had ever option... but safety.” (Products case where no guard was in place.)

“Safety, sense and science, which the defendant claims it considered... death, injury and disaster are what the defendant overlooked.” (Products/auto case.)

“A company will not take responsibility for safety.” (Obvious liability case where defendant denies responsibility.)

“An over-the-road trucker that tried to drive day and night.” (Truck driver that drove fourteen straight hours.)

“A doctor not listening to the patient.” (Doctor rejects complaints of patient.)

“If the doctor did not write it down, it did not happen.” (This occurs in almost any medical case. Can be used in any case involving a missing record, entry or note.)

“If a doctor should err, it should be on the side of caution.” (Case where doctor failed to order CT scan.)

“David versus Goliath” (Universal theme.)

“The first rule of medicine, do no harm.” (Universal theme.)

“Profits over safety” (Premises case where defendant chose to not put up padding because of costs. Could be used on many different types of cases.)

“Speed kills.” (Wrongful death case where defendant was traveling nineteen miles over the limit.)

“Recipe for disaster.” (Great theme when several defendants are involved in a case and you want the jury to find most or all at fault. For example, “if you add the conduct of “x,” the conduct of “y” and the decisions of “z,” you have something akin to my aunt’s recipe for beef stew... unfortunately, here we too have a recipe, a recipe for disaster.)

“The wrong person, doing the wrong thing, at the wrong time.” (Effective to use when nurse or someone under the “principal” is making decisions.)

“One of the basic rules of administering medications, start low and

go slow.” (Over prescribe a medication resulting in death.)

“Appears as if life gave up on John, but John has not given up on life.” (Damages theme where client fights through adversity.)

“She did what was right, only to be wronged.” (Good theme where there are no allegations of plaintiff’s conduct contributing to the occurrence.)

“A hard working man, who only followed orders.” (Good theme when there are no allegations of plaintiff’s conduct contributory to the occurrence.)

“The left hand not knowing what the right hand was doing.” (Lack of communication between parties or others.)

“One drink too many.” (Dram shop case.)

“Captain of the ship.” (Any case where the “principal” does something wrong and blames others.)

“A half truth is a lie.” (Where defendant is not telling the truth.)

“What a tangled web we weave, when we practice to deceive.” (Where defendant is not telling the truth.)

“Complaints do not cease to exist because they are ignored.” (Defendant ignores complaints.)

“A promise made is a debt unpaid.” (Theme used against a corporation that didn’t fulfill obligations.)

“A forty-five pound girl versus a 2,000 pound Honda Accord.” (Defense contested neck injuries to a young girl.)

“She is under a death sentence... only the time of execution is unknown.” (Theme used in a failure to diagnose cancer case.)

“The straw that broke the camel’s back.” (Good theme to use for aggravation of a pre-existing injury case.)

There are dozens and dozens of other themes out there. I wanted to provide the reader with some I believe are effective. Having a theme for your case is crucial. When a lawyer fails to provide a theme, jurors will provide their own “theme.” Unfortunately, their theme may not coincide with your view of the case. If a theme fails to connect your client’s situation to the values jurors hold, the “motivation” to find for your client is gone. When and if you can

establish that your client is a human being with the same needs and wants as members of the jury, an identification is created. Jurors will then feel that what happened to the plaintiff could happen to them, too. “There, but for the grace of God, go I.”

The art of developing and using case themes should be a fundamental shield for all trial lawyers. A simple comprehensive theme will focus the jurors on the main message of a case. The time spent developing an effective theme is time well spent.

III. Analogies

Analogies are also an effective way of communicating with jurors. Analogies are simply a comparison based upon the similarity between two things. Many stories contain analogies to make or clarify a crucial point. Think about it, a good story always commands your attention. A good story at trial will grab the attention of the jury. As trial lawyers, we need to force the jurors to crave additional information about our case. An analogy or two will allow the jury to understand and identify with the crucial aspects of your client’s case.

More importantly, an analogy challenges jurors to consider the appropriateness of the analogy to the point or points being made. Obtaining analogies from everyday life or the media can make excellent comparisons to the value of human life, a patient’s physical and mental suffering, or identifying and explaining the defendant’s negligent conduct. There are very effective sports analogies, are analogies and an array of other analogies which can be used for comparative purposes. The uses of analogies are limitless. Here I a brief list of some analogies and stories which can serve as a comparison based upon the similarity of things that jurors could hopefully relate to:

A. Defeating Contributory Negligence

The doctor had years of experience, earned hundreds of thousands of dollars during his career, went to a top notch medical school to learn to avoid the plaintiff’s injury. Compare that conduct to the plaintiff, who had no choice in the selection of a doctor, no medical education, no training and was unconscious during surgery.

In a truck collision, compare how long it took for the bad brakes to get in poor condition, the opportunity and requirements for inspections and compare that length of time with the time in which the plaintiff had to make a decision at the intersection.

In an intersection collision case against a busy company, compare the control over every element that caused the collision (training of the driver, condition of bus, selection of route, speed of travel, policy on use of hazards, etc.) versus your client’s speed at 12 mph.

B. Circumstantial Evidence

1. Powdered sugar

It is not uncommon for a doctor in a malpractice action to argue that “he did something,”

but did not chart it. I like to argue this analogy during closing argument. Recently, I had my niece, Ellie, over for a family barbeque. I was cooking hamburgers on the grill, and she asked me if she could have a powdered sugar donut. On the counter was an unopened box of powdered sugar donuts. I told Ellie to wait until we were done with the hamburger and then could have one. I went back outside and finished grilling the hamburgers. When I re-entered the kitchen, the box of donuts was opened and Ellie had powdered sugar all over her face. To top it off, she was chewing something. I got down on one knee and asked Ellie if she had eaten a donut. As she was chewing, she looked at me with powdered sugar all over her face and said “no, I didn’t eat one.” At that point, I had two options.. Believe Ellie or believe the powder sugar all over her face... now let’s look at the powdered sugar all over Dr. Smith’s face.

2. Snow

Last night when I went to bed there was no snow on the ground. This morning, I looked outside and there was snow. Although I did not see it snow while I was sleeping, the logical inference is that it snowed sometimes last night.

C. Pain and Suffering

Every state, under their own constitution, cannot inflict physical pain.

People pray for death, no one prays for pain.

“The art of living is the avoidance of pain.” Quote from Thomas Jefferson.

A state may kill you for your crimes, but it cannot torture you.

Mary has pain. Not excruciating pain, but pain none the less. It’s as though Mary is an old pair of shoes and the defendant came up and hammered a nail through the bottom of the shoes. Now every time Mary walks, she feels the nail sticking into her foot. She can have fun and forget for a moment, but every time she gets up, she feels the nail sticking into her foot. I suggest to you that all of Mary’s future pleasures in life will be overcome by this nail in her shoe. Defendant claims that Mary would have had a nail sticking through those old shoes sooner or later, therefore, it is not their fault. The fact remains, this nail was hammered in by this defendant.

D. Value of Human Life

1. Baby Jessica McClure (trapped in west well Texas for 56 hours)

When 18 month old Baby Jessica McClure fell twenty-two feet into an eight inch well in Odessa, Texas, the entire country spared no expense in the fifty-six-hour rescue. They drilled through twenty-five feet of rock while her mother sang Winnie the Pooh. Why? Because the value of a human life is enormous in our society.

2. In relation to sports related events, Picasso

Defense counsel says we are greedy asking for \$7 million dollars for little Timmy's injury. We live in a society that pays two men millions of dollars to get in a ring and hit each other. When Tyson fought Spinks, they were in the ring for 91 seconds and were paid \$31 million dollars. We live in a society where a 30 second Superbowl commercial is \$3 million dollars. A signing bonus for an unproved athlete can reach \$10 million dollars. We live in a society that pays a \$5 million dollar endorsement to a drug user who happened to fraudulently win a gold medal. We live in a society that pays \$53.9 million dollars for canvas and wood pieces just because the canvas happens to be "irises," a Van Gogh masterpiece, a one of a kind original. What about the human body? What about God's masterpiece, Timmy, a one of a kind original? What is God's masterpiece, Timmy, worth?

E. 5% Disability

It is not uncommon for a defense expert to argue that the plaintiff's injury amounted to a 5 percent disability. Put that in perspective. Have the jury look at the clock on the wall. If that clock was percent off, when they returned one day from now, that clock would be seventy-two minutes behind schedule. Two days from now, 144 minutes behind schedule and four days from now, almost five hours behind schedule. Yet, that clock is only off by 5 percent. It is a big deal? You bet.

F. Anatomy

Meniscus - A C-shaped cushion in the joint that acts like a shock absorber.

Herniated Disc - The cushions center is made of a jelly like goop. When the disc ruptures, the goop leaks out and pushes on the nerve. The pressure on the nerve produces pain.

Arthritis in a joint is like two rusty steel edges grinding on each other with no oil.

Imagine a beautiful green lawn. Then, imagine a rock in the middle of that green lawn. The lawn will not grow well over that rock. Fibroid tumors are like that.

A heart attack due to blockage in one of the coronary arteries is like a lawn that dies when there is no rain or irrigation.

Imagine that a straw represents your lungs or bronchi. Close one end of the straw. Suck from the other side, the straw collapses. That is similar to the bronchi spasms that John is suffering from.

Tom has a herniated disk. Imagine a tire with a weak spot - two bulges through that spot are like forcefully squeezing Silly Putty into your fist. A portion will squeeze out that thumb, the side with the least resistance.

In an emergency room, a doctor sees all new patients with the same appointment... now. Tibial plateaus are like platforms in our knees on which we stand. Nerves are very funny

animals. If you have pressure on a nerve, it's like putting your foot on a running garden hose. You get less transmission of the signal/water.

Disease is the enemy and the body is the battle ground. The disease infiltrates your body and takes over. An infection is an attack by the disease. Medial procedures are attacks by the patient. The immune system is a defense. Winning the war is being cured of the disease, and being defeated is dying.

Tendons are like cables attached to the motor on one end and what its going to lift or move on the other.

G. Plaintiff substantially impaired prior to occurrence.

1. Rich man/poor man robbed

The only thing we can do is translate human pain and human misery into dollars and cents. Damages are not measured by what you leave them with, but what you take away. If you take a thousand dollars from a man who has a million dollars, you have not hurt him too much, because he still has \$999,000.00. But, on the other hand, you take away from a poor man, a thousand dollars, you have taken away everything. By the same token, if you take away from a person his ability to eat, his ability to enjoy a meal, his ability to go outside, his ability to engage in a normal relationship with a spouse, you have taken away everything. He now has nothing.

2. Cracked windshield

Mary Smith did have a prior back injury before this motor vehicle collision. However, she is now totally disabled from the motor vehicle collision. The defense is arguing that they are not responsible because of a pre-existing condition. If you listed to the defense, they are not responsible at all. Let me give you an analogy that we can all relate to. Assume that our windshield has a little chip in it from a pebble that struck it. We can drive with that windshield for years. If the defendant smashes your windshield, they would have you believe that they are not responsible because your windshield already had a "crack." That is not the law. Sure, Mary Smith had a "crack" in her body, but they are responsible for the shattering of her body.

**Various Liability Analogies, Either Tied in with a Theme
or about a Witness**

To err is human, to forgive... design.

His testimony is as questionable as an anonymous letter.

Doctors are like ostriches when it comes to their colleagues... they bury their heads in the sand.

When a patient does in the hospital with one condition and comes out damages in another part of the body... "Like having a small dent in your car, taking it to the body shop, they fix the

dent but the wheel falls off.”

By letting residents and interns make critical decisions, it is like letting the kids run the candy store.

What he did was as dangerous as a deep sea dive at night.

Failure to take several different x-rays... when you go to pick fruit out of the bin at the supermarket, you turn the fruit and look at it from all sides to see if it is damaged. Here, the radiologist only took one x-ray. He should have been at least as careful as we are when we are picking out fruit.

Tie in the closet - you know your favorite tie is somewhere in the closet but you cannot find it until you turn on the light. Radiology is the same, you cannot find the problem without selecting the correct test.

Sammy Sosa error (I used this analogy during a medical malpractice case in a small town in South Carolina). I am a Cubs fan. Not too long ago, I attended a game to watch Sammy Sosa. Sammy Sosa is a perennial All Star. That day, a fly ball was hit to Sammy and he dropped it. I thought, “they can’t give Sammy Sosa an error.” It must be a hit. Sammy Sosa is an All Star.” Sure enough, they gave him an error. He dropped the ball. I am not saying the doctor here is a bad doctor. He committed a medical error. Just like Sammy Sosa “dropped the ball” with this patient.

Don’t excuse this conduct as being a mistake in judgment. We all know it is illegal to run a red light. But if we are in a hurry and exercised our judgment to run a red light causing a collision, we are responsible. We know that exercising our judgment should not excuse our conduct. By the same token, Dr. Smith ran medical red lights with his care of this patient.

People believe in reason, especially their own reason. More importantly, jurors identify with their own ideas. Jurors want to reach their own conclusions. The heart of advocacy is presenting facts to lead the jury to reach their own conclusions.

By simply reading the newspaper or being “in-tune” with society, analogies will leap out at you. Analogies should be used early and often. They should be used in opening statements, throughout the trial with lay and expert witnesses and during closing arguments. Use these analogies as a basis of establishing societal standards from which to argue the reasonable value to compensate for a catastrophic injury or for clearly demonstrating a defendant’s negligent conduct.