9. Where’s the Passion: Effective Use of Emotion

"Where's the Passion: Effective Use of Emotion"
WELCOME TO THE REVOLUTION

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Without passion, hollow and empty verdicts results. If the jury does not feel your client's hurt, understand the suffering and wallow in despair, a low verdict, or no verdict will surely result. While passion can certainly be found during all aspects of the case, it's true home resides within the four corners of the closing argument. The preparation of the all important closing argument should begin when the case is accepted. All too often, the closing argument composition commences in mid-trial. This unfortunate occurrence contributes to the high rate of defense verdicts. One tends only to see the trees rather than the forest when waiting until late in the trial to prepare the summation.

Ask yourself simply "why did you take the case." What features appealed to you during the first interview? Did you feel sorry for your client, did your heart hurt? Chances are if you were unmoved during your first meeting, so will be the jury.

Thus, remember your initial feelings about the hurt, frustration and suffering of the case. These feelings will dictate the themes of the case.

At every turn, the defense, through its monotone delivery and uncompassionate approach, will attempt to suck out of the courtroom all remnants of emotion and passion directing the jurors' attention away from the most sympathetic aspects of the case. Bring them back during summation. Make them see the forest, make them feel the hurt.

CASES CAN BE WON OR LOST during the closing argument, proclaim the trial masters.

Most of us hope that this maximum is simply untrue, for if untrue, a great responsibility is lifted from our shoulders. No trial lawyer happily embraces the notion that months of work and expense rests solely on a thirty minute or an hour condensation of fact and emotion.

Although there are some cases so clear cut, so undeniable that the closing argument can have no effect, the vast majority of juries can be touched by the depth of brilliant summation and, in some instances, the able trial counsel can snatch a case from the treacherous jaws of defeat.

MAJOR TRUTHS

Before we sojourn through the particulars of a good summation, let us visit upon some major truths. First and foremost is the honesty of the closing argument. Once the Plaintiff's counsel loses credibility with the jury, the case is surely lost, no doubt about it. The trial lawyer must convey an honest, unashamed aura of the case. This honesty, if properly conveyed, will make up for any lack of trial skills and eloquent advocacy. Simply stated, the jury will resolve the case in favor of the side they believe.

Of equal importance is the second major truth, the jury must feel the case and feel good about their role in the judicial process. You make the jury feel good about their role by acknowledging them, stand when they enter the courtroom, look at them, react with them and at the beginning of your summation, tell them good morning or afternoon and thank them.

Most of all, make them feel the injuries, feel the suffering and feel the tragedy. If the feeling consumes the jury, they can not turn their backs on your client, instead, they will reach out the hand of kindness and a Plaintiff's verdict will surely result.

If the defense is successful in reducing the trial to an emotionless, antiseptic, sterile and

unfeeling place, the insurance companies prevail again. You must unlock the hearts and minds of the jury; honesty and feelings are your keys.

Enough said about major truths, let's move on to specifics.

THE BEGINNING

One should begin the closing argument by outlining the importance of the case. Be certain to stress the importance of the role of the juror in the American system of jurisprudence.

Counsel should remind the jury that the jury system is firmly built upon the blood, sweat, and in some case lives of our forefathers so as to insure that this system of arbitration of disputes is left intact. Remind them that in most countries, there exists no right to trial by jury in damage cases. Even the British don't think juries are smart enough to evaluate damages. Explain the beauty of our jury system: that a fair cross section of humans from every walk of life of their collective opinion can tell the world through its verdict how the community values human life and human suffering.

The jury should also be impressed with the finality of their verdict. The fact that no other jury in the whole world will have an opportunity to decide the case and that the fate of our client rests solely in their hands. Therefore, if they should meet your client in a grocery store some ten years from now, they should have no pains of conscience or misgivings or remorse that they failed to accomplish full justice.

THE CHARGES

The basic charges such as burden of proof, credibility of witnesses, negligence, and damages should be fully discussed using common sense everyday examples, i.e., scales of justice or the 50 yard line of a football field for the burden example; negligence not meaning an intentional or malicious wrong, but rather just a mistake, just simple human error.

LIABILITY

More often than not, if you are required to strongly argue the liability evidence of your case in closing argument, you have serious problems. The jury should already agree and be comfortable with a liability finding prior to the closing argument. Thus, in most cases the closing argument is dedicated almost in whole to the argument of damages. However, if you are required to argue liability, do so with simplicity and clarity with direct reference to the witnesses and the facts. It is helpful to write key liability phrases on the blackboard or flip chart in advance and use them during summation.

LISTING OF SPECIALS

The specials of the case should be discussed in detail, using either a blackboard or poster board. All special damages should be listed and totalled to the penny. Do not, under any circumstances, round ff any figures. All prescriptions should be listed even down to a couple of aspirin. Counsel's dedication to showing each and every penny of the special damages will reinforce to the jury the seriousness of the notion of full recovery.

PREEXISTING CONDITION

The attorney should be armed with many comparisons between the facts of preexisting conditions and everyday events. For example, if the facts of the case outline aggravation of preexisting injuries, the attorney should go back to law school and teach the jury the doctrine of "thin skull". Everyday examples can be sued to highlight the common sense of the thin skull doctrine:

> "Certainly if you hit the back of a truck with your car through your own negligence, you cannot, upon discovering that the truck was loaded with eggs, argue that you should not pay for the full value of the eggs because you had no knowledge of the contents of the truck. We certainly are not entitled to hit the back ends of trucks only loaded with steel."

THE VALUE OF LIFE

The comparisons available when arguing the value of a life are too numerous to list. One example would be to compare the cost of a valuable race horse to that of a human life. The contract price negotiated by football players these days certainly lends itself well to arguing the valued of human ability. We can also use the notion that America, more than any other society, values life above all else as evidenced by our lag in the space race so as to insure that all precautions have been made for the safe return of our astronauts. We can also argue that no one would criticize an Air Force pilot for bailing out of a failing $8 million aircraft to save his life. We would all be happy to see the plane crash and the pilot survive if those were the alternatives. Perhaps the best example that I have seen in arguing the unlimited money which our society would expend to save a stranded person: You can sue the example that if a person were sinking in quicksand, this country would spend millions of dollars to build a ladder of gold studded with diamonds if that was necessary to insure that the person was saved.

COMPENSATION FOR PAIN

On the matter of pain, you can state that each day our world continues to march toward a pain-free existence. Television commercials boast of ways to reduce discomfort and eliminate pain. No one likes or enjoys pain and it's often said that the only pain that's easy to bear is that of someone else. Counsel can use the dentist situation and without any disagreement proclaim that all of us would happily pay $100.00 for 10 minutes in the chair to have a tooth pulled and to guarantee

that we will thereafter have freedom from pain and be able to enjoy the simple act of eating.

When requesting sums of 10, 20, 30 thousand dollars or more for pain and suffering, you should use as comparisons the price tag of known objects such as a new car, middle-size home or whatever the facts of the case dictate. Jurors have a difficult time understanding the figure of $15,000.00, however, when you tell them that the average cost of an American car is $13,500.00 and the car will fall apart in five years or so, the figure of $15,000.000 for the pain of your client is not unreasonable. Of course, the extent of pain will dictate the comparative value used and the corresponding dollar value of the pain and suffering.

SMALL INJURY - BIG EFFECT

Often, counsel is confronted with a situation where the injury appears small but the effect on the person is devastating. Several everyday examples can place this in proper perspective. Can anyone dispute the fact that a small pebble found at the bottom of our shoe can bring us to a screeching halt? Can any of us doubt that a small microscopic piece of glass located in an automobile tire could bring that 2,000 pound automobile to a stop and render it useless until the tire is fixed?

USE OF FIRST PERSON

Above all, during closing argument pick some point to speak to the jury in the first person as if you were talking as the injured plaintiff would. Example as follows:

> "Ladies and gentlemen, I am a little bit ashamed to be here in front of you and ask for money. However, I don't want to be here, I would rather be a million other places than here in this courtroom in the condition in which I'm in. All I ask is for you to consider what I've gone through, what I have to go through every day and know that I'm doing the best I can under the circumstances. However, please help me out and know that this is the only day in court that I'll ever have."

CONFLICTING OR NEGATIVE DOCTOR TESTIMONY

Although jurors generally hold doctors in high regard, most have experienced communication problems with doctors, i.e., the doctor's inability to answer direct questions and the doctor's inability to find the direct cause of a particular hurt. Therefore, counsel should capitalize on these juror predispositions when faced with evidence of conflicting or negative doctor testimony, as follows:

> "We've all dealt with doctors and I am sure that you share in my frustration when I say that a doctor is incapable of giving a definite answer. They often disagree and that's not bad considering that medicine is an inexact science, there is a whole lot they just don'tknow. The law is not stupid and recognizes all this and thus you'll hear the judge tell you that you can throw out all the doctor's testimony and believe solely Mrs. Jones. There's only one person who knows how we feel and that's us."

USE OF DATES IN FUTURE

Many cases deal with the calculation of future economic and medical damages. Of course, all wrongful death cases must use future dates as projection vehicles. Many trial lawyers will talk on about the year 2020 or 1995, without having achieved any real jury appreciation for those dates. The trial lawyer should illustrate those dates and their length by going in reverse order. With a forty-year period in the future, we should outline to the jury that forty years ago, the United States was in the middle of World War II. A person in World War II saying forty years from then would really mean 1984. And, likewise a good twenty year mark would be the Kennedy assassination in November, 1963. By referencing known events to the jurors, it is possible to dramatically increase the jurors' perception of what twenty years really means and what forty years really means.

PER DIEM ARGUMENT

Unlike Georgia, many states either preclude or restrict the use of per diem arguments. Almost every injury case will be conducive to some form of per diem argument. Examples as follows:

> "Mrs. Jones is paid by her employer at the rate of $9.52 per hour. Of course, this employment has no pain, no mental anguish. We have no problem in reimbursing Mrs. Jones for her three weeks off the job. However, we must remember that during those three weeks, Mrs. Jones was in constant pain 24 hours a day. Is it unreasonable to ask that during those three weeks that Mrs. Jones, for her pain and suffering, should be compensated for 24 hours at the rate of $9.52. Of course, we should have no problem since in a very real way, Mrs. Jones was an employee in pain for those three weeks. And at the rate of $9.52 per hour for 24 hours, $228.48 for 21 days, the total figure is $4,798.00."

The basics of the per diem argument is to break down the injury into the small fraction of time, one hour, one minute, etc., and apply a thing of value to the time, i.e., pack of cigarettes, gallon of gas, movie ticket, magazine. The process is complete in multiplying the thing of value with the amount of time, i.e., time cast was on leg, time missed work for 24 hours a day, time had headaches, etc.

HALF JUSTICE

When you have decided on a reasonable figure to present to the jury, you must then combat the jurors' natural desire to cut the amount, either out of compromise with other jurors or because they feel that your stated figure is not the true figure you desire. To help stop this potential stampede, you need to argue something similar to the following:

> "The figure I've just given you may sound high and to some of you unreasonable; however, I can assure you that in arriving at this amount we took a full review of all facts and lengthy heart to heart talks with Jim and this is a fair figure. Most importantly, it represents what Jim wants most, justice. Now when you get back in the jury room, there are those of you who may want to cut this amount. However, if you cut this amount I can assure that justice will be your victim, for to cut this amount by 1/2 is to render 1/2 justice. Ladies and gentlemen, 1/2 justice is no justice at all."

CONCLUSION

The conclusion of the closing argument should properly shift all the burden of the case onto the shoulders of the jury. With such phrases are:

> "Ladies and gentlemen, my long job is over and your job is about to begin. I have done the very best job that I could do in preparing for you all the facts of this case. I only hope that you will be as comfortable and as confident in your role once you decide and you should have no sleepless nights nor pangs or conscience by what your verdict says. You should have no hesitation in looking the plaintiff dead in the eye two, five, fifteen years from now and saying your verdict was fair and just and you made no mistakes. This is a tremendous responsibility for you, however, I know that you will uphold your oath and be guided by your conscience."

MISCELLANEOUS

Perhaps the most debated areas of arguing damages is when the actual amount of damages is communicated to the jury. There are those who steadfastly adhere to waiting until closing argument to mention a specific amount of money to the jury. Except in rare cases, I don't believe that such a delay is beneficial to the case. The average juror is simply not accustomed to dealing with large amounts of money and they may agree with the plaintiff's liability position and likewise agree with the establishment of the damages, but yet be shocked and near appalled during closing argument

when a large figure is spoken for the first time. We as a society want to know the price of merchandise before we consider purchasing. Will a salesman be successful with the average citizen if he delays communicating the purchase price until the end of the sales presentation? We generally want to know the price, the amount immediately so that we therefore can be educated either self-induced or by way of persuasion into accepting the amount.

Therefore, I believe that the proper time to mention the dollar value of a case is during opening statement and done in a clearly convincing and unequivocal manner. The plaintiff's bar has been brainwashed into the "specials" equivalent in settling cases, the proverbial three times or four times the specials as the value of the case. Thus, for settlement purposes, the most important consideration often becomes the amount of the specials. This examination flies in the face of the average juror. When we hear that a friend or neighbor has been involved in a serious accident, do we ask as our first question, "What are the expected medical bills?" or, "What are his lost wages?" Of course not, our primary and, in most instances, our sole concern is how severe are the injuries and to what extent will the injuries limit the person's activity and become permanent. Damages must be argued considering the same perspective.

In conclusion, I firmly believe that damages and the dollar amount should be argued forcefully and with all the sincerity and vigor you can muster. In so doing, the jury will award every penny requested if you make them feel the injury and you give them a reason to award the verdict. If the damage presentation lacks sincerity and the dollar figure is not reasonable, a low verdict will surely be rendered.

Good luck.