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TRIAL THEMES:

A Trial Without a Theme is a Trial Without a Purpose and Without a Hope

By: Michael J. Warshauer

**A STORY WITHOUT A THEME IS NOT MUCH OF A STORY - IT IS JUST
TALK.**

A car crash is not a sterile legal event. Instead, a car wreck is an every day tragedy involving real people with real damages. Our task is to convince the jury that the plaintiff we represent is a victim entitled to full compensation. This can only be accomplished through the effective presentation of the facts within the framework of the law which governs the case. This process requires the successful litigator to develop a theme which will carry the case through, over, and sometimes around the many obstacles which make up the plaintiff's legal theory and that of the defendant.

The best way to present the facts of a case is to tell a story. The most memorable stories are those which both illustrate a moral and which can be summed up in a phrase or two. In the realm of trial practice, the moral to our stories

is our legal theory and the phrase or two which captures the essence of our moral/legal theory is our trial theme.

THE TRIAL THEME IS THE HOOK ON WHICH THE JURY WILL HANG ITS VERDICT.

The American Heritage Dictionary of the English Language defines theme as “[a] topic of discussion, often expressible as a phrase, proposition, or question.” Robert V. Wells writes in his book, *Techniques of Expert Practitioners*, that “[t]hemes link narrative and argument to show the role of human action in producing the particular plot. These stories don’t just happen, but they are caused by the actions of the parties.” *Id.* at §6.08 p.209. Another author puts it this way: “[t]he theme is the ‘storyline’ of the case. . . . [It is] the soul or moral justification of your case. It is rooted in human behavior and sociocultural attitudes, and is sometimes more intuitive than analytical.” Purver, Young, Davis & Kerper, *The Trial Lawyer’s Book: Preparing and Winning Cases*, §6:3 p.86-87. Put still another way, the “theme should be that explanation of the facts which shows the moral force is on your side.” Lake Rumsey, *Master Advocates’ Handbook*, p.1. “Strong themes crystallize complex concepts and arguments, fixing in jurors’ memories the ideas they represent.” Amy Singer, *Jury-Validated Trial Themes*, *Trial*, October, 1994.

All of the above sounds impressive, and certainly each of the sources quoted above should be read when the curious trial lawyer finds the time, (perhaps while waiting for the jury to

return), but the definition which is most useful when attempting to choose a theme is this:

A trial theme is the single phrase which lends credibility, through human experience, to your version of the facts. An effective trial theme will leave a jury with no choice but to apply the facts, presented within the framework of the legal theory of recovery, and award you a verdict.

The trial theme is *not* the legal theory of recovery. The legal theory of recovery is the *why* of your case and the theme is the *how* of your case. For example, in a typical intersection case the legal theory, that is the reason *why* you are entitled to recover, is almost always that the defendant failed to yield the right of way. The themes which are applicable to such a case are as broad as the imagination of the trial lawyer, who will tell the story of the crash through the voices of his or her witnesses illustrated by exhibits. *Negligence* is not a theme - it is a legal theory. *Careless failure to prevent injury* is a theme. Note the emotional difference. Talking about negligence does not establish emotional or psychological responses in the jurors. Talking about a defendant's careless failure to prevent injury evokes a variety of emotions and images which are likely to aid the plaintiff in obtaining a fair recovery.

DEVELOP THE THEME AS EARLY AS POSSIBLE - BUT BE READY TO CHANGE IT - EVEN DURING TRIAL IF NECESSARY.

Any implication from the order of this presentation as last in the program, that the theme need not be thought about until "you have to try the case", or until the very end, is unintended. In fact, the theme needs to be developed as early as possible. Every case must be prepared as if it will be tried and every effective trial has a theme. While the theme may evolve as the facts develop, it should nevertheless be considered when answering discovery, when taking depositions, and when conducting settlement discussions.

In fact, it is good practice to begin thinking about an effective way to tell the plaintiff's story even while you are being told it the first time. Write down everything that comes to mind with regard to the theme and put it in a file. Most importantly, think about the theme when you are thinking about the legal theory of recovery - the two, though separate, nevertheless go hand in hand. Sometimes they even share the same words. "The value of the trial theme is that it (1) personalizes case issues and (2) helps jurors form impressions - and impressions win [and lose!] lawsuits." Amy Singer, *Jury-Validated Trial Themes*, *Trial*, October, 1994.

DON'T SHOW YOUR CARDS UNTIL YOU HAVE TO - BLUFF IF YOU CAN.

Keep the theme to yourself. Do not share it with the defendant. Counsel for the defendant can figure out your legal theory of recovery fairly easily (this is true even though you

may have several theories which can be pursued at once) because car wrecks are simply not that complicated from a legal point of view. But unless you spill the beans, he or she can only guess at the theme you will use to convince the jury to apply the law to your client's advantage. A theme can be so effective that the jury will even ignore or nullify the law if the story convinces it that such a course of action is the only way to reach a just result. Remember, the theme is the moral justification for your verdict.

Sometimes *sandbagging*, while never ethical or appropriate with regards to matters of trust, is appropriate with regards to the strategy of how you will proceed at trial. There is nothing wrong with allowing the defense to think your trial theme is X when it is actually Y. A defendant who is totally prepared to rebut a theme, not used, is certainly at a decided disadvantage when you pursue an entirely different theme once at trial.

REMAIN FLEXIBLE AND READY TO CHANGE.

Be ready to refine or totally change the theme. A theme painting the defendant as the devil incarnate, which sounds wonderful when you hear your client's version of the story, may prove totally inappropriate when you depose the soft-spoken, frightened, gray haired elementary school teacher who ran into the back of your client on her way to church choir practice. It might even prove necessary to change the theme after you hear the defense counsel's ridiculous opening which makes even the

judge look up and smile. Similarly, a sub-theme often arises from the defendant's opening.

THE THEME MUST FIT.

An effective trial theme will fit the law, the facts, and the people involved in the trial. In order to develop a theme which will carry you to victory you must know the law which will govern your case. Not only must you understand the law supporting your cause of action, and right to recover damages, you must also consider and understand the rules of evidence which will govern what facts can be used to illustrate your theme. If your theme is best illustrated by inadmissible testimony it will not be very effective. Try to focus your theme - damages or liability. While focusing on one issue or the other is usually a good idea, in the rare case where it is possible find a theme which covers both liability and damages. In many car wreck cases liability is not the major problem and the theme should focus on damages - this is particularly true in rear end collisions which leave your clients with soft tissue injuries.

Knowing the law is not enough. The formulation of a successful theme also involves the consideration of the various human factors involved in the trial of a case. The following people must be considered:

(a) You - Do not choose a theme which you are not comfortable presenting. Do not violate the cardinal rule of trial advocacy by trying to be someone you are not. If you

can't tell your friends your trial theme with a straight face you need to choose another theme.

(b) Defense counsel - Always consider who will be trying the case. If the opposing lawyer is a jerk, themes such as *good should prevail over evil* or *small victimized by big* might be considered. However, always keep in mind that the defense lawyer who is an overly aggressive jerk during a deposition may well be able to appear to be as sweet as sugar once in court. Go to the courthouse to watch your adversary work as part of your trial preparation. How he or she conducts voir dire, opening, and cross examination may be surprising. Also consider the theme the defense is likely to use.

(c) Plaintiff - Consider all aspects of your client. Physical appearance, age, voice, education, occupation, income, and attitude play an important role in selecting an effective trial theme. Look for unique hobbies - shattered dreams and ambitions. A theme which attempts to tell your 6'7" 300 lb. client's story as one of the weak plaintiff, in need of the jury's compassion, versus the strong defendant might not be the best one.

(d) Defendant - Again, all personal factors must be considered. In car wreck cases look especially closely at the defendant's attitude towards his liability. Everyone on the jury will be familiar with the risks of driving a car and a defendant who steadfastly refuses to accept any responsibility for his actions is often good fodder for a variety of themes. A

phrase taken from the defendant's deposition is often a good theme.

(e) Witnesses - Sometimes an analogy or description by a witness can be very inspirational in choosing a theme. The witness who describes the defendant as driving like a "bat out of hell" can very well be the foundation of an effective trial theme. Medical depositions are great sources for trial themes because you can be certain, long before trial, of the exact words which will be spoken by the medical witness.

(f) Jury - If you choose as your theme a phrase which the jurors have never heard you have failed to choose an effective theme. Consider everything about the jurors. Education, country versus city, age, race, religion, and employment. Even consider what sports teams and radio stations the jurors are likely to follow.

(g) Judge - This is important both in the selection of the theme and its use at trial. Some judges will allow you to begin developing your theme in voir dire and others will not. This kind of personality difference will help you decide whether to choose a subtle or obvious theme.

In addition to reviewing all of the human factors involved in the case, look closely at the facts relating to liability, causation, and damages. Unique or unusual facts can often serve as the basis for the most compelling themes. Consider extremes of size, speed, and weight when preparing for the trial of an automobile crash. Look closely at the level of intoxication of

drunk drivers. Look carefully at the opportunities the defendant had to avoid causing or contributing to the crash. Consider both sides of the plaintiff's injuries - *what was lost and what is left.*

IDEAS FOR TRIAL THEMES.

As noted above, trial theme selection is limited only by the imagination of the trial lawyer. But the best and most effective themes are those with which the jury and the witnesses are familiar. A wonderful quote from an obscure poem while perhaps a good theme is not usually going to be as effective as a quote from a well known source. A good theme should be as commonly understood as the easiest phrase used on *Wheel of Fortune*. When choosing a theme, insure that it can pass the *Wheel of Fortune* test - if Vanna White will have trouble understanding your theme you can be assured that the jury will be slow picking up on it. Every bright nine year old will understand and appreciate an effective trial theme. A great trial theme will naturally, almost magically, fill in the blank in a sentence which begins like this:

This is a case about _____
_____.

A great trial theme will serve as the title of the book written about your verdict and will fit on movie marquees at a theater near you. It will be consistent with human experience and common sense.

Own the words used in your trial theme. Noted trial consultant, Amy Singer of Trial Consultants, Inc. calls this concept "attribution theory". Amy Singer, Jury-Validated Trial Themes, *Trial*, October, 1994. This theory provides that words "belong" to one side of the dispute or the other. Plaintiffs must insure that the words used in their theme, in the questions to and answers of witnesses, in their arguments, and even in the jury instructions belong to them and are consistent with their trial theme. The classic example in a car wreck case involves one word descriptions of the event. The defendant owns these words: accident, fender bender, soft tissue injury, and whiplash. All of these words give linguistic cues which are helpful to the defendant in minimizing the event and its consequences. On the other hand, the plaintiff owns these words: crash, violent wreck, and torn cervical tendons, ligaments and muscles. Take time to figure out which words you want to own and use them so that the jurors recognize the case in terms of words the plaintiff owns and gives to them.

Sources for trial themes include at least the following:

(a) Fables and Children's Stories - The morals in fables are generally well known and compelling. Children's stories are successful for generation after generation because the theme is easily understood and readily accepted.

(b) Nursery Rhymes - Almost everyone remembers common nursery rhymes. Many plaintiffs are like Humpty Dumpty and cannot be put back together again.

(c) Cliches - English teachers may hate cliches but they are an effective shorthand method for describing events and personalities. Such phrases as "Sacred Cow", "In the Nick of Time", "As Fast as Lightning", "Straight from the Horse's Mouth", and "Safety first, not last" can often be used as trial themes. In cases involving drunk drivers there are dozens of cliches from which to choose; and all are effective in describing the condition of the drunk defendant in terms well known to jurors. Take a look at Christine Ammer's book, *Have a Nice Day - No Problem! A Dictionary of Cliches*, for a list of 3,000 cliches.

(d) Famous Quotes - Make sure the quote is indeed famous and well known. A description of the crash as being the "Mother of all crashes" might have been effective four years ago during the Gulf War but of little help now. There are several well known books of quotations and every good office library should have at least a couple of them.

(e) Common scenarios which evoke predictable emotions - Included within this type of theme are those evoking images of contrasts such as good versus evil, small versus big, weak versus strong, innocent versus sophisticated, human versus inhuman or impersonal, personal versus faceless or anonymous, simple versus complex, moral versus immoral, caring versus insensitive, careful versus careless, vulnerable versus invulnerable, old versus young, dumb versus smart, city versus country, minority versus majority, and rich versus poor. This

kind of theme is not only articulated but is also an underlying current or thread running throughout your trial presentation. Consider this list when choosing a "marquee value" phrase which captures the meaning of your case. In other words, if you believe an effective theme to be *small versus big*, you might choose *David versus Goliath* as your marquee value theme.

Painting your client as a hero, or as the indomitable fighter, is often effective. Use analogies to famous people and common events. Effective phrases which might be considered for small injuries which hurt everyday include the burned wedding dress and the pebble in the shoe.

(f) Moral Values and the Bible - The Golden Rule and the Ten Commandments contain themes known to, and accepted by, just about everyone. Certain biblical quotes and stories can make excellent themes. If there is comparative negligence by your client, weave in a theme which includes King Solomon to advise the jury it *can split* the baby. When using religious analogies, be careful not to offend anyone.

(g) Books and Popular Literature - The themes of certain best sellers are known to just about everyone even if they have not read the books. Similarly, if you are describing a particularly horrible and frightening event, reference to Stephen King may be appropriate.

(h) Popular music, television, and movies - There are certain phrases in, and relating to, songs, television shows, and movies which seem to invade the common intelligence. If one

of these phrases comes to mind, don't hesitate to use it if it fits. Country music and *Saturday Night Live* are particularly fertile areas for trial themes. Advertising jingles can also be great sources of trial themes. Lines from songs evoke well known feelings and commonly held thoughts and beliefs. An injury to the rib cage which hurts "every move she makes, every step she takes" will evoke Sting's popular song if it is the trial theme. *Too Legit to Quit* by Hammer might be a great theme in a case in which the plaintiff keeps trying to get on with his or her life despite serious injuries.

(i) The facts - As noted above, the facts of every case must be considered when choosing a trial theme. If the plaintiff is no longer able to realize a lifelong dream, because of a broken bone, a theme emphasizing shattered dreams may prove effective. Always keep your eye open for the bizarre or unusual which will capture the imagination and heart of the jury.

(j) Family and friends - After you choose a theme, or if you are stumped in finding one, talk about your case with your partners, secretaries, friends, spouses, and children. Ask the office cleaning person what he or she thinks about your theme. Spouses, who are tired of hearing about what we trial lawyers think is the most exciting job on earth, will often, under the pressure of hoping we will shut up, provide a brilliant trial theme in short order.

(k) Focus Groups - This method is more sophisticated and expensive than the methods discussed above and will probably be

too expensive for most car wreck cases. However, if the damages are severe and the case merits the \$2,000.00 to \$8,000.00 expense associated with this kind of research it should be considered. (Obviously, if this kind of effort is going to be expended the focus group should also be sued to test the trial itself like a mock jury.) Using a focus group will insure meaningful, scientifically valid, results with the widest possible level of acceptance. Amy Singer, Jury-Validated Trial Themes, *Trial*, October, 1994.

USE THE THEME.

No matter how great the theme, it will be of no benefit if not properly used. Themes need to be verbalized and told directly to the jury - as early as voir dire and again through every witness and argument. In fact, if the theme is discovered early enough, it should be used in pre-trial depositions as much as possible.

The theme can be considered the "Mantra" of your trial. To be repeated, referenced, illustrated, and expanded upon at every turn. Sometimes an alliterative theme such as Death, Despair, and Destruction will prove effective. This continually repeated theme will, like an effective advertising jingle, "echo in the Jury's mind when they retire" to decide your client's fate. Lake Rumsey, *Master Advocates' Handbook*, p.4.

A word of caution is in order. If you choose a theme which is too clever or too cute, or which fails to fit the facts, it will be used against you with devastating effect.

Pre-Trial Use of the Theme

It is imperative that your witnesses know the theme of your case. This will help them understand the importance of their testimony and they will often naturally tell their story as a chapter consistent with the theme of the trial story itself. Meet with the witnesses, in a group, before trial, to educate them about the theme. Witnesses who are aware of the theme will usually assist in the presentation of that theme to the jury.

In most car wreck cases the medical evidence comes into evidence through depositions testimony taken months before the actual trial date. Unless the theme has been considered prior to the deposition, it will obviously not be a part of the testimony, and a golden opportunity will have been lost. It is a fairly simple matter to include words "owned by the plaintiff" and the theme itself when questioning a physician. If a case involves a theme about the defendant's failure to prevent an injury, the physician can be asked various questions using the words "prevention" and "prevented" to bring home the theme. Similarly, if the case involves a drunk driver, or a incredibly violent crash, and these facts are part of theme they need to be included in the questioning. For example, when qualifying the witness physician ask him or her if their experience includes treating victims of car wrecks in which small cars are hit by huge trucks, or ask if they have experience treating victims of car wrecks caused by drunk drivers who do not care about the safety of others on the roadways.

Use the Theme in Voir Dire

If the theme involves big versus little a question might be: "Have any of you ever witnessed or been involved in a wreck in which a small car was demolished by a large truck?" If the theme involves carelessness ask the jury: "Do all of you believe that drivers should take care to prevent injuring other drivers?"

Use the Theme in the Opening Statement

If the theme is not identified to the jury in the opening the case is probably lost. An effective theme provides the road map the jurors need in order to travel to the place where big verdicts are kept. Without a solid theme they will not know what evidence they should look for and will not know how to process the evidence which is presented. The opening is the place to tell the jurors the theme. "This is a case about _____" is an easy way to put the theme right before the jury at the very beginning of the opening.

Use the Theme During the Trial.

The questions to the witnesses must include the theme in just about every witness. If the case involves large versus small questions to witnesses should establish the size differences. "How did the size of the truck compare to the car?" "What did it sound like when this large truck smashed into the small car?" With damages witnesses the questions should continue to include the theme. "How has Mr. Plaintiff changed since his small car was destroyed by the large truck driven by

the defendant?" Sometimes the theme should be referenced during objections - "I object to the relevancy of this line of questioning, your Honor. This case is not about *my* client's *past* driving record, it is about the defendant's huge truck smashing into the back of my client's small car."

Use the Theme in Closing Argument.

Do not make the mistake of saving your best stuff for closing argument. It is too late then. By this point in the trial the jury should recognize your theme and know the case only by your theme. When they talk among themselves they should describe the case using the succinct theme you have provided. In closing you should remind them of the theme and identify the facts which make the theme applicable.

Use the Theme in Jury Instructions.

While it is unlikely that the court or opposing counsel will allow you to actually include your exact theme in the charge, it is fairly easy to insure that the charge contains bits of your theme and uses words "owned by the plaintiff" instead of the defendant.

EXAMPLES OF PROVEN THEMES.

All of us have heard a "war story" or two in which much of the success can be attributed to a well selected trial theme. Here are a few, greatly condensed, recent stories which illustrate some of the concepts discussed above.

(a) Property Damage - In this case the plaintiff sued his own car insurance company for bad faith failure to pay his

property damage. After an initial estimate and repair, the insurer had refused to even look at the plaintiff's car. When the case was called for trial the insurer did not send a representative - only a lawyer. The theme of the case revolved around these failures. The jury was asked in voir dire if they expected to be left alone after they suffered a loss. The empty seat at the defendant's table was also referenced during voir dire. In opening, it was stated that the insurer left the plaintiff alone and without help. During examination of the plaintiff he was asked whether he was left alone by the insurer. And in closing, the jury was asked to right this wrong as the plaintiff did not deserve to be left alone any longer.

(b) Personal Injury - The plaintiff-in-counterclaim, a black male, was riding a horse inside the city of Atlanta when he approached an intersection, rode through a yellow (some say red) light and broad-sided a car. The horseman was thrown over the car and broke both of his wrists. The legal theory of recovery was that the driver of the car had the last clear chance to avoid the crash. The theme, asked of every juror, and every witness, and emphasized over and over in opening and closing was "How do you miss a black cowboy galloping through the city?"

(c) Personal Injury - The plaintiff drove her car over a hill on a country road and smashed into the bulldozer blade of a back hoe which was blocking the road. The plaintiff shattered her knee cap. This prevented her from ever riding horses again.

During conversations with the plaintiff, long before trial, she recounted her humble childhood in which her family could not afford to buy her a horse and bought her a bridle instead. She spoke of carrying the bridle with her to college and on into adulthood until she could finally afford a horse. She loved and dreamed of horses. At the time of the crash she operated a horse farm. The successful theme of her trial was that her dreams, like her knee cap, had been shattered by the defendant.

(d) Personal Injury - In this case brought under the Federal Employers' Liability Act, the plaintiff was injured when he stepped down from a locomotive engine onto large rocks and twisted his back. The defense basically stated that large rocks were used everywhere on the railroad and were used where the plaintiff was injured because that was the traditional thing to do. The plaintiff's theme was that tradition does not equal safety. This was best articulated by reference to a Hank Williams, Jr. song about drinking, smoking, and living out the songs that he wrote because it was a family tradition.

(e) Personal Injury - In this case the plaintiff was injured by a John Doe hit and run driver. Her injury was to her rib cage and she testified that it hurt her every time she breathed. Her doctor agreed this was possible. Liability, of course, was not much of a problem and the focus of the trial was damages. Without actually using the words, the theme used was from the popular song, *Every Breath You Take*, by the Police - that every move she makes, every breath she takes, she will be

in pain. The jury was asked to watch over her. After the trial, the jurors mentioned that they indeed thought about the song during their deliberations.

(f) Products Liability - In this case the plaintiff was injured by a defective tool. Two defendants were identified and sued. Throughout discovery the case against both defendants was about the same. The theme used successfully asked the jurors "Who done it?"

(g) Death case - The deceased inhaled smoke in October and died in December. The defendant argued that the deceased had recovered and that his death was caused by unrelated sickle cell anemia. The theme emphasized the continuity of symptoms and the defendant's wrongful conduct. "It took sixty-nine days for a bad locomotive to kill a good man."

CONCLUSION

"By constantly 'enveloping' the theme throughout every point of the trial, attorneys are able to orient the viewpoints of an individual juror to the case as they want jurors to see it. The theme becomes the jurors' primary 'road map' - showing them the direct route to a good verdict." Amy Singer, *Jury-Validated Trial Themes*, *Trial*, October, 1994.