THEME DEVELOPMENT

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(Richard G. Stuhan)

Modern technology – Power Point, computer simulations, advanced graphics – have made it much easier for a trial lawyer to tell his story. But one thing has NOT changed over time: Counsel still needs to tell a story. In defending a products liability action, counsel must decide what the **themes of the defense** are going to be. Those themes must be **articul**ated during opening statement, **echoed** in the cross-examination of the plaintiff's witnesses, **developed** during the testimony of the defense witnesses, and **hammered** during closing argument.

Research has shown that verdicts generally do not turn on juror arguments over witnesses or documents – although that it, of course, part of the process. Rather, verdicts turn on which side's themes **resonate** with the jurors. To prevail, counsel needs to give defense leaning jurors **the ammunition** they need to persuade the **fence-sitters.** Our job is to give defense jurors **themes** that they can use in making plaintiff-leaning jurors feel comfortable about denying recovery. That happens when the themes we advance satisfy a three-pronged test:

(1) They are sound as a matter of common sense;

(2) They resonate with jurors on a visceral level; and

(3) (Most importantly) They are straight-forward.

Themes must be presented in terms that jurors can understand and restate during deliberations.

A. The Burden of Persuasion

Before we talk more about themes, let us first consider a related topic: the burden of persuasion. I have no doubt that, in a **criminal** case, jurors typically follow the court's instructions and hold the prosecution to proving guilt beyond a reasonable doubt. But my consistent experience in civil

litigation – and, in particular, products liability cases – is that jurors generally **flip** the burden of proof/persuasion. Stated otherwise, there is a **presumption of recovery.** Jurors assume that the plaintiff is entitled to recover for her injuries, and they look to the defense to provide reasons why the plaintiff should NOT recover.

This should not be surprising. In the typical products case, we are confronted with a plaintiff who is not only injured, but **severely** injured. The injuries are either fatal or life-altering. If the injuries were not severe, the case would never have gone to trial. There is also generally no doubt that the injuries were caused by a specific product. On the other side of the case, we have the manufacturer of that product. The manufacturer of that product is typically a large corporation with substantial assets. The jurors' mindset going in is that the corporation is better able to absorb the costs of the catastrophe. To counter that attitude, the defense must provide a means for the jurors to feel comfortable about denying recovery.

B. Themes in McReynolds vs. AMKCO

Which themes are viable depends on the nature of the case. In a commercial dispute, the defense can and should argue dollars and cents. But the considerations are different in a personal injury case. Arguments available in commercial litigation need to be avoided or at least de-emphasized. In this case, I believe, there are four possible categories of themes that the defense can develop:

1. Imposing liability would drive up consumer costs;

2. The injuries were the decedent's fault;

3. There are gaps in the chain of causation occasioned by the actions of others;

4. AMKCO acted responsibly.

Let's now consider each of those themes.

1. Imposing Liability Would Drive Up Consumer Costs

It is always tempting to us to make the economic argument because it appeals to us as the intellectuals we think we are. Here is my advice: **RESIST THAT TEMPTATION.** Arguing that the safety measures that plaintiff claims we should have taken would drive up costs is a losing strategy for at least three reasons:

First, the argument is too easy to counter. It makes the company appear callous. Plaintiff leaning jurors will argue that the defense is "trading people for profits." At least one juror will make the point that, if AMKCO had spent an additional six bucks, Mrs. McReynolds would still be alive.

Second, the argument is too complex for most jurors. The argument is not really that AMKCO cannot afford to spend an additional $6 on its fryers. Rather, it is that requiring AMKCO to do everything possible to make its products safer would eventually drive up product prices to unacceptable levels. That is too much for most jurors to digest.

Third, many – if not most – jurors are willing to accept any trade-off for safety. The mindset is "there but for the grace of God go I."

2. It Was Plaintiff's/The Decedent's Fault

I spent many years defending tobacco companies in suits brought by smokers who developed lung cancer, COPD, and other diseases linked to smoking. In those cases, we were very successful with comparative fault/assumption of the risk defenses. Jurors understood that there had been massive publicity about the health risks of smoking for decades; that cigarette packages had carried warnings since 1966; and that individual smokers were warned by physicians, families, and friends. So, the "plaintiff was at fault" defense worked. That situation, I would submit, is the exception, not the rule in products cases.

a.. Blaming the Victim. There is great risk in **blaming the victim** for her injuries – even under the best of circumstances. We are dealing with someone who has sustained horrible injuries and/or that person's bereaved family. Taking the position that Mrs. McReynolds has no one but herself to blame might well be perceived as "piling on." That is especially true here because she really didn't do anything that seems blameworthy. Yes, she used a door on the fryer as a stool – a use for which it clearly was not intended. But most jurors would not find that action so reckless that it warrants denying or reducing recovery. So, I would recommend treading lightly in this area, if at all.

b. Mitigating Damages. One of the most difficult issues this case presents is whether to argue for mitigation of damages. The argument would be that any damages award should take account of the fact that Mrs. McReynolds was 72 years old and in poor health.

Raising these issues runs the risk of making you appear callous and blaming the victim. There is also a danger that the jurors will see your alternative calculation of damages as a concession that plaintiff is entitled to recover **at least** that amount – in other words, it becomes a **floor** for recovery.

Not raising these issues could be seen as a show of strength. You are not going to talk about damages because you are confident that your client is not liable. The risk, however, is that, if you lose on liability, the only number for the jurors to consider is that proposed by the plaintiff – and it is likely to be high.

There is no clear answer. As a general proposition, however, it is probably wise to offer an alternative award in cases where you have serious doubts about your position on liability.

3. Gaps in the Chain of Causation

You will hear more about this when we do opening statement, but this is probably the best defense in the McReynolds case. Whether you call it "breaks in the chain of causation" or

"alternative causation," the notion is that there is a gap between anything your client did and the decedent's injuries. My research has shown that jurors find this argument persuasive. They feel comfortable denying recovery on this basis.

In the McReynolds case, there are several viable alternative causation arguments:

a.. The kitchen was understaffed on the day of the accident. The understaffing forced the chef to use Mrs. McReynolds for a task beyond her job description. In addition, trying to cover for workers who should have been on duty led her to exhaustion. When you're tired, you tend to be less careful. Certainly, Mrs. McReynolds would not have sat on the fryer door if she hadn't been so tired.

b. Mrs. McReynolds had not been trained to use the new equipment. Until a month before the accident, the hotel had used fryers that were in place the entire time Mrs. McReynolds worked there. Now all of a sudden, there is new equipment. There is nothing in the record to suggest that Mrs. McReynolds had ever received training on the new fryer. Plaintiff could argue that such training would have been unnecessary because using the fryer was not in her job description, but that argument would hoist plaintiff on its own petard.

c. The fryer was not installed by approved installers. This is, in my view, the single best defense argument. The Manual clearly recommends installation by approved installers. AMKCO maintains a list of approved installers. There was one nearby. But for reasons not disclosed in the record, the hotel never even contacted the company or the nearby installer but, instead, used its own trained personnel to install the equipment.

This argument, I would submit, **guts** plaintiff's case because it undermines all three of the "omissions" on which plaintiffs predicate recovery:

- Recommendation to use restraints in Manual, but not on product label;
- No express instruction that the gas line is not a sufficient restraint;
- No restraint straps included with the product

None of these "omissions" would have mattered if the hotel had hired an approved installer. An approved installer would have known of the need for restraints without a label, would have known that the gas line was not enough, and would have carried the straps in inventory.

This defense offers the additional benefit of deflecting criticism from the manufacturer for not including restraints with the product. It wasn't AMKCO that caused the accident for being too cheap to include straps but, rather, the hotel for not hiring approved installers.

4. The Company Acted Responsibly

We have talked multiple times about the importance of making jurors feel comfortable about denying recovery. Part of that process is showing that the company acted responsibly. This is particularly important in resisting claims for **punitive damages.** The defense needs to defuse such claims by showing that (1) There is no basis for punishing the company for engaging in irresponsible behavior that puts consumers at risk and (2) There is no need to send the company a message that it needs to be more solicitous about its customers' safety.

Here we have at three compelling arguments that it acted responsibly. **First,** AMKCO manufactured its fryer in full compliance with industry safety standards. **Second,** it issued a product manual that expressly warned of the need for safety restraints. **Third,** it expressly recommended installation by qualified installers from a list that it provided.

CONCLUSION

Even in today's technological age, developing and presenting themes remains a crucial part of the defense trial strategy. Here, there are many themes that the defense can present.