Go Forth and Conquer!

Theme Development in Trial Practice

By Thomas C. Regan
and Kevin G. Kenneally

Create a framework to better connect with your jury or finder of fact.

In literature, a theme is a recurring or implicit idea carried throughout a literary work that binds the events and characters together. The work need not be fictional, and the theme need not be explicitly stated. Rather, it provides a framework within which the story binds to our memories and emotions. Development of the theme helps the reader connect to the story by placing the events in context, but it also connects the audience to the main characters or narrator.

In *To Kill a Mockingbird*, by Harper Lee, Atticus Finch struggles with prejudice and racism in his community, as well as the inherent danger to himself and his family, in arguing to free an innocent man. In *Hamlet*, the title character argues, largely with himself, about the uncertainty of the knowledge on which we base our actions and the rightness of those actions. The thematic framework of *Beowulf* is the challenge and price of good's triumph over evil. All of these themes connect the story to the lives of the reader. They provide context to the story, and the universality of human struggle represented in each theme leads to the survival of the literary work for decades, even centuries.

Thankfully, as attorneys, the time periods in which the stories of our cases are set are not historically as distant as the settings of the stories of Atticus Finch, Hamlet, or Beowulf. However, development of a trial's theme, regardless of when the incidents explored during the trial occurred, will connect you to your jury or finder of fact in a way that you cannot do without.

When and How to Develop the Theme

If you wait until right before trial, it may already be too late to develop a theme that will work with all of your evidence. The following advice comes in many forms, but the most poignant the authors have heard is from an old colleague who said that he starts writing his closing argument, in his head, of course, when he receives the file referral materials. He noted, "It's where I want to be when the case is over, so why not set it as the goal at the beginning?" The advice is sound, if contrived. Obvi-

■ Thomas C. Regan is a partner in the Tort Defense Group of LeClairRyan resident in its Newark, New Jersey office. His practice focuses on corporate defense of serious and catastrophic product liability or negligence and general aviation claims, and provides insurance and reinsurance coverage advice. Kevin G. Kenneally is a shareholder in the Tort Defense Group and attorney in charge of of LeClairRyan's Boston office. His practice focuses on complex litigation, including product liability, mass torts, commercial disputes, and health care litigation. He is a member of the Massachusetts Defense Lawyers Association.

ously, you cannot fully develop a closing argument at the file referral stage. However, you can start at the file referral stage to develop your thematic approach, and refine it as you go.

Most important in developing a theme as a trial lawyer is being true to yourself. Fire and brimstone speeches won't work unless you really are indignant. Likewise, if you tend towards a heavy-handed approach, a soft touch is likely to backfire on you. Thankfully, most of us have personalities that lead us to adopt trial presentation approaches somewhere in the middle ground. What follows is the identification of three of the most popular themes used in trial practice, some obstacles to theme development, and some "tricks of the trade" that will help you weave your theme into your case.

Psychological studies tell us that many people will remember and use as context the first and last things they hear. Given that the trial is set up so that the plaintiff's counsel is heard both first and last in most, if not all, jurisdictions, pounding home your theme can help you overcome this barrier.

Theme Models

Story Theme Model

The story model is, by far, the most popular because it is generally the most powerful. Our minds develop from a young age to follow a story from beginning to end in order to remember the progressions from one event to another. Those individuals with children recognize that as early as three or four years old, most children can recognize the order in which a story should progress. Storytelling has consistently been a method of sharing ideas in every culture, from the beginning of the formation of societies.

A story is made up of specific parts. Although thinking about your trial story as requiring a beginning, a middle, and an end is a bit too superficial for our purposes, it is a good jumping off point. A truly compelling story most often consists of a *beginning*, which introduces the players and the conflict; the *body*, which divulges the facts upon which the story is based and develops the characters; the *climax*, which is the point at which the conflict in the story reaches its pinnacle; and the *resolution*, which resolves the conflict and concludes the story. In literature and art, these basic parts are often substituted, amended, or moved around to engage the reader. However, a straightforward, linear approach will work best in your trial practice.

The *beginning* of your trial's story may have been set out in part by your adversary in his or her opening statement. If so, do not be deterred from telling your own story from your perspective. Do not be afraid, within limits, to retell parts of the story to accomplish your own ends. The nuances from the placement of certain facts in your story can lead your audience to a conclusion far different from the one drawn from the opening presentation of the plaintiff's counsel.

Do not consistently refer to your adversary's opening during your own. This is *your* time in the spotlight. Giving air time to your adversary during your opening in a consistent manner will give an implicit impression of agreement with and acquiescence to the plaintiff's version. You need not avoid it completely, but if you must agree, make the story your own. As with every element of the story model, your decisions regarding your own *beginning* should reflect your own comfort level. If you are uncomfortable with the way you tell your story, your uneasiness will be misinterpreted as discomfort with your version of the story.

Identify the conflict as explicitly as you identify the characters. The conflict and your overall theme should work hand in hand. If the plaintiff's version of the story lacks credibility, let the jurors know they should be looking for inconsistencies not just within the testimony itself, but within the facts taken altogether, and within the realm of common sense. Which version of the story fits all—or most of—the facts and leaves no room for interpretation? Your theme turns on personal responsibility in two ways: (1) accepting the consequences of one's actions, and (2) being truthful under oath to maintain the sanctity of the judicial process. The conflict weaves into the discussion of the overall theme in a way that places it in context for the listener—the ultimate arbiter of your fate at trial.

The *body* of your story will place your conflict into context within the factual framework of your case. Here, too, your theme can play an integral part. Anyone who works regularly with new associates coming from clerkships recognizes the importance of advocacy. The way in which you phrase and highlight the facts of the case changes the story dramatically, providing opportunity for you to steer the expectations of your audience to your own end. It is ultimately important, therefore, that you meet those expectations. A second chair attorney can be very useful in this regard, if the case warrants it. If you work off bullet points or an outline, your second chair can make note of the expectations you have set out for the jury to ensure each point on the outline is met. Just like a list of the elements of your defense, the expectations list can be converted into a simple checklist for use during trial.

Our minds develop from a young age to follow a story from beginning to end.

Finally, the *climax* is the point to which the conflict builds throughout your story. Often, it is where your trial story will diverge from a literary story. When you write a literary story, you write the ending. At trial, the ending is written for you. Depending on the rules of the jurisdiction and the judge, limitations may exist about suggestions you can make for the *resolution* of your trial's story. Whatever you are permitted to do should be done. Leaving an audience to its own devices to determine a *resolution* may work for "The Sopranos," or perhaps not, but it most definitely does not work in a trial setting. You must tell the jury how your story should end, and an effective story can lead the jury to the defense verdict you seek.

Choice Theme Model

The choice model can work well when incorporated into the story model, if you so choose, but sometimes it is the best option, *e.g.*, if your story is not going to carry the day. The general gist of the choice model is the idea that with choice comes consequence, good or bad. Most conduct has an array of potential consequences, depending upon the available choices in any given situation. Had the plaintiff made a better a choice, the accident could have been avoided, or the damage lessened.

The choice model does have one significant drawback. If the defendant was at all responsible for supplying the plaintiff with the choice, the choice thematic argument can backfire. For example, a common argument in industrial engineering cases is that a particular location on a machine should have been guarded. The simple argument that the plaintiff should not have stuck his hand into the machine is not terribly effective when compared with the designer's choice to leave a pinch point unguarded. Indeed, many states, like New Jersey, do not permit a jury to assess any percentage of negligence against an employee in a factory setting. Your theme, however, can assist you in challenging the backlash as well.

The general gist of the choice model is the idea that with choice comes consequence, good or bad.

If you can develop a strong subtheme of personal responsibility through the presentation of the facts of your case, you strip the effectiveness of the plaintiff's choice counterargument. For example, we trial lawyers should get enough sleep, eat well, and take better care of ourselves, but we don't because of competing concerns. So we pull late nights, eat fatty foods, fail to exercise, and generally beat ourselves up to get more work done. Some people do it worse than others. We all make bad choices, and we must live with the consequences.

Counterfactual Theme Model

The counterfactual model can be a powerful tool for the trial lawyer. The goal is to make the jury see how easy it would have been to avoid the complaint outcome. It is factually driven, which is one reason the theme must be developed early. Discovery is essential to making this model work. Sometimes, the counterfactual theme will leap out at the trial lawyer. We have all been in situations where we get the file referral materials and our first reaction is "the plaintiff did WHAT???!?!?" Counterfactual models work very well in those cases, but they can work elsewhere as well.

The counterfactual model becomes more difficult when a visceral reaction to the factual scenario is mild. The key is to help the jury reach the conclusion that a reasonable person would recognize that "if only I had done this," the eventual outcome would have been avoided. That conclusion requires the recognition of cause and effect between the choice made and the danger encountered. The more remote the choice is to the injury, the less effective this model becomes.

A likely response to the counterfactual model, particularly in product liability litigation, is that a hazard easily avoided is a hazard easily designed out or guarded against. The plaintiff's attorney thus uses a counterfactual model to defend against a counterfactual model. In such a case, the facts developed in discovery can be crucial. The plaintiff's "if only" defense to your theme can be countered with a "but for" parry of your own.

In a case from the authors' experience, a plaintiff was working with a machine that wrapped boxes of product for shipment to consumer stores. The guard over the wrapping area, which included the hot blade that ultimately injured him, was electrically interlocked and shut down the machine when it was opened. This would require the plaintiff to reset the machine before restarting it, causing him to lose productivity. When the machine jammed, he inserted his arm into the machine through the opening reserved for the product. The blade was activated and dropped onto his hand, injuring him.

In defense of the manufacturer, we argued that the plaintiff could have avoided the works of the machine simply by not sticking his hand into the machine to clear a jam. The plaintiff countered by arguing that if only the designer had extended the guard, the plaintiff's arm would not have reached the working portion of the machine. We successfully argued to the mediator that because he found a way to encounter the hazard with the machine as presently designed, circumventing the guard, there was simply no way to design the hazard out. He would have found a way to encounter the obvious danger.

The three thematic models discussed above should be used and intertwined however your case warrants. You must be comfortable in your plan to present your case to the jury in a fashion that will be accepted. Your theme may have elements that are not outlined in this article and still be very effective. The trial lawyer brings the theme together and works it into a successful strategy.

Obstacles and Tips

Some counterarguments are outlined above, but those are not the only obstacles to an effective theme. The remaining sections of this article give some insight into some common obstacles and some tips on developing and presenting an effective theme in your trial.

Emotion

The most prevalent obstacle to trial practice, especially when dealing with catastrophic injury or wrongful death cases, is emotion. Even in cases that may not immediately conjure up images of emotionally packed jury deliberations, emotion may still play a part. Either turning that emotion to your client's benefit or diffusing it is essential to a successful trial practice.

Often, a plaintiff is at his or her most engaging with testimony that has never before been shared in the case. It is best to ensure that moment is in a deposition, not at trial. When dealing with a litigant who is likely harboring a great deal of emotion, we always complete the discovery deposition with what we refer to as "The Question," which is "Is there anything else that you wish to tell me about?"

Routinely, The Question is met with a quizzical stare or the return question "like what?" Working past the initial reaction can lead you to testimony diamonds that you will never get to through traditional means. In one case, the witness was the mother of a three-year-old child who had been accidentally locked in a car on a used car lot. The major issue in the case was whether the child was alive when found. If he was, under the law at the time, the value of the case would skyrocket. The Question opened her heart like a floodgate, and she proceeded to bare her soul for approximately 20 minutes. Her son's death, she explained, had led to the demise of her marriage, the loss of her job, and what amounted to a complete downward

spiral of an already difficult life for her. It had destroyed her other children. He was the most wonderful child, she said, as she described a loss that had been almost too great for her to bear. Then she said it. Paraphrased, "I don't know for sure if he was alive when I pulled him out of the car, but I need to believe that he was." Her sentiment was understandable, even expected. Now try to imagine how you would get that testimony out of her with the use of standard deposition questions, much less on the stand. The Question allowed that case to settle where it otherwise would not have.

Intricacy

The one obstacle to theme development that you have complete control over is intricacy. In developing trial themes, simplicity reigns supreme. Intricacy can be wonderful when writing a law school exam question or an appellate brief. For a jury, it is terrible. You should be able to define your theme in three sentences or less. If you cannot, your theme is probably too specific and bogged down in the facts of your specific case. The theme is the general proposition that you want the jury to accept, to pave the way to acceptance of your more specific positions. Fairness is good; unfairness is bad. The broad, sweeping tenets of society that fit your case well are the basis for your theme. Simplicity is king.

Monday Morning Quarterbacking

A final obstacle to theme development is "Monday morning quarterbacking." It may seem obvious to the jury that the event that led to the lawsuit would occur. The proliferation of information resulting from 24-hour news stations and the Internet makes this even more perilous. These days, there is a real danger that a jury will believe that just about anything is foreseeable. If your position, therefore, is that it was not a foreseeable incident, you must combat this inclination at every turn and with every witness.

Additional Tips

Repeatable Phrase

Themes and facts that counteract your opponent's facts can be developed by phrases or concepts that convey a larger message about the case. Such phrases are often developed from adverse witnesses, or, for instance, in industrial products cases, from company or industry safety practices or government-issued safety regulations. Commercial truck drivers and opposing expert witnesses in a commercial vehicle defect case will be forced to admit that a comprehensive pre-trip examination of the tractor and trailer is required—sometimes called the circle of safety—during which the alleged unsafe vehicle condition could have been discovered and repaired, thereby preventing the accident. The circle-of-safety phrase should be defined by a witness and adopted and repeated by the defense as a shorthand expression to show that any alleged defect did not cause the outcome or that the accident simply could have been avoided. A repeatable phrase—especially if it provides authoritative support for the defense position—is invaluable during trial to explain the message or theme being conveyed.

The late Johnnie Cochran used this technique, adding a rhyme to the phrase, in the "if it doesn't fit, you must acquit" portion of his closing argument in the O.J. Simpson trial. The phrase was introduced while the defense was discussing the prosecution's gaffe in having Mr. Simpson try on the bloody glove from the crime scene. (See further discussion later.) The "it" in the phrase when it was introduced was the glove. As the closing progressed, the "it" became the prosecution's evidence in general. The vial of blood from the crime scene, the testimony of various police officers and other witnesses, everything that the defense argued did not "fit" with common sense or the version of events espoused by the prosecution. The theme and phrase were so memorable, and the trial garnered so much publicity, that it has become a part of the American legal lexicon.

Where the injured plaintiff is a skilled tradesman or plant worker, the employee's experience with or knowledge of the product and its appropriate use may be superior to that of all other witnesses in the case. Defense counsel can elicit jobsite jargon about safety procedures or protocols from the plaintiff and incorporate those phrases into the defendant's trial presentation and in your closing argument. In medical product liability and pharmaceutical cases, there are usually highly skilled and well-trained personnel interacting with the product and possessing high-level knowledge about its safe use. Adopting the phrases and safety nomenclature from the hospital setting or of its risk-management procedures to demonstrate improper use by a plaintiff or intermediaries may provide a potent antidote to allegations of product defect. Even a seasoned veteran can take on an "I'm just a simple country lawyer" persona during deposition to elicit the terms and phrases that will build the theme of the case.

Use of Literary, Movie or Music Themes

Some lawyers try to use literary allusion or references to movies or popular music to develop jury themes. If the literary connection is on target, the tactic can be quite effective during trial. There are pitfalls, however. If the reference is obscure or involves great works of literature, the jury members may decide the lawyer is being pretentious or talking down to them. Even if they don't, the jurors may simply not understand the reference. Most venires will not be conversant in Tolstoy or Dostoevsky.

Be careful when you inject popular culture themes into your case. Hollywood and the music industry are well-known to overexpose the stars and the artistic works most familiar to jurors. Unless you are hip to all the latest trends and entertainment news, your presentation may be viewed as trite or banal by the jury, or worse, that you are trying too hard to connect.

Motion pictures may be filmed in Technicolor, but they often portray complex situations in black and white, without the nuance of real life or inconvenient facts. Movies frequently depict manufacturers as driven solely by corporate greed, with every product design or engineering consideration as a nefarious choice putting profit over consumer safety. Most tort trials lack such a compelling villain and simply involve human judgment. Unless your case is as breathtakingly stark as the facts presented in a feature film, you should skip comparisons to the latest legal thriller. Otherwise, your opponent may co-opt or mock your theme and make unfavorable comparisons to the movie script, which could undermine your intended point or credibility.

Use of the Jury Instructions

Using concepts or phrases that the jury will later hear from the judge in the court's

jury instructions can be very effective to support the theme of your case. Standard jury instructions on burden of proof, degree of culpability for punitive damages, standard of care, or proximate cause can provide helpful phrases to subvert the plaintiff's proof and, when repeated in the jury charge, underscore the defense's trial themes. Some jurisdictions do not permit expert opinion evidence about the contents of a law or whether a statute or government regulation was violated. Instead, the court often will read the disputed law or ordinance to the jury. Knowing that the jury will later hear the full text of the regulation or statute presents an opportunity for the lawyer to anticipate and introduce specific terminology from the instructions into the case, which the court will later confirm as an important case concept or aspect. This can be an especially effective tool for closing argument, once the parties learn at the charge conference the precise contents of the Court's instructions.

The counterfactual model can… make the jury see how easy it would have been to avoid the complaint outcome.

Exercise caution when anticipating jury instructions through the use of and explaining certain phrases or legal definitions. Presuming to tell the jury what the judge's charge will contain is not without hazards. If an advocate is seen to overstep his or her role, a judge may not give the requested instruction at all or could revise it to make it neutral to both sides. The trial judge is unlikely to permit a lawyer to argue law in closing, so it is important to refer merely to *concepts* the jurors may hear in the court's instructions. The lawyer should let the Court be the law giver and just urge the jury to open their ears and minds to the important phrase or concept and to consider its impact on the case. If couched in that way, the judge is unlikely to withdraw or refuse an instruction based on inappropriate argument by a party.

Title the Trial Theme

In literature, an author's themes frequently are developed to demonstrate universal truths about the human condition and their impact on the characters in the story. To be effective, a literary theme is implicit so the reader can unlock the message for his or herself. This subtle method of theme presentation should not be used in trial practice, however.

The trial theme should be identified explicitly and titled so you can convey it clearly to the jury. It is not a good idea to let the jurors try to discern your theme on their own, hoping they apply it appropriately to the facts of your case. If your theme is on the mark and fits the trial evidence, the jury will respond when you speak directly and openly about it.

Visual Aids

Demonstrative evidence and exemplar demonstrations in tort or product liability trials can be effective to familiarize the jury with the operation or characteristics of the device or subject premise. Filmed or staged tests or experiments can be admissible upon a showing to the court as a preliminary issue that there is substantial similarity to the actual conditions that gave rise to the litigation. In-court demonstrations arguably should meet the same standard, but once the exemplar item is actually being handled, manipulated or activated before the jury, it is "live TV," and all bets are off. The experienced trial lawyer knows that the in-court objective is merely to demonstrate rather than conduct a laboratory-style experiment. The lawyer and witness should practice what will take place in the courtroom and should anticipate and avoid any untoward results or mishaps. The jury is the audience. If the goal is to operate an exemplar and to validate the safety of the product, simple operation of the device should be carried out. The presentation should follow the script.

Demonstrations ordinarily should be conducted only by friendly witnesses, such as your own expert or in-house design engineer. Cross-examination of an adverse witness is not an ideal place to undertake a demonstration because you cannot rehearse, and the witness will not be motivated to demonstrate your desired outcome. When the product or device is manipulated or activated on cross, you give away control to the adverse witness. Sometimes, however, it becomes necessary to confront the opponent's expert if he or she falsely describes the product's operating characteristics to the jury. In one trial where the operation of a mechanical braking mechanism was the core issue, the expert witness stood directly before the jury box and claimed that no matter how much force was applied he could not get the device to engage. He feigned putting pressure onto the device in front of the jury. When challenged, the expert handed the exemplar to defense counsel and suggested he try for himself. It was a challenge that could not be refused. Thankfully, the brake easily and audibly clicked into its proper position, but a lesson was learned.

The most well-known instance of the perils of using an adverse witness in a demonstration was the glove incident in the O.J. Simpson trial. Most individuals will recall that the prosecution team filed a motion before Judge Ito that would require Mr. Simpson to try on the bloody glove in front of the jury. Because they were certain it would fit, they presumably intended to argue that the glove must be his. The glove, of course, did not fit, or at least not very well.

The glove incident illustrates two separate lessons. First, you must maintain control over the demonstration, which is why it is best to use a friendly witness. Mr. Simpson was in complete control of the demonstration the moment he was handed the glove. Second, you must take care to determine whether the point you are trying to make is important enough to warrant a demonstration. Had it been successful, the demonstration in that case would have proven only that an off-the-rack item that comes in three or four sizes, small to extra large, fit the defendant, along with about 20 percent of the male population of Los Angeles.

Body Language and Speech

It is important to maintain the attention of the jury when you are on stage, so to speak, whether it be during cross-examination

Theme, continued on page 88

Theme, from page 34
or opening and closing arguments. To do so, you should vary your pace, volume, and speed while speaking. Resist the temptation to speed up only during testimony that hurts your case. A spirited cross-examination will often take on a life of its own. Maintain control over the speed of the questioning, and you can slow down the witness. Do not be afraid to pause to allow significant points to sink in. Diction is important, especially when speaking in softer tones. If the jury cannot hear and understand you, the point is lost.

Keep your body language open to the jury. An open stance is essential to giving the impression that the jury should believe you. This is especially so when dealing with the faults in your case. You want the jury to limit their discussion of those faults. Therefore, the jurors must believe that you are being open and honest when you are telling them that the faults are not fatal to your position. If you need the lectern, or in a federal court that requires you to be tied to it, stand beside it, not behind it. Do not lean against it, lest you give the impression that what you are saying is unworthy of the jury's attention.

Finally, use your notes conservatively. Speeches and soliloquies may be written out when given to the public or audience, but they generally do not appear so. If you know your story, you will not need to read your opening or closing to the jury. Bullet points are all that should be necessary. If you feel more comfortable writing out an opening or closing, then do so, but do not be tied to it. Nothing kills the flow of your closing more than losing your place. The jurors will be reluctant to accept your story if they do not believe that you could tell it over a beer or while on a coffee break.

Conclusion

Long before you step foot in the courtroom, you should know your case and know your themes. We hope these tools will assist you in your next trial, arbitration or mediation. Regardless of which thematic model you employ, you should determine the trial story you want to tell and weave your themes into it. If you cannot muster the emotion necessary from the case itself, draw it from your own life experiences. The themes are tools to tell your story. Engage the jury. Hook their emotions. Appeal to their collective sense of right and wrong. Convince them that you are wearing the white hat. Go forth and conquer!