

TRIAL THEMES FOR THE INJURED PLAINTIFF

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I. Introduction

A great trial lawyer, first and foremost, must be a great storyteller. Numerous articles on the subject of trial advocacy begin this way, but it is worth repeating. After the discovery is completed and all of the pretrial motions are resolved, a jury trial is really nothing more than a story with a sad life at stake. In a jury trial, two people present opposing versions of a story before an audience, albeit an audience protected by the Constitution and having the authority and opportunity to resolve the dispute. A successful trial lawyer makes his case by telling his story in a way the jury can understand and, most importantly, remember. All of the plaintiff lawyer's work is for naught if the jury cannot or does not remember the story in the jury room or is not persuaded to do justice for the party harmed.

The ability to tell a story does not come naturally for most of us. For every friend a person has who is known to tell a great story, there are a half-dozen friends who are notoriously bad story tellers.

Everyone has the ability to be a good storyteller with practice. Those who are not natural storytellers can learn from those who are. Young trial lawyers can learn from lawyers with more trial experience. And novice storytellers and young lawyers alike can improve by learning the importance of having a compelling theme for every case.

II. Theory versus Theme

A trial lawyer must strive to capture the jurors' attention and leave an impression that lasts long after the jury instructions have been given and the deliberations have begun. To be effective, the lawyer must present the evidence, testimonial and non-testimonial, and his version of the story (by way of the opening statement and closing argument) in a logical and comprehensive manner that allows the jury to process and make sense of it. If the lawyers do not present a logical and believable story of what happened, the jurors will come up with an explanation of their own.

Jurors in a personal injury case are looking for an answer to three basic questions:

- What is this case all about? (i.e., Who got hurt? How?)
- Why did it happen? (e.g., Negligent driving, Defective product, Medical malpractice, etc.)
- Why are we here? (Liability.)

A story must have a theory and a theme. Without a theory, no one will listen; without a theme no one will stay awake. An examination of what a person remembers as being great stories illustrates the importance of theory and theme. Take for example, two different bedtime stories:

- Little Susie may ask “Daddy, tell me about when you were a little boy.” The story goes a little like this: “Things were a lot different when I was a child. I had to walk ten miles to school everyday, uphill, both ways. And when I was young we didn’t have video games and hundreds of toys like you kids have today. And when I was in high school, we didn’t have....” By this time in the story, Susie is fast asleep.
- Other nights, Susie may ask for an old favorite, “The Little Engine That Could.” The father has told it many times but delivers a faithful rendition, complete with “I think I can. I think I can.” Without fail, Susie makes it to the end of this story without falling asleep.

The difference is the second story has a theory and a theme, while the first has neither. The “Little Engine That Could” is about more than just a train. It’s about an underdog, never giving up, and overcoming all odds. Susie pays attention because the story is about a train making it up the steep hill (theory) but also has an inspiring theme that a person can do anything if she sets her mind to it. The catchy hook “I think I can” connects the theory and theme and condenses them into a simple phrase that is memorable and symbolic of the whole story.

Legal Theory

The concepts of theory and theme, although often used interchangeably, serve important, distinct functions at trial.¹ However, the functions of theory and theme are closely related, and they work together to create a story that is both interesting and persuasive. At the basis of every case is a story explaining what happened and who is to blame. The theory of the case arises from legal principles, facts, and rules, which must be proven to validate or justify why one side should prevail over the other. For example, in a products liability action, the plaintiff’s theory may be that the seller breached the implied warranty of merchantability, while the defendant may argue that the seller was not a merchant or that the product was not used for its ordinary purpose. Some practitioners argue that theory is, in fact, more than a simple list of legal elements, but rather a more detailed and fact specific scenario. Regardless, the theory must be factually proven at trial, and therefore it must be consistent with the evidence and common sense.

Legal Theme

When a juror hears the word “negligence,” no emotions are evoked. Yet lawyers mistakenly attempt to make theories such as negligence into themes². Whereas the theory is a legal justification, theme has been called a “human justification,”³ and it appeals to the jurors’ morals and notions of equity and fairness. One of the primary purposes of a trial theme is to help jurors remember and understand the vast amounts of information they are hearing at trial.⁴ Themes leave impressions which ultimately are taken into deliberations. This is done by providing jurors with a “big picture” and allowing them to make inferences.⁵ The theory of the case comes from law books; the theme is derived from common human experiences that are familiar to every member of the jury. Once you have a solid theory regarding your case, this theory must be condensed into themes and labels⁶.

Theme has been called many names, including scheme, story line, moral, anchor, catch phrase, hook, or motif,⁷ but it essentially establishes a simple framework for the story. The theme helps the jurors organize and understand the evidence and testimony and, at the same time, appeals to their sensibilities and emotions.⁸ These are certainly the most important theme functions, but other trial advocacy commentators have pointed out other advantages of themes. A theme allows an attorney to define his case rather than leave it to the opposition, who will not define it favorably.⁹ Themes can resolve differences in evidence and undermine the opposition’s case without ridicule.¹⁰ The best theme unifies the case and reduces the attorney’s story to a short and memorable expression that will resonate in every juror’s head during deliberations.

Opposing Themes

Both lawyers present their stories to the jury, and ultimately the jurors must choose which theory they believe. The side whose theme is adopted by the jury as its own is the side that prevails. Often the lawyer who prevails is the one who is most effective in appealing to the emotions of the jurors.¹¹ While jurors are for the most part unfamiliar with legal theories and technicalities, they have been acquainted with examples of stories with opposing themes all of their lives. Whether by hearing bedtime stories, studying literature, or watching television, jurors have been trained since childhood to differentiate between opposing forces and take sides. In this way, the theme works together with the theory to support the overall rationale for why a party should prevail.

There are numerous examples of opposing themes that every juror will be familiar with and which can be incorporated thematically into a trial:

- Good versus Evil, e.g., *Cinderella*;¹² *Moby Dick*; *Star Wars*.¹³
- Man versus Nature, e.g., *The Old Man and the Sea*; *The Perfect Storm*.
- One person against many, e.g., the story of Davy Crockett at the Alamo; *The Fountainhead*; the story of Rosa Parks; the Jackie Robinson story.
- The weak versus the powerful, the underdog defeating the favorite, e.g., Aesop's story of the Tortoise and the Hare; the Bible story of David and Goliath; the 1980 U.S. Olympic Hockey Team's "Miracle on Ice."

By using opposing themes, an attorney goes beyond merely a moral of the story, but links two contrasting ideas.

What a Theme Can Do

A trial theme is a key component of the lawyer's version of what happened, why it happened, and why the jury is assembled. The lawyer must present a plausible explanation of "what really happened" and a theory of legal liability. The theme of the story appeals to the emotions and common sense of the jury about why it happened and who is responsible. For example, the lawyer for the plaintiff in an automobile accident case may tell the jury how the brakes of the car the plaintiff was riding in failed (the "theory"). She may then argue that the case is about much more than just failing brakes; it is a story of an innocent passenger injured by a greedy corporation that failed to take simple measures to insure the safety of its vehicles (the "theme"). The basic themes of this story are "Good versus Evil" and "profits over safety." A good theme will make the trial more dramatic and will make it about principles rather than just money. When a trial appears to the jury to be just about money, the plaintiff is in trouble.¹⁴ Raising the theme to the larger issue of automobile safety opens the jurors to the possibility that they can make a difference locally by making their streets safer and by correcting a fundamental wrong.

Making the trial about more than just faulty brakes does three things:

- First, it makes the case more interesting. Raising the stakes to the magnitude of an epic struggle between Good and Evil will keep the jurors' attention much better than a dry discussion of faulty brakes and liability.
- Second, it helps the jurors organize the information presented to them. For example, in this case, the jury will hear evidence about the accident and how the brakes failed, but also evidence that there was safer technology in existence, that the corporation chose to put cheaper brakes on the vehicle, that this was done to maximize profits, and that the corporation had knowledge these brakes would fail and possibly cause injuries or deaths. If the corporation is portrayed as "Evil" and the plaintiff is described as trusting and

“Good,” the jury will have a much easier time organizing and remembering all this evidence.

- Third, a theme such as this one will appeal to the sympathies and emotions of every juror who has been taken advantage of by a larger company or even by a greedy person. In this respect, a good theme can be better than good facts.

III. Develop a Theme

A lawyer should never go to trial unless he has developed a theme for his case. No single theme will work for every case; instead an effective theme incorporates the unique facts of the particular case. In order to realize the three advantages discussed above, a theme must pull together everything that will be presented (i.e., evidence, expert testimony, lay witness testimony, etc.) and help the jurors make sense of it. The theme must be simple, easy to understand and to remember, and must make common sense. It should be logical, comprehensive, and never contradictory. A lawyer should avoid arguing in the alternative as it will weaken his theme, reduce the believability of his theory, and lower his credibility with the jury. He should not base his theme on evidence that is in dispute because if the evidence is disproved, he runs the risk of his whole case falling like a house of cards.

A lawyer should start developing a theme as soon as possible after he meets with the client for the first time, because his theme will likely be the foundation of his entire case. The lawyer starts developing the theory or theories that he will advance as he decides whether or not there is a legal basis for the claim. The theme must be integrated with the theory if they are to work together to form a rationale for a verdict for the plaintiff. Often the legal theory for the case will suggest a theme, or vice versa. A well-established theme, developed early on, will help focus discovery and trial preparation.¹⁵ With a focused discovery process, often a conflict can be narrowed down to one theory, one pivotal element, which in turn, narrows down arguments, and ultimately theme selection.

A. Methods to Development of a Theme

Brainstorm

There are several different ways to develop a case theme. One way is simply to open the file, examine the facts and evidence, and use some imagination to come up with a theme. The theme ultimately chosen should take into consideration the facts, the law, the personalities of the parties and the witnesses, the cultural setting of the trial, and the characteristics of the judge or jury.¹⁶

One way to approach brainstorming is to view it as an investigation. After reviewing the law, review the facts of your case in three separate ways: chronologically, by subject matter, and by issue¹⁷. By doing so you establish not only a sequential view of the facts and events, but also a better perception of which facts are the strongest in each subject category and an idea of possible defenses.

There are numerous questions a lawyer must ask when brainstorming possible themes, including¹⁸:

- What are all the possible themes and theories?
- What theories and themes best explain our story?
- What theories and themes best explain the defense story?
- Why would a jury rule in our favor?
- Why would a jury rule against our client?

This method of brainstorming, however, if merely based on intuition and guesswork rather than deliberate and thorough analysis and consideration, can ultimately disappoint.¹⁹ Often a theme that sounds good to an attorney will not necessarily resonate with a jury. And testing your theme on a single stranger might result in “wildly variable” results.²⁰

Mock Trials/Focus Group

A far superior way to develop a theme is to present the case to a panel of jury-qualified representatives from the venue where the case will be tried.²¹ Just as products are first tested on focus and marketing groups, so too should a theme be tested on a jury focus group. Preparing for trial in front of a focus group will build confidence in the presentation of evidence, testimony, and legal issues, reveal how best to use visual aids; provide the lawyer with insight into the issues that will be the source of the most confusion; and help identify the case’s strengths and weaknesses.²² Just as products are not solely tested on employees of the design company, it is important to note that in use of focus juries, a lawyer is advised not to substitute fellow lawyers, paralegals from one’s office, spouses, etc. These “juries” will not give the unbiased opinions and reactions a focus group is designed to provide.

The utilization of the focus group is effectively becoming an exacting science. The world of mock trials and jury simulations is the specialty of a field known as litigation research. Such research delves into the opinions, attitudes and beliefs of jurors in order to increase the likelihood of development of juror-validated themes.²³ The process entails selection of a jury focus group, picked from the venue where the trial

is to occur. Members will usually hear an abridged version of the trial, with both sides of the case being presented. Following the mock trial, thorough deliberations take place, attended by a focus group who attempts to elicit basic issues.

This process should take place in two phases. The first phase occurs well before the trial and the presentation takes place in front of anywhere between 2-4 different groups. Following discovery, the second phase is performed to determine perceptions of evidence. Eventually a basic theme emerges which hopefully guarantees acceptance among jurors.

Other Methods

Employing questionnaires with focus groups can test the effectiveness of potential themes with representatives of the trial community.²⁴ Hiring a jury consultant will help you discover what the average juror's predisposition will be to your themes. Obviously, the use of mock trials and focus groups eliminates much of the speculation as to how a jury will respond to various case themes, but by keeping some basic guidelines in mind, a highly effective theme can be formulated through brainstorming and a little imagination.

B. Factors in Development

Know the Client

A lawyer must know everything about her client before she can develop an effective trial theme. In particular, the lawyer must know everything that the opposing counsel will know. The lawyer must achieve mastery of all aspects of the client's background, including family information, educational and employment history, prior medical history, hobbies, interests, and criminal record. The particular information that needs to be collected depends on the facts of the case, the claims brought, and the allegations. For example, in a brain injury case arising from a car accident, the client's past involvement with sports or physical activities (other possible brain injuries or concussions) and measures of intelligence, including I.Q. tests, S.A.T. scores, etc. are important.

Pre-Trial Proceedings

Much of this information can be obtained through a thoughtful and thorough interview during the intake stage. The purpose of this stage is merely to develop all possible theories of the case. An attorney should not be fooled into thinking that after

the first interview with a client both theory and theme are finalized. Most likely the client has not conveyed all facts or data. The interview should be transcribed so as to preserve every detail. Many attorneys recommend making house calls to visit a client in their home and otherwise spending time with them.²⁵ Oftentimes, in a busy practice this is not feasible; therefore, the focus should be on the quality of interviews with the client. However, the lawyer should strive to spend as much time as possible talking with the client in person or at the least over the phone. Further discussions with the client and witnesses and further review of the prevailing law will help narrow down possible themes. Through the pleadings and discovery proceedings many theories are eliminated for lack of legal merit.

Know the Audience

As every good storyteller knows it is extremely important to know the audience (i.e., at trial, the jury). A theme should be grounded in common human experiences with which every juror is familiar and should be consistent with juror beliefs.²⁶ The jury should play a large part in determining what theme is chosen, just as one's company affects what joke is told. A joke that may be appropriate to tell among close friends at a golf course may not be appropriate at all for Mother's Day dinner. Likewise, a theme that may be highly effective before a jury in a rural county could turn out to be counterproductive with jurors from a more metropolitan area. A lawyer must work to stay abreast of prevailing juror attitudes and trends locally as well as nationally.²⁷ ATLA or VTLA conferences are helpful, but a lawyer can also learn about jury attitudes by reading the newspaper and talking with colleagues.

Know Defense Counsel

Keep in mind that lawyers with arrogant, aggressive personalities out of the court, may come across as sympathetic and humble in front of a jury. Therefore a theme of good versus evil may not work as effectively as desired. A lawyer not familiar with defense counsel should consider determining his adversary's jury personality.

Know the Judge

Some judges will not allow the introduction of a theme until opening statement, while others may allow it during voir dire. Knowing the judge and his like or dislike of themes will dictate the development of a subtle versus an obvious theme.

IV. Choice and Use of a Theme

A lawyer who has mastered the facts of the case, knows his client, and has a good idea of what the jury will be like is ready to choose a theme. A few guidelines will ensure that his theme is effective.

- First, the theme must be simple.²⁸ Even in complex cases jurors should easily comprehend each aspect of the case. The use of one-liners (e.g., “sour grapes” from *Aesop’s Fables*) can be highly effective.²⁹ One word themes clarify, bind, and illuminate³⁰. They are simple, easy to remember, and sum up what the case is all about.
- Second, the theme should be something that the jury can relate to. Many commentators on the subject in the past suggest the works of William Shakespeare as good sources for themes. However, in today’s culture, few people, literature majors aside, read Shakespeare except for possibly *Romeo and Juliet* or *Hamlet* in high school. Movies and television provide a better source of themes to which educated and uneducated jurors alike can relate. Jurors can relate to human experiences; therefore, the plaintiff’s case should always be about people. For example, the attorney should not focus on an automobile accident, she should talk about the people in the accident, where they were going, what was going on in their lives at the time, how they felt, etc. Jurors can relate to other people’s situations and understand why someone acted the way they did. Jurors also secretly want to pick a side to pull for and focusing the case on the people will give them that opportunity.³¹
- Thirdly, a good theme carries a strong causal implication.³² For example, a theme of a doctor having no time to be careful carries a causal implication that care, patience, and time were not taken, resulting in the plaintiff’s injuries.
- Finally, it is important that the chosen theme cannot be turned around and used by the other side. For example, suppose in a brain injury case an attorney likens the plaintiff’s injury to falling asleep and entering a dream from which she cannot awaken. Suppose further that the defense argues that the plaintiff is a career victim based on her litigious past and picks up on the dream analogy by arguing to the jury that, “The plaintiff is dreaming alright, dreaming of big bucks.” In this case, the theme has backfired and the persuasiveness of the plaintiff’s story is lost. To avoid this situation, in planning a theme, a lawyer should also try to theme the defense’s case.

Another way to summarize these guidelines is the “C.A.S.E.” method, which essentially defines a good theme as containing the following:

- Congruence with basic American values
- Accuracy
- Short and Simple
- Emotionally compelling.³³

*Sources for Themes*³⁴

- Modern culture, e.g., *Twelve Angry Men* (one juror can make a difference), *A Christmas Carol* (Tiny Tim against Ebenezer Scrooge). Literature, movies, television, songs, and even slogans provide a number of powerful themes that jurors can relate to.
- History, e.g., Abraham Lincoln walking ten miles in the snow to return a book (honesty, keeping one's word), Martin Luther King, Jr.'s "I Have a Dream" speech (words are more powerful than violence).
- Current events, e.g., the New York City firefighters on September 11, 2001 (courage in ordinary people).
- The Bible or other religious texts, e.g., the parables of Jesus Christ (the Good Samaritan, etc.).³⁵
- Children's stories, e.g., the ugly duckling who grew up to be a beautiful swan (people change, don't give up hope), the story of Pinocchio (transparency of lies), *Aesop's Fables* (the boy who cried wolf, etc.).
- Adages and old "sayings," e.g., a chain is only as strong as its weakest link, a small hole can sink a big ship, actions speak louder than words, the fruit never falls far from the tree, etc.

Techniques to Incorporate Themes

Rhetorical devices are language techniques that give greater force to sentences and paragraphs through the use of arrangement of words.

- **Analogies and Metaphors**, e.g., "Doctor Defendant is much like a professional baseball player who dropped a pop fly. No matter how long they have been playing, no matter how much they get paid, no matter how good they are, professional baseball players can drop pop flies. We have also seen the best players do it. Doctor Defendant is a professional too, and here he dropped a pop fly."³⁶
- **Adulteration and Modification**, e.g. "Safety first" becomes "Profits first, safety last" in a products liability case.³⁷

- **Rhetorical Questions**, e.g. “Is the defendant simply too busy to watch out for the safety of others?” This technique piques the juror’s interest, and prompts them to wonder about the answer.
- **Embedded Commands**, e.g. “Aren’t *you* upset knowing how the defendant is too busy to watch out for the safety of others?” This technique allows an attorney to deliver an action message to jurors, subconsciously.
- **Expectancy Statements**, e.g. “You can expect that I will show you....” Jurors will anticipate and look for the themes and messages that support your position.³⁸
- **Parallelism**, e.g. “Preventable, Avoidable, Foreseeable” uses rhythmic language to capture jurors’ attention.³⁹
- **Antithesis**, e.g. “Don’t look at the death of the child, but look at the life which will never be.”⁴⁰ This method contrasts past and future, life and death, healthy and sickly, mobile and paralyzed, etc. to create memorable examples.
- **Rule of Three**, e.g. “Safety, safety, safety!” Repeat the idea three times to ensure memory retention. Repetition may be of a word, phrase, clause, sentence, or paragraph.
- **Anchoring the Theme**, e.g. establish a “pattern of behavior to communicate with the listener’s unconscious mind.”⁴¹ This is done by setting a case theme, returning to the exact language, and saying it in the same manner with the same gestures from the same position in the courtroom.⁴²
- **Understatement** prevents loss of impact, which may occur when the obvious is overstressed. It allows such evidence to speak for itself.
- **Implication** focuses on avoiding ever saying your theme phrase aloud, but instead relying on imagination. The fear is that when someone is told, “this is not about money,” they instantly believe it is⁴³. This method places the importance on meanings of themes, rather than actual words. That way, should each juror have a better word, a worse word, or even the same word, they’ll all have the freedom to put the meaning first in their own minds. They should never be forced into conflict between the *meaning* you want to convey and the unacceptable *word* you may have chosen to describe it.”⁴⁴

*Specific Examples of Themes*⁴⁵

Injury/Damages

- This is a case about broken bones but also broken dreams.
- Her dreams, like her elbow, were shattered.
- I speak for a man who can no longer speak.
- Mr. Smith is not dead but not really alive.

- He just wanted to be normal. But now he's anything but normal. You decide what he would have done with his life had he been able to grow up normally.
- Little Bobby is three years old, but he will never know what it's like to be a child. He will never know what its like to play with his friends

Amputation

- In America we don't go by "eye for an eye; tooth for a tooth." We compensate someone for their loss.
- No one asks her for a date anymore.
- He can no longer feel the grass under his feet.

Blindness

- For Jane, the sun rises, but there is no day. There is only darkness.
- Dan's world is a dark and dreary place.
- Before the accident, Joe could see and do things for himself. But the defendant blew out his candle. Now he is alone in the dark all the time.

Brain Injury

- This case is about a terrible tragedy. A young man who had such a bright future now doesn't even remember his name.
- You can break a watch without breaking the crystal. John doesn't have a fractured skull, but his brain is so badly damaged that he can't keep track of time. He doesn't "tick" anymore.⁴⁶
- He's five years old now. He's going to get older. He's going to get bigger. But he's not going to grow up. His parents will always have to care for him as they do now. They will have to change his diapers when he is twenty, dress him when he is thirty....

Burns/Disfigurement

- She used to be so beautiful. All of her friends envied her. Now they pity her.
- Not even his friends can look at him anymore.
- A scar is only small when it is on someone else's face.
- It's no wonder that there are no mirrors around David's house anymore.
- This little girl will never be a stranger to the children's hospital burn unit.

Pain

- This case is about pain. Mrs. Johnson's only companion these days is constant pain.
- In history, many people have prayed for death. No one has prayed for pain.⁴⁷

- His injury doesn't work an eight hour day and then quit. It's always there. He's entitled to overtime.⁴⁸
- You can't erase the pain.

Paralysis

- She is a prisoner in her own body. She cannot move.

Medical Malpractice

- This case is about the right of a patient to be fully advised and fully informed.
- This is a case about a busy doctor, a doctor with no time to be careful.
- First, do no harm.
- The doctor wouldn't look past his chart to see the patient.
- What if an airline hired and kept a pilot who wouldn't read the altimeter? A doctor must read the diagnostic tests.⁴⁹
- This was a doctor who knew too much and cared too little.
- Like the movie *Cool Hand Luke*, there was a "failure to communicate." The surgeon, anesthesiologist, and nurses were all there but they failed to communicate. The tourniquet was left on for four hours and now Joe is an amputee.⁵⁰

Negligence

- This is a case about carelessness and how it ruined another person's life.
- Two seconds of carelessness can cause a lifetime of misery.
- She was run down in the safe zone – the crosswalk.
- He threw caution to the wind.
- "It was a reign of terror. One dog held an entire neighborhood at bay, and the owners did nothing. In the dog's fifth attack of a human, he chomped off the lower one-third of a seven-year-old child's ear. This dog, Baron, was a recidivist. He should have been locked in a pen. They let him out on parole."⁵¹
- The defendant was too busy to be careful.
- The defendant, by continuing to drive at that speed, was playing Russian roulette with every other driver on the road.⁵²

Products Liability

- This case is about the right of a consumer to be protected against dangerous products.
- They didn't build a car, they built a bomb!
- This furnace was a time bomb waiting to go off.
- Workers should outlast their tools.

- This corporation cares more about profits than safety.
- The manufacturer wanted us to take all the risk so it could take all the benefits.
- This case is about a company that refused to do business the American way.⁵³
- An ounce of prevention is worth a pound of cure.
- Better safe than sorry.
- The car had every option but safety. Safety should never be an option.⁵⁴
- This was an accident waiting to happen.

Wrongful Death

- They took everything he had.
- I want to talk about the little girl who speaks to us from her grave.
- There's a chair at the dining room table that's always empty.⁵⁵
- Dead – forty years too soon.
- The children had a right to their father. They had a right to have a father to teach them to ride a bicycle, to throw a baseball.... They have a right not to say to their friends, "I have no daddy."
- Nothing can ever replace him, but you can compensate the family for their loss.

Accountability/Responsibility

- This is a case about taking responsibility for your actions.
- This case is really about fairness. It's not fair that.... It just "ain't" right!
- The buck stops here.
- You cannot be an ostrich with your head in the sand.
- Each snowflake in an avalanche blames the other and pleads not guilty.⁵⁶
- "You break it, you bought it." All of us have seen that sign in stores. Well, this case is about a defendant who broke a young man's back. I remind you of the rule, "If you break, you pay."
- He who does not open his eyes must open his purse.⁵⁷

Multiple Themes

In most personal injury cases, a lawyer should advance multiple arguments to the jury, e.g., one for liability and one for damages. One guideline is to stick to one theme per case, as just discussed. Another is to have no more than three or four themes per case.⁵⁸ However, a third school of thought claims that there should only be two themes to every case, the cognitive and affective themes.⁵⁹ The cognitive theme is what is called the "case theme," and it organizes the facts, science, and evidence together. The affective theme is the moral of the story, the motivation for the jury to make its decision.⁶⁰ Introduction of the cognitive theme should occur during voir dire and carry on throughout opening statement, direct and cross examinations, and

closing argument. It is once the jury has a complete picture of the entire story, during closing argument, that introduction of the affective theme takes place.⁶¹

Incorporation of Multiple Themes

To be effective, the lawyer must find a way to incorporate several themes and keep them simple and memorable for the jury. There are no doubt countless ways that other lawyers deal with multiple themes, but Jeffrey T. Frederick, Ph.D., of the National Legal Research Group, suggests three excellent ways to communicate multiple themes. Whether they do it consciously or not, most lawyers manage multiple themes using one of these techniques or a variation thereof.

- Create an overall theme, e.g., “This case is about responsibility: the responsibility of a truck driver to obey traffic laws – to stop at stop signs – and the responsibility to provide just compensation to allow Mrs. Doe to live at home instead of in an institution.” Here, “responsibility” is the overarching theme.⁶²
- Use a layered approach, e.g., “This case is about a hospital and its employees that ignored a patient’s cries for help. Mrs. Doe repeatedly told her doctor about the pain in her leg. He ignored her. She told the nurses about the pain in her leg. They ignored her. The only time the hospital paid any attention to Mrs. Doe was after it was too late. The blood clot in her leg, which was causing all the pain, broke free, lodged in her brain and caused a massive stroke, killing her instantly.”⁶³
- Weave the themes together, e.g., “This case is about corporate greed and cover-up. National Motor Company maximized profits at the expense of consumer safety and tried to cover up its crime. National knew that putting gas tanks on the side of its trucks was dangerous – they had conducted tests where the tanks exploded in side-impact accidents. Accidents just like the one that killed the Doe family. The problem could easily be fixed by moving the gas tanks to the rear of the trucks. But it cost money to change truck designs. So instead National ignored the safety inspectors’ warnings, ordered the destruction of the crash test reports, kept the gas tanks where they were, and continued producing trucks that they knew would blow up. As a result, National saved hundreds of thousands of dollars. This is corporate greed at its worse – profits above everything else.”⁶⁴

Alternative Themes

There is a lot to be said for simplicity. While lawyers are noted for their use of alternative themes and theories in cases, this often can do more damage than good. Jurors are searching for the truth, not alternative truths. Arguing alternative themes may result in a loss of individual effectiveness and complications of the case, especially if the themes themselves are inconsistent with one another. If the jury is confused, they often will blame the messenger or the information rather than their ability to process the information. They will view the lawyer as incapable of simple communication skills. Even if the alternative themes don't actually contradict one another, they may still result in complexities that jurors do not comprehend, let alone appreciate. The bottom line is to know the pros and cons of multiple themes before using them.

V. Introduce the Theme

Choosing a theme is only part of the lawyer's job. Conveying the theme to a jury in a persuasive manner takes much more effort. The theme must be incorporated at every step of the trial, from the opening statement to the closing argument and everywhere in between. Missing any of these steps will result in a lost chance for reinforcement. The importance of knowing the audience has already been stressed, and voir dire presents an opportunity for the lawyer to put a few people in the audience who will likely be persuaded by the chosen theme.

Voir Dire

All of the members of the jury panel are potential jurors. In voir dire the lawyer should plant the seeds of the theme and weed out jurors who will not be particularly receptive to the chosen theme. Positive and negative reactions to the theme can be gauged and jurors can be rehabilitated or removed as necessary, e.g., "Do you believe that a person may have suffered serious brain injury that severely limits their life activities even though they appear physically normal?" Strikes can be made using peremptory challenges for jurors who react negatively to the theme. The lawyer should keep in mind the probable jury instructions and attempt to select the jurors who will respond most favorably to them. Voir dire questions can be phrased in such a way that mimics jury instructions, and in this way the lawyer can gain insight into how the jurors will react to them. In this way, a lawyer is essentially asking whether a panel member would respond favorably to a theme, rather than whether or not such panel member would vote against the case as a whole.

Opening Statement

The opening statement is the first time a lawyer speaks directly to the jurors about the facts of the particular case and the theme. To be successful, he must grab their

attention and attempt to get them on his side. To get the jurors on his side the lawyer must earn their trust. Most importantly, jurors decide the majority of cases after the opening statement.⁶⁵

Current attitudes in this country towards the legal system and lawyers are at a nadir. Many Americans harbor a fundamental mistrust of lawyers, the legal system, and the jury system in particular. They believe that most plaintiffs have frivolous claims and are looking for a windfall. Many believe that tort reform is required, that lawyers are the only ones who benefit from the legal system, and that lawyers have no integrity.⁶⁶ A good plaintiff's lawyer recognizes this and strives to overcome the negative attitudes and restore the jurors' faith in the jury trial process.

Jurors are rarely open-minded. They never come into a trial as a "blank slate"; instead they bring their baggage of preexisting beliefs, attitudes, and experiences. Before they know all the facts they often quickly form preconceived notions of what really happened. Jurors tend to filter all of the evidence that they hear throughout the trial through a lens that they form in the opening statements.⁶⁷ As stressed before, if lawyers neglect to offer a theme, the jury will develop one on its own.

There are several ways to overcome prevailing juror attitudes and beliefs in the opening statement. First and foremost, legalese and "big words" should be avoided as they undermine the trust that the lawyer is trying to establish. If you must use Latin legal terms at all, reserve them for brief writing and oral arguments; at trial, no one is impressed and they only serve to confuse the jurors. Also, emphasize the trial as a search for the truth.⁶⁸

Power of the Jury⁶⁹

While it is true that many Americans are critical of the jury system, the same people also recognize that it is the cornerstone of democracy. Emphasizing the jury's role in the democratic process helps overcome some of the negative attitudes towards the system. Juries want to hold wrongdoers accountable and therefore two things should be emphasized in the opening statement: the inherent power of the American jury to hold such wrongdoers accountable and the opportunity that the case presents for doing so.⁷⁰ Jurors must believe that they hold the power to fix a problem, to impact the lives of others, and to punish the guilty. They must also believe that our justice system is formed and developed by standards set by juries.

Keeping these obstacles in mind, the lawyer has a number of important things to accomplish in the opening statement.⁷¹

- First, she should give an overview of the important rules of law that apply to the case. These rules should be kept as simple as possible, e.g., a driver must watch the road or a doctor has to use the care that other doctors in the same position would use.⁷²
- Second, and perhaps most importantly, she must give a brief synopsis of “what happened.” the story of the case. The lawyer should avoid giving opinions and conclusions about what happened. The jurors know that they are to draw conclusions, and they resent when a lawyer intrudes on their territory.⁷³
- Next, the lawyer needs to explain the resulting injury or harm to the plaintiff.
- Then, she needs to point the finger, assign blame, and explain why the defendant is being sued.
- Fifth, the lawyer needs to spend a little time discrediting the other side. Then, she should spend time explaining all of the consequences of the harm so that the jury knows the extent of the plaintiff’s injury.
- Finally, the lawyer must charge the jury and explain how they can make the plaintiff whole again.

The opening statement is where the techniques of good storytelling first come into play. The lawyer must engage the jury while recounting the facts of the case. It is most effective to tell a simple story as though you were an eyewitness to the event itself. This is best accomplished through the use of present tense. Telling the story in the past tense tends to distance the listener from the action, therefore the story should always be told in the present tense, allowing the story to unfold for the jury. Compare the following two examples:

- Past tense: “Ms. Smith saw that the light was red and slowed to a stop. She looked in her rearview mirror and saw defendant’s car approaching at a rapid speed. She knew the defendant was not going to stop, so she braced herself for the collision.”
- Present tense: “Ms Smith sees the light is red and slowly stops. She looks in her rearview mirror and sees defendant’ car approaching at a rapid speed. She knows defendant is not going to stop, so she braces herself for the collision.”

Certain phrases help the jurors visualize the story by guiding them through the plot sequence, e.g., “Let me take you back to the morning of August 21, 2001,” and, “Now we’re at the intersection of Forest Lane and Main Street, the scene of the collision.”

Labels

The use of labels and thoughtful word selection can convey a particular position and strengthen the theme without violating the rules against personal opinions in opening statements. Labels are the way that people and events are referred to throughout the trial. For example, a plaintiff's lawyer should refer to his client as "Mrs. Johnson" or "the little boy," while the defense will call them "plaintiff." Labels for witnesses are extremely important because of the difficulty for jurors in remembering the names of all the witnesses, especially in a prolonged trial. Action words and objects can also be "labeled" during the opening statement and throughout the trial. A plaintiff's attorney should explain how a car "crashed" or "collided" while the defense will say that it had an "accident." A plaintiff might refer to a tractor-trailer as a "50,000 pound rig" or an "eighteen-wheeler," while the defense will prefer "vehicle."⁷⁴

Choice of Words

It is important to use concrete rather than abstract words.⁷⁵ This means using words that evoke one of the five senses. Abstract words fail to create an image that a juror can "put his finger on," so to speak. When asked to define such words, it is often difficult to define, let alone describe an abstract term. Concrete words, on the other hand, stir up tangible, describable images. Additionally, concrete words serve to supplement demonstrative evidence by allowing jurors to essentially "see" the evidence. For example⁷⁶:

- Impaled
- Crushed
- Cooked
- Buried alive
- Torn
- Shredded

Realize that the defendant's choice of words will serve to minimize your client's event and injuries. For example, defense will use words such as "accident, fender bender, soft tissue injury, and whiplash."⁷⁷ Simply emphasize your client's situation with words such as "crash, violent wreck, torn cervical tendons, ligaments and muscles."⁷⁸

As mentioned earlier it is important to avoid use of legalese for fear of confusing jurors and possibly turning them against you. Additionally, jargon of other professions should be avoided. Such words often require additional explanations and would be more efficiently substituted with synonymous lay terms⁷⁹. Also avoid use of slang in the courtroom, as it may be offensive to some jurors.

Attribution Theory

Closely related to the concept of labeling is that of the attribution theory. This theory or principle is designed to predict how an individual places blame.⁸⁰ Under the theory there are two types of blame: person and situation. For example, did the car crash because of failure to pay attention (person), or because of road conditions (situation). Eric Oliver, a jury consultant, points out that

“[I]n the extensive work of plaintiffs’ attorneys investigating the minds of mock jurors nationwide for evidence of the kinds of psychic groundswells. . . , here are a couple conclusions. Two themes seem to recur among jury panels over and over again. First is the “act of God” theme, also known as “stuff happens.” Second, and equally weighted among most panels, is the “you should’ve known” theme, also known as “personal responsibility.”⁸¹

Through use of labels, jurors can be “signaled” to assign blame to a situation or a person. When a juror assigns blame to a person, it is usually because the juror believes that person had a choice in the matter⁸². When a person makes a choice to do something, jurors will hold that person responsible for their choice.

Personalization

In a personal injury case, it is important to connect with the jury and personalize the plaintiff’s injuries to the jury. This process is called “crossmatching,” which is a purposeful intent to match a juror’s background trait to a trait of the plaintiff.⁸³ An example of this would be a juror disclosing an interest in horses, and the plaintiff during direct disclosing his childhood hobby of riding. When personalizing it is important not to attempt to portray your client as totally perfect nor the defendant as wholly evil, because the goal of personalization is for the jury to recognize your client as human.⁸⁴ If an attorney can convince a jury that the client is human with similar needs and wants, identification and personalization occurs.

Additionally, care must be taken to personalize events that the jury has not personally experienced. For example, few people have ever experienced serious burns, but a good plaintiff’s lawyer will make the jurors feel as if they know exactly what third degree burns feel like. In his opening statement, the lawyer may say:

As a result, Susie has third degree burns over forty percent of her body. It is very hard for you or me to understand how painful these burns are. Perhaps you have experienced sunburn before. You’re at the beach.

You think you'll be fine so you don't put on any sunscreen and the next thing you know your back is red. Maybe you remember trying to sleep that night. You're lying in bed. Your whole body is hot. There is a burning sensation all over your back and the pain when you try to move feels like your skin is tearing. Well, that burn, if it was bad, was a first degree burn. Susie has *third* degree burns as a result of her stove exploding as she tried to cook pancakes. The pain that she experiences is impossible for any of us to imagine.

With all of the things that must be included and all the storytelling tips to follow, a lawyer must always remember that the theme *must* be introduced in the opening statement. As previously discussed, the theme should frame the story, help the jurors manage the evidence, and make the case more interesting to the jury. Most attorneys believe it is wise to begin the opening with the theme and use it as an attention-getter.⁸⁵ This is reinforced by the theory of primacy. Beginning the opening statement with the theme does two things: it maximizes the ability of the theme to set the perspectives of the jurors; and it capitalizes on the theme as an organizational tool.⁸⁶ Repeating the theme too much in the opening statement will come close to violating the “no argument” rule but most judges will allow the theme, if expressed as a phrase or sentence, to be repeated at the beginning and end of the opening jury address.⁸⁷ The lawyer might want to begin:

Ladies and gentlemen of the jury, this is a case of profits over safety. As this trial unfolds, you will hear a story about a manufacturer of kitchen appliances that cares more about corporate profits than consumer safety. The defendant builds an expensive line of stoves, costing around \$5,000, but fails to put a \$10 safety switch on them. This is a recipe for disaster.

In this example, the lawyer has established a strong theme, i.e., “profits over safety,” and has also coined the catch-phrase “recipe for disaster” that can be carried throughout the trial. In other cases, especially if the story is particularly suspenseful or exciting, it may be more effective to tell the story first and establish the theme later in the opening. In every case, however, to ensure retention the theme must be presented and established for the jury sometime during the opening statement.

VI. Weave the Theme

Through the opening statement, the lawyer should give the jury a taste of how the evidence and the law will reinforce the theme that she has presented. During the rest of the trial, the lawyer must weave the theme throughout all the evidence presented

and tie all the supporting facts together. It is not just the best theme that wins; it is the side that can best support its theme with witnesses and evidence.⁸⁸ The theme must be recurrent; it must be interjected throughout the trial in order to make it to the jury room. The jury will need to apply the law and calculate damages the lawyer must establish the elements of the claim and prove damages. The theme should be woven throughout all of the evidence supporting the claim for damages, in such a way that aids the jurors in remembering the individual pieces of evidence as well as the theory of recovery.

Case in Chief

Presenting testimony has been compared to painting a picture – each witness can offer one or more brush strokes, but no one witness should ever paint the entire picture.⁸⁹ The reason is simple: long stories are boring. Using many witnesses keeps the story interesting and the jury engaged. Often a wife or friend’s testimony about how an injury has changed a person is more effective than the injured party’s own testimony.

While witnesses are an important element in weaving the theme, however, caution must be taken to avoid sounding contrived through overuse or extreme repetition. It is important that jurors do not view the theme as merely cliché. Ideally, every witness should echo the theme in some way. In order to accomplish this, a lawyer must make sure that her client and witnesses understand the case in terms of theory and theme. Often witnesses will naturally incorporate such theme into their testimony. Again, a lawyer should be aware that overuse of a thematic phrase by a witness can sound orchestrated and can be interpreted by the jury as insincere.⁹⁰ The tone and phrasing of questions and the witnesses’ answers can reinforce a plaintiff’s theme and weaken the opponent’s theme.⁹¹

Primacy and Recency

The order of the witnesses also is extremely important. Most lawyers agree that the strongest witnesses should be the first and last. Some say the first witness should be the most dramatic, capturing the most attention of the jurors. The last witness may be the most sympathetic, often the injured plaintiff. Stated in terms of theory and theme: the first witness should typically be the best theory witness and should recount as many parts of the story as possible in order to give the jury “the big picture;”⁹² the last witness should be the best theme witness because that testimony will be the freshest in the minds of the jury as they leave the courtroom for the last time, and naturally the attorney wants to end on a high note.⁹³ This is illustrative of the theories of primacy and recency. The theory of primacy dictates that the first information received by jurors will be viewed to be the most important and will be remembered for the longest amount of time. However, this theory applies not only to direct and cross-

examinations but throughout the trial, including opening statement, closing statement, voir dire, etc. The recency theory, on the other hand, dictates that information jurors receive last is remembered most easily. Primacy relates to formation of a belief, while recency relates to ease of recalling such belief.⁹⁴

Direct and Cross Examination

Just as sequencing of witnesses deals in theories of primacy and recency, so too does the organization of each witnesses' testimony. It is recommended that each witness on direct examination end on a fact supportive of the theme. Once the decision has been made on whether to cross-examine a particular witness, the lawyer should seek information from that witness which corroborates the theme.

Expert Testimony

Expert witnesses present a great opportunity to tie the story together and have the jury hear it from someone who does not have a pecuniary interest in the case. When questioning experts, the use of analogies and hypothetical questions will help the jury process the technical information that is fundamental to the theme.⁹⁵

Exhibits

It is important to support a theme, especially the key components, with physical evidence. Jurors acquire most of their knowledge of a case by listening and visual aids are important to break the monotony of the testimony. The type of exhibits offered will obviously depend on what exists, but also what legal theory the lawyer is trying to advance. In a medical malpractice case a note in a medical chart revealing that the doctor overlooked an obvious health threat is an important part of the theme "the over-worked doctor." Often jurors are waiting impatiently to see a certain piece of evidence that they've learned about in the opening -- a gun or x-ray for example. A good lawyer will develop a visual strategy that capitalizes on the impact of such key pieces of evidence.

A lawyer should think broadly in deciding when and how to present visual evidence. Different mediums are more effective on different people. For some, photographs can be very persuasive. Having people in the photographs, those of an accident scene, can personalize the event for the jurors and give them a perspective that they would not have from the jury box.⁹⁶ Modern technology, especially laptop computers and overhead projectors, allows for a number of new presentation techniques. The lawyer should consider if the use of such technology will be useful instead of or in addition to traditional methods of presentation, such as the easel. Videotaped or animated recreations help many jurors relate to the story and can reinforce the theme by

providing another perspective. Summary charts and exhibits can be used to condense the theme into a single image, e.g., Mr. Monopoly® from the game Monopoly® to symbolize a greedy corporate executive.⁹⁷

VII. Leave the Theme

A lawyer must be certain to leave the theme, not in the courtroom, but in the minds of the jury as they enter deliberations. A good lawyer will try to incorporate his theme into his proposed jury instructions. And he will make the most of his closing argument, the last time he will speak directly to the jury.

Requesting Jury Instructions

A lawyer who has presented a strong case theory can benefit greatly from more specific jury instructions.⁹⁸ Specific names, dates, places, and events in the jury instructions can make the substantive law that the jury must apply sound like a repetition of the attorney's theory of the case.⁹⁹ If the theory makes it into the jury room, there is a good chance the theme will be somewhere in the back of the jurors' minds. The lawyer should also request an instruction that incorporates the theme, frequently the evidentiary instruction.¹⁰⁰

Closing Argument

In formulating a theme, a lawyer must start at the end. Just as a joke teller must know the punchline before she begins, a good lawyer must know the closing argument before she steps foot in the courtroom. In order to hit the theme home in the closing, the lawyer must have a theme that she can carry to the closing argument in the first place. The theme should relate to the jury instructions and be effective in conjunction with them. After all the evidence is presented, the storytelling done, and the theming complete, the lawyer must sit down and let the judge give the instructions to the jury. A theme that can stick in the jurors' heads during the judge's instructions and make it to the jury room is a theme that has the potential to be effective.

The theme should be communicated and reinforced throughout the closing argument. The lawyer has every juror's fullest attention as soon as he stands up and he should make the most of it by beginning his closing argument on a strong note. For example, the lawyer may want to begin: "Good afternoon, ladies and gentlemen. As I told you in my opening statement, this case is about a corporation that chooses profits over safety. The defendants manufacture an oven that we have seen is a recipe for disaster." Or, "Two seconds. As I said in my opening and as you have seen from the evidence, that's all it would have taken. Two seconds to stop at the stop sign, but the defendant couldn't even spare that."

Several things must be accomplished in the closing argument. First, the facts of the case established through the evidence and the applicable law should be revisited in the closing statement and shown to support the theme. Each piece of testimony that supports the theme should be reviewed scrupulously. The theme should connect the facts and the law and help the jury remember everything it has heard over the course of the trial. Unlike the opening statement, the lawyer is not constrained by the strict rules governing improper content and is free to use all of his advocacy skill to emphasize the theme. The opposition's theme should be challenged. A lawyer should attempt to point out any inconsistencies in the opposition's case and use rhetorical questions to show that their theme is illogical. Closing arguments of this nature should take the form of "the defense promised more than was delivered."¹⁰¹

Revisiting Affective Themes

A case is really only about facts and laws, not themes. The jurors are not really deciding between "Right" and "Wrong" or "Good" and "Evil," they are deciding between "Plaintiff" and "Defendant" based on a particular fact pattern and the applicable law. The theme in the closing argument should give the jury a reason to return a verdict for the plaintiff. This is what an affective theme can do. While the cognitive theme "anchors the plot," the affective theme is meant to inspire the jurors to act accordingly.¹⁰² An affective theme calls for respect, care, and responsibility from the defendant. It gives the jurors the motive to decide for the plaintiff by highlighting the power they hold. The lawyer should conclude his theme strongly and then tell the jury what they are to do. For example, "This case comes down to A versus B and now it's up to you to decide who wins. You must carefully consider the evidence presented here over the past few days and decide whether to compensate A for her injuries or to let B off the hook. Thank you."

Using the Defense's Theme

As mentioned earlier, caution must be taken to avoid having your own theme used against you. However, using the defense theme against the defense is recommended. The best theme is the one that explains your client's position, while at the same time reversing the theme of the defense. The following are some popular defense themes that can be turned around in the plaintiff's favor:¹⁰³

- Defense theme: "Don't rush to judgment; act deliberately and responsibly" becomes "Defense asks you to act responsibly, but she didn't follow her own advice when she operated without listening to the patient's complaints."

- Defense theme: “The plaintiff refuses to accept personal responsibility” becomes “Our client accepts her responsibility, why can’t the defendant accept his?”

Additionally, while keeping your theme as simple as possible for the jury to understand, be sure to make your opponent’s theory seem complicated and challenging.

VIII. Conclusion

The defendant can usually prevail without a theme by showing that the plaintiff failed to carry his burden of proof. With the prevailing attitudes towards the jury system and many calling for tort reform, it is not as easy for an injured plaintiff. The injured plaintiff must have a theme that makes the jury want to help him. A few lessons from great storytellers and a lot of practice is all it takes for any lawyer to take a theme into the courtroom, weave it throughout the trial, and persuade the jury that the injured plaintiff deserves compensation.

VIII. Notes

¹ See generally, STEVEN LUBET, MODERN TRIAL ADVOCACY, ANALYSIS AND PRACTICE 7-9 (Nat. Institute for Trial Advocacy 1993); THOMAS A. MAUET, TRIAL TECHNIQUES 24-25 (6d. ed. 2002); JONATHAN M. PURVER, DOUGLAS R. YOUNG, JAMES J. DAVIS III, & JANEEN KERPER, THE TRIAL LAWYER’S BOOK: PREPARING AND WINNING CASES 86-105 (Lawyers Coop. Publishing Co. 1990); RONALD WAICUKAUSKI, PAUL MARK SANDLER & JOANNE EPPS, THE WINNING ARGUMENT 70-75 (Am. Bar. Ass. 2001).

² Amy Singer, *Jury Validated Trial Themes: Raise the Odds for Courtroom Success*, 30 Trial 74 (Oct. 1994)

³ PURVER ET AL., *supra* note 1, at 87.

⁴ Thomas R. French, *Trial themes and trial stories: Building Blocks for success at trial*, 12 Trial Diplomacy Journal 245, 250 (Winter 1989)

⁵ *Id.*

⁶ Mauet, *supra* note 1, at 25.

⁷ See, Charles L. Becton, *From Mediocrity to Virtuosity: The Theme’s the Thing* 1417; Jeffrey T. Frederick, *Themes: A Key to Persuading Jurors*, Jury Research Update, vol. 9, no. 1 (National Legal Research Group, Inc. 1999).

⁸ See, Donald W. Carlson & David B. Graeven, *The Development of Trial Themes in Catastrophe Losses*, THE BRIEF 21 (Summer 2002) (themes should “influence jurors on the issues of responsibility, blame, and justice”).

⁹ Lance Sears, *Developing Your Case Theme: Without It You and the Jury are Lost*, TRIAL BY JURY, sec. II.A.1, Trial Themes.

¹⁰ Becton, *supra* note 7, at 1420 (suggesting a “litmus test” for determining the right theme).

¹¹ *See*, Carlson & Graeven, *supra* note 8, at 21 (describing a trial as “a battle of themes”).

¹² John M. O’Quinn, “*Far Away and Long Ago*” *Successful Storytelling in a Jury Trial* 1451 (2002).

¹³ *Id.*

¹⁴ *See id* at 1453.

¹⁵ *See*, PURVER, ET AL., *supra* note 1, at 95 (stressing the importance of developing a theme early but warning against settling on the perfect theme too quickly).

¹⁶ *Id.* at 96 (describing in detail the factors to be considered in developing a theme and theory).

¹⁷ *Id* at 97 .

¹⁸ Todd Winegar, *Developing Compelling Trial Themes*

¹⁹ Singer, *supra* note 2, at 75.

²⁰ Eric Oliver, *Telling the Story: Elements of Case Presentation and Planning*, 22 *The Trial Lawyer* 441, 443 (1999)

²¹ Eric Oliver, *Telling the Story: Elements of Case Presentation and Planning*, 22 *The Trial Lawyer* 441, 443 (1999)

²² Carlton, *supra* note 21, at 2918.

²³ *Id.*

²⁴ *See, id.* at 2918-19 (example of questionnaire in personal injury case); Frederick, *supra* note 7.

²⁵ Anna B. Williams, *Theming and Arguing Damages in Auto Collision Cases*, 1572-73.

²⁶ WAICUKAUSKI, ET AL., *supra* note 1, at 71.

²⁷ *See*, Williams, *supra* note 26, at 1578-81 (discussing ATLA programs and resources on national juror trends).

²⁸ *See*, Williams, *supra* note 26, at 1578-81 (discussing ATLA programs and resources on national juror trends).

²⁹ O’Quinn, *supra* note 12, at 1455; Sears, *supra* note 9, at II.E (describing one-word themes as “trigger words” and emphasizing the use of catch phrases, e.g., “little boy” instead of “deceased child”).

³⁰ Singer, *supra* note 2, at 75.

³¹ MAUET, *supra* note 1, at 26 (describing how television news programs focus on individual people in a catastrophe, for example, rather than just covering the event itself).

³² Jim Perdue & Jim Perdue, Jr., *Trial themes: winning jurors' minds and hearts*, 34 TRIAL 34, 36 (Winter 1989).

³³ French, *supra* note 4, at 246.

³⁴ These examples have been pulled from a number of sources, with many of them appearing in multiple books and articles. The fact that these sources for themes have been cited by so many authors shows their popularity but also their versatility to be adapted to a variety of cases. The following sources were consulted by the author and are highly recommended readings on the topic of trial themes: Becton, *supra* note 7; Carlson & Graeven, *supra* note 8; Frederick, *supra* note 7; Russ M. Herman, *Theme Selections for Opening Statements and Closing Arguments*; LUBET, *supra* note 1; MAUET, *supra* note 1; O'Quinn, *supra* note 12; Perlman, *supra* note 29; PURVER, ET AL., *supra* note 1; Sears, *supra* note 9; WAICUKAUSKI, ET AL., *supra* note 1; ROBERT V. WELLS, *SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS* (McGraw-Hill, Inc. 1988).

³⁵ Cf. Elizabeth Brooks, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 Ga. L. Rev. 1113 (Summer 1999)(discussing the possibility of reversible error for use of Biblical themes particularly during the sentencing phase of capital murder trials).

³⁶ Herman, *supra* note 35, at 1501.

³⁷ Perdue & Perdue, *supra* note 33.

³⁸ Singer, *supra* note 2, at 81.

³⁹ *Id.*

⁴⁰ Howard L. Nations, *Themes*, <http://www.howardsnations.com/themes/themes2.html>

⁴¹ *Id.*

⁴² *Id.*

⁴³ Oliver, *supra* note 20, at 444

⁴⁴ *Id.*

⁴⁵ What follows is a compilation of themes that are applicable for personal injury trials. This list is by no means the original work of the author. Variations on these themes can be found in numerous trial lawyer publications and texts on trial techniques. See, *supra* note 35. The majority of these examples were found in Charles L. Becton's paper, *supra* note 7, which provides an excellent list of case-specific themes and a lot of the credit for this list is owed to Mr. Becton. These themes have been used for years by successful trial lawyers all over the country and, because of their universal appeal, will continue to be effective in personal injury cases for many years to come.

⁴⁶ Becton, *supra* note 7, at 1424.

⁴⁷ *Id.* at 1436.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1434.

⁵⁰ *Id.* at 1435.

⁵¹ *Id.*

⁵² LUBET, *supra* note 1, at 396.

⁵³ MAUET, *supra* note 1, at 63.

⁵⁴ Becton, *supra* note 7, at 1435, 1439.

⁵⁵ *Id.* at 1440 (citing Michael I. Koskoff, *The Language of Persuasion*, 3 LITIG. 24 (Summer 1977) (quoting Moe Levine)).

⁵⁶ *Id.* at 1423.

⁵⁷ *Id.* at 1429.

⁵⁸ Mauet, *supra* note 1, at 63.

⁵⁹ Perdue, *supra* note 33, at 35.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Frederick, *supra* note 7 (comparing this scheme of subordinate themes to “an umbrella with its supporting spokes”).

⁶³ *Id.* (calling this approach “peeling the onion”).

⁶⁴ *Id.* (calling this “weaving the fabric” of the case).

⁶⁵ Edward J. Imwinkelried, *The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme*, 39 Vand. L. Rev. 59, 73 (1986)

⁶⁶ Perlman, *supra* note 29.

⁶⁷ LUBET, *supra* note 1, at 335 (stressing the importance of word choice in opening statements by illustrating the different visual images invoked by the words “billiard parlor” versus “pool room”).

⁶⁸ Perlman, *supra* note 29, at II .

⁶⁹ Peter Perlman, *Everyday Life – A Theme for Trial*, 21 Trial Diplomacy Journal 380, 381 (1998)

⁷⁰ *Id.* at III. (examples of excerpts from opening statements).

⁷¹ See, *supra* note 29, at 54 (outlining the seven sections of a plaintiff’s opening statement discussed in this paragraph).

⁷² See, *id.* (explaining that jurisdictions that prohibit discussions of the law in openings still allow a lawyer to discuss what his witnesses will say, so in discussing the rules, the lawyer should make sure he has a corroborating witness).

⁷³ *Id.* at 55.

⁷⁴ MAUET, *supra* note 1, at 25.

⁷⁵ Nations, *supra* note 41, at Part 7 4a1

⁷⁶ See Perlman, *supra* note 70, at 382 (listing examples of “word pictures”).

⁷⁷ Michael J. Warshauer, Trial Themes: A Trial Without a Theme is a Trial Without a Purpose and Without a Hope (<http://www.wwt-trial-lawyers.com/trialthemes.htm>)

⁷⁸ *Id.*

⁷⁹ *Id.*, at Part 8 a(7)

⁸⁰ Singer, *supra* note 2, at 78.

⁸¹ Oliver, *supra* note 20, at 448.

⁸² Carlson, *supra* note 8, at 21.

⁸³ Herman, *supra* note 35, at 1502.

⁸⁴ William S. Bailey, *Tie your case together with a good theme*, 37 Trial 58, 60 (February 2001).

⁸⁵ See, Perlman, *supra* note 29. *But see*, Ball, *supra* note 29, at 54 (starting with assertive conclusions of theme may turn some jurors off; advocating starting with rules like “drivers must watch the road”).

⁸⁶ Frederick, *supra* note 7.

⁸⁷ LUBET, *supra* note 1, at 347.

⁸⁸ Carlson & Graeven, *supra* note 8, at 21 (supporting the theme with witnesses and documents allows the jury to “rationalize its decision in favor of a theme”).

⁸⁹ Williams, *supra* note 26, at 1574.

⁹⁰ WAICUKAUSKI, ET AL., *supra* note 1, at 74-75 (example of jury reaction to theme overuse).

⁹¹ Frederick, *supra* note 7.

⁹² Sears, *supra* note 9.

⁹³ *Id.*

⁹⁴ Nations, *supra* note 41, at 3F

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See*, Sears, *supra*, note 9.

⁹⁹ *Id.*

¹⁰⁰ Imwinkelried, *supra* note 66, at 78.

¹⁰¹ Frederick, *supra* note 7.

¹⁰² Perdue and Perdue, *supra* note 33, at 39.

¹⁰³ *Id.* at 40.