Quarterly Review

Volume 7 Issue No. 1 Spring 2014

Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

Contents

OACTA
Ohio Association of Civil Trial Attorneys
The Source for Defense Success

Trying a Case with a Sympathetic Plaintiff

Tom Glassman, Esq.
Smith, Rolfes & Skavdahl Company, LPA

When we think back on the highlights of cases we have tried, there are certain scenes which inevitably pop up. It might be the time we caught an adverse witness in a lie which completely destroyed their credibility. It might be the time we blew up the other side's expert witness. A trial can be a lot of fun, especially when there are problems with the other side's case which we can attack and exploit.

Unfortunately we are not always dealt a good hand and instead are often faced with a challenging case. Perhaps the plaintiff is sympathetic. Perhaps the facts of the case are unsavory. Perhaps our client is not likeable. The challenge is how do we zealously advocate for our clients while at the same time not inflaming the jury or stirring up sympathy for the plaintiff? How do we effectively defend our clients without pulling our punches?

Consider some of the challenges we may often face as defense counsel:

- A tragic death.
- Horrible disfigurement.
- Catastrophic injury to a negligence-free plaintiff.
- Sexual abuse or assault.
- A case which has received significant negative publicity.
- An unpopular client – imagine defending AIG in 2009!

Despite the potential exposure, some cases simply need to be tried, for any number of reasons. Maybe the plaintiff's expectations are simply too high. Perhaps despite how unfortunate the loss is, there is simply no strong evidence of liability. We cannot always completely detour around a minefield, and sometimes must carefully walk our way through it.

Jurors are sophisticated enough to know most civil cases settle, and because of this, one of the first questions they have before any witness even testifies is "Why am I here?" The sooner you answer this question during *voir dire* and your opening statement, the sooner you are on your way to earning their respect, taking the sting out of unfavorable facts, and rehabilitating your client's image. If it is a case of clear (or very likely) liability and the dispute is really over damages and causation, then you need to frame that issue for the jury very early on so they know what is and is not disputed, and where you want them to focus. You must explain what happened is truly unfortunate and everyone wishes it had not happened, and that the jury is there because the parties simply cannot agree on what a fair and reasonable resolution is. The sooner you are able to convince the jury that it is because of the plaintiff (and their attorney) that they are there, and not because of you and your client, you will begin to turn the tide.

To do this you have to be genuine. Nothing is more insulting or infuriating to a jury than an insincere apology or expression of regret.

In a perfect world jurors base their decisions on the evidence and testimony and nothing more. Reality tells us something very different. Any goodwill you may have built up during *voir dire* and your opening can be destroyed depending upon how you choose to cross-examine plaintiff's witnesses.

One of the most important things to do with any witness in a sensitive case is to pick your battles. Determine what you hope to achieve by cross-examining that witness and reflect very seriously on whether cross-examining them strengthens your case. If you do decide to cross-examine an adverse witness then your goal must be to accentuate the positive and divert attention from the negative. If there is nothing to be gained from questioning a witness, then maybe that is your cue not to question that witness. In a death case there may not be anything to be gained from questioning many of the next of kin.

While it may well be inherent in our nature to not want to concede anything at any time to our opponents, in a sensitive case there are times when it makes sense to concede the obvious. This keeps you from looking unreasonable in front of the jury and also provides a better platform to argue against the admission of certain types of evidence. If you are defending a wrongful death case and the cause of death is not disputed, certain stipulations

regarding the cause of death may well keep out testimony (and photographs) of a coroner or pathologist which could be inflammatory in front of a jury.

Another challenge in a sensitive case is knowing when to turn the other cheek. This is a lesson I learned the hard way. While trying a truck accident case, I was faced with plaintiff's mother who was his "before and after" witness. She (in my opinion) greatly exaggerated the effect the injuries had on her son, and one of the themes of our case was that her son was a profound malingerer. She was not a pleasant person and although it is my common practice not to cross-examine a "before and after" witness, I felt her testimony was so far out there that I had to rein her in. Although it was short, the cross-examination became very contentious. When the case went to the jury my client and I were very happy with how everything came in, only to be stung several hours later by an adverse verdi ct. One of the dissenting jurors advised me later my downfall was the five to ten minutes I spent cross-examining the plaintiff's mother. There were three older women on the jury who were offended by my cross-examination because they thought I was disrespectful to his mother. The testimony of plaintiff and four doctors meant nothing to them, five to ten minutes was all that was necessary to undermine everything else I had done at trial.

You can be gentle when you cross-examine a plaintiff, and this will bolster your standing in the eyes of a jury. There are ways to show someone's memory is unreliable or that their testimony is not entirely believable, without being hostile or accusing them of lying. "My Cousin Vinny" is a very good illustration of this. Without raising his voice or being confrontational, Vinny gently demonstrated the perceptions of certain witnesses were simply mistaken. One witness had not had her eyeglasses cleaned in years, and was long overdue for an eye exam. Another witness's cross-examination dealt with how long it took to cook grits and how her estimate of elapsed time was mistaken.

There is a serious application though to these points. I represented a church daycare whose employees were accused of giving Melatonin to children to make them sleep at naptime. The parents were angry, and rightfully so. My client ultimately prevailed at trial based upon the argument that these were acts committed by rogue employees who were beyond the course and scope of their employment. In order to get the jury to that conclusion I first had to contain and neutralize the parents' testimony. There was nothing I could do about them being angry. There was nothing I could do to suggest that they had no right to be angry. Instead I had to shift the jury's focus by focusing on my theme and not the plaintiffs' attorney's theme. I had to condemn the employees' actions and not criticize the parents' response.

To do this I also needed my client's help. If my client did not buy into our theme and have it come through in the testimony of church witnesses, then how I treated the plaintiffs would be irrelevant. We were able to establish written policies were in effect which were violated by the employees, and that church employees did prompt and decisive action once they learned what was going on. Plaintiffs' theme was that there was an elaborate cover-up, and we showed the jury the rogue employees were immediately fired and the church fully cooperated with the police investigation. Because of how our theme was framed I was actually able to get the lead detective to praise how the Pastor handled the situation.

If you are successful in these steps then your closing argument puts you in the position where you can turn the tables on the plaintiff. Just like the jury wondered at the beginning of trial "why are we here?" by presenting your case properly you have answered the question for the jury.

Tom Glassman is a partner in the Cincinnati office of Smith, Rolfes & Skavdahl, and practices in Ohio, Kentucky, and Michigan. He can be reached at tglassman@smithrolfes.com.