Themes

by Paul M. Mann

"You can't take back words and you can't take back tears"

Introduction

In litigating any case that I have done probably over the last 20 years, I have always had at least three themes that appeal to me with respect to:

- the fact situation;
- the parties;
- the type of injuries and how they were occasioned;
- the type of operation (being a medical malpractice lawyer); and
- the subsequent damages.

As I work my way through this article, I think that you will note that the themes are expressed through witnesses, in the opening and in the closing.

These themes are common-sense ideas. They can be taken, for example, from literature or works of art, and they need not be presented by the use of technology.

The Opening

In the opening statement, I try to set the stage for what the evidence will be as I fully anticipate it during the trial. By that I mean that I am not setting the theme for the defence; I am setting it only for the plaintiffs. In my closing, I often refer to the defence position, again using themes, but this will be the first time that the jury or the judge will hear it.

In the opening, a very useful way of presenting a theme is to introduce all of the facts upon which you'll be relying, bearing in mind that the attention span of an average juror and for that matter, probably a judge, is about 37 minutes. If you will remember, that is the average attention span of any elementary school class some 20 years ago, so you should keep the opening to an hour at most.

Understanding that you are probably talking to somebody who doesn't want to be there (the jurors); who is being paid very little, if any anything, if the trial runs under two weeks; and who often misses the nuances; one must always bring the exercise down to the lowest common denominator and still get the point across successfully.

One of the most effective themes in the opening is, "You can't take back words and you can't take back tears". You can work that theme into your opening by indicating that as a result of the operative procedure, the family has suffered tears and the doctors haven't spoken any words; or, if the doctor or nurses have spoken words, these are not words that the parents or the injured parties want to hear but are merely words that the doctors, risk managers and the social workers want to say. Somehow, these words make those speaking them feel better but it does nothing for the patient or his/her parents or siblings.

Opening Witnesses

My first witnesses are generally family members, but never let it be said that you must "stick to the script".

Very often, one witness will set up or lay the foundation for another witness who will be testifying several days later. The most that can be expected of the anaesthetized patient is that she doesn't know what happened but that she was told that she was going to go into labour and that everything was normal. These words have been repeated to her on several occasions during visits with her obstetrician/gynecologist or general practitioner. A "trust" has developed between the doctor and the patient.

Only after the baby is delivered and is severally compromised, does the patient understand that that trust was betrayed.

When clients come in and explain all of the circumstances, I often warn them in my first or second interviews that the most important step they've ever taken and the hardest step they'll ever take, is coming to a lawyer - after they've trusted this doctor so much-to complain about the doctor and eventually possibly sue the doctor for negligence.

I indicate to the clients that they are about to embark on the second tyranny, the first being "The Tyranny of Medicine" and the second being "The Tyranny of Litigation". I advise them that this is not going to be easy, that my job is to lift the legal problems off their shoulders, and that they should get on with their lives to the best extent possible. I also indicate that this will

be a lengthy process and that although justice is illusory at best, our system of compensalion is the best that we can do.

In that regard, I indicate to them. "in this life you get law, in the next life you get justice". If they are looking for justice, I tell them that they will not be able to understand it, they will not be able to obtain it, they will not be able to stop the doctor from practicing. they will not be able to "take his ticket" because they are seeking damages through the civil process of law, not through an administrative process or a criminal process.

Compromised Children

If this is a case where a child has been horribly compromised, it often does well to recognize the first line of the Hippocratic Oath as part of your theme *"Primum Non Nocere"*, otherwise translated as "First do no harm",

In my opening and throughout the course of events, I make it abundantly clear through statements from witnesses, experts, caregivers and the plaintiffs themselves, that their child was horribly compromised, and this is a permanent harm - irreversible, life-long and serious. I do this not because I need to meet a "threshold"; I do this to impress upon the jury or the judge how seriously this has affected not only the child but the whole family unit.

Later on in the Hippocratic Oath it is stated *"From the brain and the brain alone, arise our pleasures, joys, laughter and jests, as well as our sorrow, pain, grief and tears ... The brain is also the seed of madness and delirium, of the fears and terrors which assail by night or by day"* - Hippocrates.

This, in a nut shell. sets up what the extremely compromised child is being deprived of, which is laughter. joys. pleasures and jests. As well, it indicates to the jury and to the judge that what the child and family are in fact going through is sorrow, pain, grief and tears. They suffer fears and terrors which assail them by night and day, but the compromised child just can't often communicate that because of the destruction of the grey matter in the brain due to the negligence of the defendants. Children such as they cannot feed themselves. they cannot tend to their own needs. They're completely reliant upon others and as we well know, the government has failed them miserably with respect to providing them with community care access services and centers, and the number of hours that the government has allotted to each one, including respite care, totals about three days a year when you add it all up.

It is to be madeabundantly clear to the jurors at all times that the two themes that I've spoken of, "you can't take back tears and you can't take back words" and the Hippocratic Oath, go hand-in-glove.

These terrors, these rigors, these fears, these anxieties, these pains, these sorrows that the child feels, during the lifetime of the child, are never ending and continue on minute-by-minute, day-by-day, month-by-month, year-by-year, often to the detriment of the sanity of the parents, who are the primary caregivers in any event. Money cannot adequately compensate for this type of injury and, as a result, I firmly believe that the "cap" on non-pecuniary general damages is, to say the least, low. It is unrealistic. The conservatism of our courts seems to have overtaken the reality of the situation before them. They feel that they are bound by case law, they feel that they do not have the opportunity for original thought, they feel that if they were to express their original thoughts about this case and in a charge to the jury, they may well

have a "run-away jury" as is often described in current novels and books about medical malpractice.

Throughout the cross-examination of defence witnesses, I get them through their examinations-in-chief when they say "This is a tragic story ... but it was inevitable". And then they go on to say how the mother was a cocaine addict, which of course was not true, or that it was a genetic defect, which was not true, or they layout a whole panoply or smorgasbord of theories as to why the child is suffering from the disorder, none of which has to do with negligence, of course. But they have mentioned one thing that is consistent wilh the plaintiffs' case and that admission is, "This is a tragedy". Continue to harp on that during your cross-examination and during your examination-in-chief of the plaintiffs. The plaintiffs don't have to describe it as a tragedy ... they have to describe it as a "horrible exercise in futility that they are now proceeding with" and that they live with on a day-to-day, week-by-week basis while the defendant continues to carry on his profession. continues to carry on his daily life activities, continues to carry on his family activities and his professional activities and then retires, hopefully, at peace. What a juxtaposition that is from the perspective of the plaintiffs, who will never retire, and who will only live to see their daughter die.

Therein comes another theme. "Parents are put on this earth to be buried by their children, not to bury their children".

Very often, life expectancies of the victim - the compromised child - is shortened and I see no reason why the courts are hesitant to award loss or expectancy of life damages, nor loss of income for the monetary recompense that the child would have earned (notwithstanding the *Trustee Act).* One can assume that the child, had he or she not been so compromised, would have gone on to college, university or at least graduated from high school and earned a living. And she would have earned that living until the end of her natural life. Why do the courts not compensate these children for this? They rely on the *Trustee Act,* that's why - and it makes no sense. Common sense should be another theme that goes throughout the trial that, if not a judge, at least a jury can understand.

"Parents are put on this earth to be buried by their children, but parents are not put on this earth to bury their children"

Trial Tactics With Respect to the Use of Themes

Depending on what I know the witness will say, very often I will call some of the experts from the defence and some of the treating physicians from the defence. This is especially so in a compromised child case where you may be suing the nurses and doctors of Hospital A where the child was born - which is often a secondary-type hospital, but the child is then transferred to a tertiary care hospital (university setting). In such circumstances, I often call the doctors who treated the child when she arrived at their hospital together with a chart from the original hospital, and ask them very simply: "Doctor - you have had an opportunity to review and thoroughly go through all of the activities of the nurses and doctors in the first hospital?" Answer: "Yes". "And based on that, doctor, you understand that the admitting diagnosis was that of a child suffering hypoxic ischemic encephalopathy (HIE)?" Answer: "Yes". "And, doctor, although you may not have counted this up - and you can do so if you wish as it is already marked as an exhibit as to its truthfulness and contents - I put it to you that HIE was repeated by more than 41 doctors who reviewed this chart and treated this child while at your hospital. and the answer will be yes?".

If the defence stands up and argues that I'm leading the witness, I put out to the judge and the jury that these people are witnesses that are probably going to be testifying for the defence and as such I ask for latitude in my examination-in-chief, or if worse comes to worse. I get the doctors to be very defensive and to "go off their script" and then ask the judge to make a declaration of adversity. In that way I can cross-examine the witness while in chief.

The Defence Caregivers and Actuaries

It should be noted that the defence caregivers, without exception, have been used in absolutely every case where the Canadian Medical Protective Association or the nurses are involved. These witnesses, in fact, refuse to act for plaintiffs.

The same for their actuary, who is a very nice person and a great witness in the box. Only when the foundation of his evidence is attacked, do you realize that the conclusions of his report are erroneous. The foundations of his testimony are facts given to him by the CMPA lawyers. They're not facts gleaned from Canadian statistics or the Canada Census, but they are clothed in such a way as to appear to be impartial. Very often, if it is a compromised female child, they'll

only use female statistics when it is abundantly known to all actuaries that they use mixed statistics of male and female.

It is further to be noted that the actuary often uses all females in the workplace - students, unemployed, people who only work twice a year, two weeks a year, people who've become unemployed because of worker's compensation injuries, etc.

None of this, of course, is in evidence. There is no evidence that the compromised child will go on worker's compensation. There is no evidence that she will earn less than a male counterpart and, in fact, that would be contrary to law for we are now at the stage of "equal pay for equal work",

Often they will forget the productivity factor, i.e., when the economy is up, productivity is up, wages are up, and therefore the present value goes down by as much as 0.75%.

They will often use the wrong present value discount factor of 1%.

What is the defence theme of all of this? The theme is: mitigate your loss. diminish the claim to a point where the CMPA or the defence is basically presenting a case based on innuendo, gossip and rumor.

As President John F. Kennedy said, *"The great enemy of truth is very often not the lie - deliberate, contrived and dishonest, but the myth - persistent, persuasive and unrealistic".*

That is where the defence is going. They are not lying, they are just creating various myths upon which their experts will testify. It can be the myth of genetic abnormality, which does not exist; or it can be the myth of a poor upbringing; or the myth of poor education of the parents; or it can be the myth of high-risk pregnancy, "You know they're always difficult".

One must also bear in mind, as I do in my opening and in my closing, that "A *society is best judged by how it treats its weakest members"* - as so stated by Thoreau.

When it comes time to close your argument, after hopefully eviscerating the defence experts and hopefully making your experts appear to be realistic and conservative - basing their testimony only on facts as presented in the clinical notes and records of the hospital, the nurses' notes, late entries, fetal heart strip monitor tracings and other hard evidence which are already in existence - you come down to the very bottom line: you ask the jury to let its collective judgment be influenced only by common sense, and you reinforce in its collective psyche that anything else is nothing but a myth ... smoke and mirrors ... magic.

Ask them to review their notes (if they're allowed to take notes during the trial), and ask them to look into their souls in assessing the credibility of each witness and how each witness testified. Ask the jury who is to be believed - the innocent victim who stands berore them as presented to them in the plaintiffs' case, or the numerous doctors, all of the same profession, very few of whom have even examined the plaintiff, and their abstinent conclusions. Who has the most to lose? The answer is the defendant. The reason is that the plaintiffs have already lost all they have - they have lost the health of their child, they have lost their dignity, they have lost their soul, they have lost their heart, they have lost financially, they have lost emotionally. The doctor has merely lost the "trust" of this particular family in not carrying out the very basic tenet as stated in the Hippocratic Oath of "Do no harm".

It is very difficult for the defence to get around that line. It is very difficult for the doctor to admit that he has acted contrary to the Hippocratic Oath which he took upon becoming a doctor. It is very hard for the doctor to overcome the secondary line that the brain of this child has been destroyed due to lack of oxygen, and that *"...from the brain alone arise the pleasures, joys, laughs and jests of life, as well as sorrow, pain, grief and tears ..,".*

Conclusion

As you can see, I use themes throughout and one of my favourites, especially to a jury, is "Do not be fooled, do not bc led astray by the myths and magic, the smoke and mirrors, as put up by the defence. Listen to your heartbeat".

There is no way in the world that you can fully distill and impart tothe jury, all of the sorrow and all of the grief that the plaintiffs have suffered during this trial. You can just give them a "snippet" or what this family has gone through and will continue to go through; that the anniversary of the birth of the child, otherwise known as the birthday of the child, is also known as probably the most horrendous exercise and experience that these parents will suffer.

It is the parents, it is the family unit, it is the brothers and sisters who often will be orphaned because the parents are spending 99% of their time with the compromised child, and they are absolutely exhausted and spending the remaining I% with the rest of their family.

Everyone is affected by such a traumatic injury.

I trust this paper is of some help in any case, whether or not it involves a catastrophic injury, because it is something to be guided by, it is a fence post upon which you can lean, and it is the truth.

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