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HEADLINE: **Trial Advocacy, The Use Of The Analogy During Trial**

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BODY:

In much the same way that a rhetorical question can be used as a powerful advocacy tool, the use of the analogy during trial can be used as an equally effective device. An analogy is, simply put, a method of comparison. Like its close relatives, the metaphor and simile, it allows you, as the advocate, to suggest an image that is unmistakable and to compare that image to the issue at hand. If used properly, the association will conjure up a powerful word picture that immediately supports your point.

The successfully crafted analogy generally meets three criteria: 1) the jury will accept the analogy as an accurate comparison; 2) the subject of the analogy is immediately familiar; and 3) the analogy casts the actual situation in a light most favorable to your position. If the parallel is accepted by the jury, it is left with no alternative but to embrace your point of view and see the case in your terms.

Complex Issues Made Simple

Too often, trial lawyers have reserved the use of the analogy to enhance only one part of the trial: summation. It is during the summation that they feel they can get the most mileage from the analogy by using it as a device to support final argument. Often overlooked, however, are the other parts of the trial where the analogy can serve to simplify the issues and bring home the point you are trying to make in clear, powerful and understandable terms.

One of the most difficult problems confronting a trial lawyer is how to explain a complex issue that is at the heart of the case when that issue deals with both unfamiliar concepts and unfamiliar language. Most trial lawyers who deal with medical issues have repeatedly been confronted by this problem. The subject matter is unfamiliar and the operative terms are foreign. Medical terms such as "aneurysm" or "aorto-bifemoral bypass grafts" have no meaning to the jury. The problem is compounded when you have a trial judge who imposes time restrictions on your ability to speak with the jurors about these complex issues.

This is the type of situation where the value of the analogy becomes apparent. Imagine the scenario where you represent a client in a medical negligence case. The claim is that the defendant, a vascular surgeon, negligently performed surgery while conducting an aorto-bifemoral bypass graft. As a result of the negligence, fecal material spilled into the client's abdomen creating a peritonitis, causing severe personal injury.

Here the problem is clear: none of the jurors are going to be familiar with any of the operative terms. If you try to discuss the case using only medical terminology you will surely lose the jury. One way to approach this problem is to consider using analogies throughout the trial, not just on summation.

On opening statement, for example, the analogy can serve to familiarize the jury with the medical issues and definitions involved in the claim in easily understandable terms:

To understand what vascular surgery is all about the best way to think about it is like plumbing. Just as in plumbing where the pipes serve to bring water to and from different places in a building, the vascular structures in the body the arteries and veins serve to deliver blood to all places in the body.

Here, a complex issue has been defined in terms that are immediately familiar through the use of a clear, comparative word picture. Moreover, you have taken the skill and training of a doctor and reduced it to that of a plumber. While the average juror possesses no insight into the standards relating to vascular surgery, he well knows that a reasonably skilled plumber is expected to fix the pipes without engulfing the house in water.

Once you have established the central analogy in your opening, you can continue to frame the events with reference to your comparison:

To understand the nature of the medical problem and the nature of the surgery you must understand that (my client) suffered from a blocked femoral artery. If you think about it in plumbing terms again it's like a pipe near the groin which had a blockage in the middle so that blood couldn't pass through from the top of the pipe to the bottom of the pipe or from the upper leg to the lower leg. The surgeon planned on attaching a bypass graft around the blockage so that he would actually be connecting another pipe or tube which would go around the blockage to once again allow blood to flow from the top to the bottom. Just like good plumbing, he's supposed to go around the blockage and connect the pipes together to repair the problem. The problem in this case is that he didn't properly connect the pipes and injured the surrounding structures.

In less than seven sentences the jury now knows the nature of the surgery and the essence of the problem.

Use Against Defendant Doctor

But the use of the analogy does not stop here. It can be used to cross-examine the defendant doctor himself, as made clear in the following excerpt from an actual trial transcript:

Q: One of the things you wanted to do in this surgery was to use a graft known as a Gore Tex graft true?

A: Yes.

Q: And you would run that graft along the vessel, correct?

A: Yes.

Q: Connecting it above and below the blockage, true?

A: Yes.

Q: To allow for the smooth flow of blood around the blockage?

A: Yes.

Q: Sort of like plumbing, so that a new pipe would be put in, true?

A: Yes.

Q: Otherwise, the plumbing doesn't work properly?

A: Yes.

Q: And it wouldn't fix the problem, true?

A: Yes.

Q: And it could damage the surrounding structures, true?

A: Yes.

Here the use of analogy on cross has served two purposes: First, it creates visual imagery through comparison to help the jurors understand a complex medical issue. Second, it serves to bolster your credibility by reinforcing the point you made on opening and by securing a tacit admission from the defendant that your analogy is appropriate

and that you know what you are talking about.

Summation

True, most analogies are used during summation. Using the criteria spelled out above, a crafty advocate can conjure images that are devastating to his adversary's case. For example, a plaintiff's attorney in a case involving a defective scaffold might suggest a similarity to a three-legged chair upon which the defendants, metaphorically speaking, have invited the plaintiff to sit. Such a comparison paints the image and, if accepted, compels the conclusion that the defendant's conduct was negligent.

While the use of analogy may be the central theme of your summation, great care must be taken to ensure that the analogy fits the situation and is not easily distinguishable from the events in your case. Indeed, use of a "false analogy" may be the downfall of your case, revealing to jurors that your view of the evidence, as suggested by your comparison, does not square with the facts as they see them.

For example, take a case where plaintiff's doctor testified that the plaintiff has suffered a permanent 5 percent decrease in the strength and function of his knee. In summation, plaintiff's lawyer states,

Defense counsel has ridiculed (my client) by suggesting that the injury is insignificant. Indeed, he said, 'only 5 percent of his knee was affected. Ninety-five percent of it is fine.' But if defense counsel were to take his family out on a boat and the floor of that boat had a 5 percent hole in it and water rushed in, would he say, that's not so bad? We don't need to worry about that hole. Ninety-five percent of the boat is good enough.

Such an analogy, of course, overstates the plaintiff's damages. In the boat example, the 5 percent hole will cause a continuing flooding of the boat, which will progressively get worse, ultimately sinking the boat. In the reality of the case, the medical testimony is that the plaintiff's limitation is permanent, but will not get worse over time. Counsel has attempted to steer the jury into comparing such a condition with an injury which, if untreated, will cause a patient's ultimate demise. If the lawyer's exaggeration is recognized by the jury, the advocate's credibility, not to mention his case itself, may float away.

Before crafting and delivering an analogy, it is worthwhile to consider the flip side to the comparison, particularly where your adversary still has an opportunity to speak to the jury in rebuttal. Here, if the analogy is not airtight, your opposing counsel may capitalize on it, using it to her advantage, while destroying your believability. Moreover, even if your adversary has no opportunity for rebuttal, as in the case where you sum up last, the inaccurate analogy may be viewed by the jury as an affront to their intelligence.

Conclusion

The analogy is a useful device in reducing complex issues and clarifying arguments on summation into terms immediately familiar to the jury. While the right analogy can carry the day at trial, using the wrong one, or false one, may well backfire, and damage your case beyond repair.