

THE LION AT THE CIRCUS: CONVINCING THE JURY ABOUT THIRD PARTY LIABILITY

— Four Experienced NCVBA Members Share Some Practical Insights

By Jim Ferguson

When trial lawyers are asked what they think is the most important stage of a trial, responses vary. However, three of the most common answers are *voir dire*, opening statements, and closing arguments. Not only are these stages of the trial the first and last times that the jurors hear from lawyers, they are also the only times that lawyers can speak directly to the jurors. Given this limited opportunity for direct communication, lawyers must make the most of it and explain to jurors in the clearest, most persuasive terms possible why the defendant should be held liable.

Maximum persuasion during *voir dire*, openings, and closings is particularly necessary in civil suits brought by crime victims against negligent third parties. While it is often easy for a jury to comprehend the culpability of a vicious criminal who intentionally harmed another person, it can be much more challenging to convince a jury about the liability of a third party whose negligent conduct gave rise to conditions that allowed a crime to occur. Because a case's success often rides upon convincing the jury that the third party should be held responsible for what happened to a crime victim, attorneys must be prepared to employ all of the persuasive tools at their disposal. Recently, I talked with four experienced National Crime Victim Bar Association (NCVBA) members who agreed to share some of the strategies and techniques that they employ when representing crime victims against negligent third parties.

Broad Issues and Trial Themes

Numerous commentators have written about the importance of developing a coherent and persuasive trial theme that is presented to jurors early in the trial and reiterated all of the way

through closing argument.ⁱ When properly presented, such themes give jurors comprehensible, memorable reasons for finding in favor of the victim. There are several related trial themes which have proven effective in crime victim suits against third parties.

Philip M. Gerson, an NCVBA Charter Member from Miami, suggests that *control* is the central theme that needs to be communicated to jurors in many negligent security cases against third party defendants. Gerson puts the issue in a sociological context. He observes that modern society is increasingly complex. Individuals are called upon to perform functions that are more sophisticated and specialized. It is the rare individual who can be responsible for meeting all of his or her own needs. Rather, people are forced to rely on others for basic necessities. For example, most people are not their own doctors, or food producers, or plumbers. Security is one basic need that everybody has in a country where more than 30 million people are victimized by crime every year. And just as most people cannot be their own doctors, they also cannot meet all of their own security needs.

The question that must be pressed with the jury is: Who controlled a particular piece of real property such that they could reasonably be expected to meet the security needs of the people on that property? The obvious answer is that the owners or operators of the property controlled it. Gerson suggests that this point can be driven home by asking whether any property owner or operator would be willing to relinquish control of their property so that random members of the public could freely institute whatever security measures on the property they saw fit. Of course they would not. Chaos would result if everybody attempted to provide their own security measures on property open to the public. The responsibility for providing reasonable security has to remain with the party controlling the property.

NCVBA Charter Member Madeline Bryer of New York City suggests a trial theme

similar to the one offered by Gerson. According to Bryer, *injury prevention* is a primary issue that needs to be repeated to jurors in negligent security cases. Who was in the best position to prevent a criminal attack and the resulting injury? In an ideal world, everyone could be expected to control their own behavior. However, in reality there is a large criminal element that does not control its behavior. Therefore, in cases involving crimes on property open to the public, the party owning or controlling the property is in the best position to prevent the attack. For example, in a rape where the assailant was able to enter an apartment building as a result of a broken lock, the tenant cannot be expected to have installed a new lock on her own. The landlord was in the best position to install a new lock. The landlord was in the best position to prevent the injury. Bryer adds that it is important to make clear to jurors that it is not a criminal case. The jurors are not being called upon to determine who committed a crime. They are being asked to decide who reasonably could have been expected to prevent a crime.

Presenting these themes of accountability and responsibility in a simple, persuasive, memorable fashion is a key step in convincing a jury that a negligent third party should be held liable for a crime victim's injuries. There are many well-tested methods for conveying a theme to a jury: state the theme as early as possible, repeat it throughout the case, express the theme in a memorable catch phrase (*e.g.*, "injury prevention"), and so on. A particularly effective technique for driving home a trial theme is the use of brief stories or analogies that convey the theme to jurors in terms or with concepts that they can easily relate to or understand.

Memorable Stories or Analogies

For an analogy to be effective in a crime victim case against a third party, it should use familiar concepts to demonstrate to a jury why a party can be responsible for an injury even though somebody or something else did the act which was the immediate cause of the injury.

John Leighton, another NCVBA Charter Member and the current chair of the ATLA Inadequate Security Litigation Group, suggests for negligent security cases the analogy of a circus lion that leaps into a crowd of onlookers and injures a small child. The circus owner knows that he can easily prevent future attacks by purchasing a reasonably priced, easily installed safety fence. However, the owner never gets around to putting up the fence, and the lion soon attacks another innocent bystander. Does the circus owner bear any responsibility for this attack? Of course he does. This analogy is effective because in simple, almost irrefutable terms, the story leads the jury to the conclusion that premises operators do have a responsibility to take reasonable steps to protect people who come onto their property.

To be consistent with the facts of a particular case, it is easy to change the specifics of the analogy and still have it be effective. For example, the story might take place at a seaside resort that has a history of shark attacks. The resort owners put up shark netting which stopped the attacks, but the netting deteriorated and the owners never got around to repairing it. The next time that a vacationer is mauled, the resort owners should clearly bear a large share of the responsibility because of their negligent failure to prevent the attack.

The concept of a potentially violent animal that can be controlled by reasonable measures can also be employed outside of the negligent security context. For example, in a negligent hiring case, the analogy could be of a farmer who leaves some newborn chicks in the care of a dog that has a history of attacking other animals. When the dog attacks several of the chicks, it is clear that the farmer shares much of the blame.

Leighton cautions that in using an animal analogy, it is essential to not let the defense attorney turn the tables by playing off the analogy and arguing that the criminal was an uncontrollable wild animal, and that therefore, there was little or nothing the third party

defendant could have done to prevent the animal/criminal's behavior. Leighton suggests that this potential defense tactic be confronted head-on by emphasizing to the jury that although the criminal was like a vicious animal, he was also a rational one when he chose where to commit his crime. For example, in *Pinsonneault v. Merchants & Farmers Bank*, a negligent security case against a bank where two robbers murdered the victim as he attempted to make a night deposit, one of the murderers testified that they chose the Merchants Bank because it had poor lighting, high shrubbery, a nearby wooded area, and no surveillance cameras.ⁱⁱ While such clear-cut evidence will not always be available—and words straight from a criminal's mouth are often not trustworthy—it is this general type of proof which will convince the jury that the criminal, like the animal, could have been controlled through reasonable measures.

NCVBA Charter Member Mary McDonnell of Washington, D.C. stresses the importance of offering evidence that the crime was a preventable, non-random occurrence. McDonnell observes that attorneys for third party defendants intentionally attempt to confuse jurors about the differences between the criminal case against the perpetrator and the civil case against the third party. When applicable, defense attorneys point out that the criminal has already been convicted—as if that somehow should end the issue. They also argue that crime is commonplace, and that the criminal was going to commit the crime regardless of any security measures imposed by the third party defendant. McDonnell suggests that it is important to pre-empt this defense, and to demonstrate that the crime was preventable through reasonable means. If possible, show the third party's motivation for failing to comply with its duty to take reasonable steps to secure its premises; for example, the landlord wanted to save a few dollars rather than install bulbs that would have provided adequate lighting for the apartment building entrance.

All four NCVBA members interviewed for this article agreed that the facts of each case

are unique, and that the specific techniques used to convince a jury of a third party's liability will vary from case to case. The important things are to tackle the third party's liability head-on, to raise the issue as early as possible, to continue to raise it throughout the case, and to use persuasive techniques that demonstrate the third party's liability in easy-to-grasp, memorable terms.

i. See, e.g., Jim M. Perdue, Sr. and Jim M. Perdue, Jr., *Trial Themes: Winning Jurors' Minds and Hearts*, **Trial**, Apr. 1998, at 34; Michael C. Maher, *Developing a Winning Case Strategy*, **Trial**, Apr. 1996, at 43.

ii. *Pinsonneault v. Merchants & Farmers Bank*, 738 So.2d 172 (La. Ct. App. 1999).