Dramatically Enhancing the Subrogation Verdict

By John W. Reis

A good play performed by bad actors can be a very painful thing. So, too, can an otherwise "good" subrogation case turn terribly bad if not properly presented before a jury. No matter how strong the facts, a lawyer who does not present those facts professionally and efficiently can lose the jury entirely. This is especially true with the trial of a subrogation claim -- a case where no crimes were committed, no one was hurt, property was damaged but then repaired, and the named plaintiff is either a disinterested property owner or a very large insurance company (and sometimes both). At the end of the day, will the jury care enough to sit in a room together, deliberate for hours, and write a very large dollar figure at the bottom line of the verdict form? Much depends on how the lawyer presents the case. The following is a playbill.

I. Before the Trial

A. Write the Script

Ideally, the trial should be scripted before it begins. About a month before trial, the lawyer should begin writing out the voir dire, opening statement, direct and cross examination questions, and closing argument. Though the lawyer should not read these during trial, the process is critical. Writing it out forces the lawyer to visualize the case from start to finish. The lawyer cannot expect to have time to script these things at night during the trial. There is no "down time" during trial. Moments outside the courtroom will be consumed by meeting with the client and witnesses and researching unanticipated issues that inevitably arise during the trial.

B. Rehearse, Rehearse, Rehearse

The lawyer should consult with colleagues, rehearsing the opening, talking through the issues, discussing strategy. Reactions from colleagues will help the lawyer visualize how the trial will actually play out before an audience.

C. Use Quality Props

Subrogation cases often rise and fall on the strength of photographs and diagrams. Have the key ones enlarged or arrange to have them projected on a screen. Consider a montage of exhibits – photographs juxtaposed next to each other. You may have visited the fire scene, but the jury cannot. Get them as close to the scene as you can with blow ups.

D. Audition the Players

Prepare your witnesses well before the trial. Get help from another lawyer and/or paralegal in arranging for witnesses to appear at trial. Lining up the cast of witnesses is one of the most stressful tasks of all.

E. Go to Scene One

Visit the loss scene again before the trial. You never know what you might have missed or what might suddenly dawn on you before trial.

F. Know Your Stage

Familiarize yourself with the layout of the courtroom theatre and with those who run it: judge, bailiffs, clerk, and others. Meet them in person. They likely will be talking about you behind your back – some of them in the presence of the jury during recess. The lawyer can begin this process at motion hearings early into the case – a good reason to engage in at least some motion practice prior to trial.

G. Know Your Audience

If your trial is in a small, unfamiliar town, talk to other lawyers in that town about their experiences trying cases in that area. The lawyer can begin doing this at motion hearings early into the case. Rent a hotel room several days before trial. Visit the nearby eating establishments. You may learn local tidbits that can be incorporated into the opening statement or cross examination or closing argument. The defense lawyer in *My Cousin Vinnie* did this, with excellent results (*e.g.*, the "magic grits").

II. The Trial Itself

A. Getting in Character

As soon as the lawyer walks into the courthouse, the lawyer should exude a balance of confidence and super respectfulness at all times. Everyone in the courtroom is watching the lawyer – judge, clerk, bailiff, and potential jurors. The slightest inappropriate expression or remark is likely to be seen and heard, even when the lawyer thinks no one is watching. The lawyer should be sure to clearly express this to anyone that will be sitting next to the lawyer, especially the client. The lawyer should drill these words into his or her brain: "Yes, your Honor" and "Thank you, your Honor," not simply "yes" or "no." The lawyer's attire should eliminate anything that will "clang" – keys, coins, loose bracelets, and so forth. Judges – and juries -- really do notice these kinds of details. After all, they have little else to do as they sit captive in the courtroom.

B. Warming up the Audience: Voir Dire

Voir dire is the process of assessing the jury pool before the opening statement. It is also the jury's first assessment the lawyer. If not executed properly, voir dire can be the most awkward and disastrous moment of the trial. The lawyer should have rehearsed his or her introductory statement, usually beginning with a description of the purpose of voir dire and a brief synopsis of the case. From there, the questions should be open-ended and touch on the broad issues of the case.

Some courts do not allow the attorney to conduct the voir dire, leaving it to the judge or relegating it to a written, pre-fabricated form to be completed by the jury pool outside the presence of the lawyers. Even in those situations, however, many judges will allow the lawyer to craft a jury questionnaire specifically tailored to the case. Whether the process is done by the lawyer, the judge, or by written form, issues to emphasize during voir dire should include the following: (1) the jurors' ability to be away from their work and family throughout the trial, (2) experience with insurance companies, (3) ability to award money damages for property damages, (4) commitment to holding someone legally responsible who did not commit a crime but did breach standard of care, and (5) ability to give weight to circumstantial evidence, (6) ability to be fair and impartial to insurance companies.

At the end of this article is a sample script of a voir dire in a fictional subrogation case.

C. Opening Scene

Opening statement must begin with confidence and clarity. The lawyer should know the first paragraphs of opening statement by heart. After that, the lawyer should follow a condensed outline that fits on one page. The lawyer should anticipate the defense and deflate it, but should not let the defense become the focus.

D. Keep the Scenes Short and Sweet with Smooth Transitions

Lawyers in the midst of trial, filled with adrenaline, can lose sight of how very boring a trial can be to those confined to watching it. The jurors do not have the opportunity to get up for popcorn or refreshments during the slow parts. The lawyer must therefore work to reduce the slow parts and keep it moving. The entire sequence of events – the order of witnesses, the topics to be covered by each witness – should be mapped out in advance. Boring parts – damage testimony, for example – should be sandwiched between more exciting parts.

E. The Stars of the Show: Witness Examination

The lawyer should have literally rehearsed the first witness with non-leading questions. Leading questions invite objections from the other lawyer. The lawyer does not want to start out the case on the losing side of those objections.

The first witness should generally be the strongest witness. If the best witness is saved until the end, the lawyer may have lost the best opportunity to captivate the jury at the beginning. Juries make up minds quickly into the case.

The lawyer must be mindful of the natural tendency of jurors to drift off during lengthy testimony. One way to avoid this to "chunk" the testimony. For example, begin by telling the witness, "I'd like to cover three topics with you. First, I'd like to discuss topic X. Then, topic Y. Finally, I'd like to discuss topic Z. Let's begin with topic X." When that topic has been covered, the lawyer should transition to the next topic with a statement like, "Now, I'd like to turn to topic Y."

F. Intermission: Respect the Jurors' Need for Recess

If the judge has promised recesses at certain times – noon for lunch, for example – the jurors are focused on the clock as those times approach. The lawyer should be mindful and respectful of this fact. Lawyers are used to taking depositions that continue into lunch time and sometimes well into the night. Jurors are not. If it is ten minutes to lunch time, the lawyer should state to the witness, "I realize it is only ten minutes to lunch time, so I'll only ask you a few more questions and we can continue after we've all had lunch." Even if the lawyer believes he or she will finish with the witness at 12:05 p.m., the jurors' concentration is more likely to be focused on lunch over those last crucial minutes of testimony. Take the break and finish up after it.

G. Working the Props: Introducing Exhibits

When a stage actor mishandles a prop, it distracts both the actor and the audience. It is critical that the lawyer have full command of all his or her exhibits and know cold the mechanics of introducing those exhibits. The mechanics are simple but must be rehearsed if the lawyer's trial skills are rusty: Mark the exhibit with a number. Show it to opposing counsel. Ask the judge for permission to approach the witness. Wait for the court's answer. Thank the judge. Show it to the witness. Have the witness identify it. Ask the witness if it is a fair and accurate representation. Move to introduce the exhibit into evidence. Ask the court for permission to publish it to the jury through the witness. Tell the witness, "Would you please show this to the jury and explain what it depicts?" The witness now has an opportunity to stand up and point to particular parts of the exhibit, standing close to and making direct eye contact with the jury.

H. The Finale: Closing Argument

Given the dry facts of the typical subrogation case, it will be difficult for the lawyer to touch the heartstrings of the jurors. In addition, by the time of closing argument, many of the jury members may have already made up their minds. However, the lawyer can tip the jurors to one side or the other if the jurors are on the edge. The key is keep the closing crisp and well organized, consistent with the presentation of the entire case. As with the opening, the lawyer should memorize the first paragraph and then use a one-page outline with very key points in bold writing.

The lawyer should have developed a theme from the very start of the case. In a subrogation case, the general theme is typically that of putting responsibility where it ultimately belongs: upon the responsible party. The sub theme is that of keeping promises and the consequences for breaking them. These themes should have been expressed as early as voir dire. The lawyer should tie in the voir dire questions – where the jurors (hopefully) agreed that they would hold the defendant responsible if they believed the defendant caused the loss. The lawyer should demonstrate the importance of keeping promises, pointing out the match between the evidence predicted at opening statement with that actually introduced. In contrast, if the opposing lawyer made statements at opening that were not supported at trial, these "broken promises" should be hammered home.

III. The Review

A play can receive a standing ovation and still fail to receive critical acclaim. The equivalent of the standing ovation is a jury verdict in the lawyer's favor. The lawyer should not let such verdict feed his or her ego. The lawyer may have won *despite* poor performance, simply on the strength of the facts. Win or lose, the lawyer can learn valuable information from the jury's view of the case. In those jurisdictions where it is allowed, the lawyer should work up the courage to seek input from the jury members to learn what worked and what did not. Lawyers learn more from what they know they did wrong than from what they *think* they did right.

Conclusion

No matter how good the facts, the trial of a subrogation case should never be taken lightly. Just as it is easier to bring down the house than to build it back up, it is easier to attack a subrogation case at trial than to prove it. In a play, the audience is eager to be there, having paid for admission. In a trial, most jurors prefer to be somewhere else entirely right from the start. The lawyer must work hard to earn their trust and respect. Only then will they be willing to rise up from their seats, stand together, and collectively find in your favor.

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Sample Voir Dire in a Fictional Subrogation Case

Introduction (Very Brief)

My name is Joe Lawyer. I represent Great Big Insurance Company. Sitting at this table right here is Mr. Insurance Adjuster who works for Great Big Insurance Company. This is a case about a fire to a house.

Explaining Voir Dire

Before we get into the facts of this case, we have a process we go through called voir dire. Voir dire is French term that means to speak the truth. Who has heard of that term before? Voir dire is also a process of asking questions from the potential jury members. The jury system is fundamental to our society and it depends on making sure the jurors have the time to sit in court for many days, the willingness to sit there, and that the jurors don't come with any biases or prejudices that might affect their judgment.

Explaining Bias and Prejudice

I want to take a moment with those two words: bias and prejudice. It triggers an unpleasant feeling in most of us to say someone is biased or prejudiced. But when you think about it, everyone has certain types of biases or prejudices. Everyone has certain predispositions to like one thing over another. Who here has a food you like or a food you don't like?

Another example is lawyers. Do most people have heartfelt love for lawyers? Raise your hand if lawyers are your favorite people. So, having a certain disposition about certain things or certain people – even having a bias – can be a very normal thing.

But sometimes it's embarrassing to discuss how you feel about certain things, depending on the situation. And here we are in a very formal environment, a courtroom. And some lawyer – me -- is about to ask you personal questions and it can be embarrassing. Telling your personal history to complete strangers can be uncomfortable. It's uncomfortable for me to ask you to give that history. These questions, however, are very important to our system of justice.

Getting Background on the Jurors

Now, what I'm going to do is ask some questions about your personal backgrounds and I'm going to try to keep those questions limited. What I'm going to do is just go around to each of you and ask some very basic questions on four important things in your life: First, where you went to high school. Second, after high school, where you went to work or what other schooling you had. Third, where you work now and how long you've worked there. Fourth, your family situation (are you married, have kids, and how many kids). [Address each person]

Exploring Prior Knowledge of Your Case

Now, let me tell you a bit more about this case just to further flush out any predispositions you might have about the people involved and the issues. Again, certain types of biases are normal and I'm just trying to get them out in the clear. This is a case that involves a fire to the home of Mr. and Mrs. Insured. There were some news reports on the local news about this fire after it happened. And I need to know if any of you may have seen those news reports. So let me give you a brief summary of the fire and then I'll ask you if you already know something about this particular fire. [Give brief details. For example, "This particular fire occurred on January 1, 200_ at the address of ___ late at night."]

Now, so far, does anyone think they might have heard of this fire before?

[Explore further details as appropriate]

Exploring Biases Against Insurance Companies

We've talked about bias and prejudice, and one thing that some people might have strong feelings about is insurance companies. As I mentioned, sitting next to me is a person named Mr. Insurance Adjuster. He's an insurance representative from a very large insurance company named Great Big Insurance Company. Great Big Insurance Company insured the home of Mr. and Mrs. Insured. My client paid the Insureds for damages caused by the fire and now we are here seeking to recoup that money from the defendant who is at the other table. And let's face it. Lots of people view insurance companies as having deep pockets.

Now, ladies and gentlemen, you don't even know what this case is really about yet. But who sitting here feels a bit uncomfortable with the fact that you have a case where the plaintiff's lawyer – that's me -- is representing a big giant deep pocket insurance company?

Exploring "Subrogation"

Is anyone confused about why an insurance company would be a plaintiff in lawsuit suing someone instead of being the one sued?

This case is what is called a "subrogation" case. Has anyone ever heard of the term before, "subrogation"?

So, for example, who here owns a house? Ms. ____, do you have insurance on that house? Who's the carrier? Ever had to make a claim with your insurance company? Do you have a refrigerator? Let's say your dishwasher leaks and it floods your home. You're probably going to make a claim with your carrier and they're probably going to pay you, right? Or at least you hope so, right?

Now, if that flood was caused by some defect in the refrigerator, would you want the refrigerator company to know about it?

So, subrogation is the process where your insurance company would make that claim against the refrigerator maker. Does that process of an insurance company making claim against the party that actually caused the loss make sense to you?

Exploring Bias Toward the Small Business Person

The Defendant, Mom & Pop Painters, is owned by Mr. Smalltime Businessman who is a painter. Do you have friends or family that are painters?

The Defendant is a small business. Do you have any friends or family members that run a small business?

If there is anyone that is going to feel a little uncomfortable with the idea that a big insurance company is going after a small business person, this is nothing to be embarrassed about and you should let us know. Is there anyone who feels like that?

Prior Jury Service (Foreperson is Often a Prior Juror)

Who here has ever served as a juror before? If yes, what type of case was it? Were you the foreperson? Did the jury reach a verdict? For whom? Did you have any bad experiences? Was there anything about being on a jury that would effect your ability to serve in this case?

Experience with the Legal System

Who here has been involved or has a family member or friend involved in a lawsuit as a party or a witness?

Exploring Circumstantial Evidence

Who here has ever heard of circumstantial evidence?

This case involves mostly circumstantial evidence. In this case, we have no video showing exactly how the fire happened. We also have no eyewitnesses to tell us that they saw exactly how the fire happened. As I said, we do have other circumstantial evidence, which you'll learn about during the trial. So, I want to ask you about your beliefs about circumstantial evidence.

When I say the words "circumstantial evidence," does anyone have a belief about what that means?

Does anyone believe it is better to have direct evidence than circumstantial evidence?

Let's say I sneak a piece of cake from the refrigerator that my wife told me not to eat. My wife didn't see me do it. So she has no direct evidence of my offense. But when I eat cake, I often leave a mess. Might there be some circumstantial evidence my wife will be looking for? [Explore some examples with the jury.]

Mrs. ___, you said you have three children. Have you ever found a mess in the house and you knew *you* didn't make it?

You don't have a video of it and you didn't witness it happen, so you have to rely on circumstantial evidence and your own common sense to figure out who made the mess, right?

Now, sometimes, it's not that easy at first, like if you have three kids in the house and the kids are blaming each other. Anyone have that happen?

But what are some ways you can narrow it down? [Explore some examples]

Exploring Ability to Sit Through the Trial

Now, to go through the trial process properly, it takes time. This trial might take several days. It might take a week. It might even take more than a week. There are lots of witnesses. There are reasons it might be hard for you to sit through a trial for that long. Some of you may have young children at home that you need to take care of. Some of you may have jobs that you simply cannot afford to leave for a full week or more. Some of you might have physical limitations. Some of you might have hearing problems or other conditions that make it difficult. Is there anyone who has reasons like those, which make it difficult for you to attend this trial?

How many of you are normally home with your child or children during the day?

Will it be hard for you to get someone to provide child care for up to ___ days?

Catch-all Questions

Is there any reason why any of you would rather not serve as a juror on this case?

Is there any reason why any of you feel you would not be fair and impartial jurors?

I appreciate your patience in answering my questions. Thank you.

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