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Ready for the defense

"It has been said that at the end of the day, every lawyer is human. What about during the day?" — paraphrasing Stephen Colbert



Kelly

By Dan Kelly

Plaintiffs' attorneys have a full panoply of theories for recovery: negligence, breach of warranty, strict liability in tort, intentional torts, employment law, premises liability, construction defects, mass torts, governmental tort, medical malpractice, etc.

On the other hand, the range of defense lawyer arguments is more constrained. Sure, they can attack liability, causation and damages, but then it's just comparative fault and assumption of the risk plus the imagination of the defense bar.

Some very imaginative defense arguments & ploys

On mitigation of damages, I used to joke about how a most worthy adversary, Bob Lynch, would handle things. Assume your client gets conked on the head in an accident and now suffers from double vision. Bob would defend by trying to make a positive out of it and suggesting your client now has twice as many friends as before the accident. And, to further mitigate damages Bob would argue the client would be better off moving to Walla Walla.

Another fine defense lawyer, Larry Kern, took defense imagination to a high level in a case I arbitrated. The plaintiffs, a young couple quite enamored of each other, decided to pull off to the side of the road and relocate to the back seat to better express their mutual affection. Unfortunately, along came Mr. Kern's client, whose car veered off the road and hit the couple's parked car. The plaintiffs claimed physical and emotional trauma from the accident. I need not provide further details.

At the arbitration, with a wry smile, Mr. Kern explained that he was seeking a finding of comparative fault based on the couple's failure to wear their seat belts. Plaintiffs' counsel quickly pointed out that the plaintiffs' car was stopped and not moving. Larry countered that the car was likely moving "a bit." We all shared a good laugh and I struck the seat belt defense. Larry then called me a "spoilsport" and I responded that plaintiffs think the real "spoilsport" was Larry's client.

For many years, John Corrigan defended Southern Pacific Railroad (SP). With his somewhat high-pitched voice, he had an ability to convince jurors that SP was not this merciless, heartless railroad that for years held that reputation.

In cases where the claim was plaintiff (or, more likely, plaintiff's decedent) didn't see the oncoming train and got hit at the crossing, SP used as a ploy a huge tapestry of a life-sized train engine coming right at the viewer. John Corrigan would skillfully get the judge to admit it into evidence and it would then be hung up on a frame and would sit there looming at the jurors for days. Mind you, those locomotives were big, over 10 feet wide and over 16 feet high. But, it seemed even larger sitting in the courtroom. Many a juror likely concluded that the train had to be seen and the accident was, in whole or in part, the plaintiff's fault for "fouling the tracks," to use railroad parlance.

John Corrigan and I struck an unlikely alliance in a tragic case. The plaintiff was working on the railroad siding and was opening the door of a refrigerated boxcar when the door fell off and struck him, rendering him a paraplegic.

The boxcar was being hauled by SP. Days prior to the accident the boxcar had been "shopped" for repair of the door by its owner, Burlington Northern Railroad (BN). Fortunately, I got to watch a legal slugfest break out between SP and BN. Based on prior experience, my money was on SP and John Corrigan.

So, John Corrigan and I went to Chicago to depose BN employees and managers. We were like a tag team and the BN deponents admitted that the welding on the boxcar door was quickly done and was likely to ultimately fail as it did. I asked a rather innocuous question to one BN employee who gave a rambling answer that contained this gem: the quick repairs were done in response to BN's management's stated goal of minimizing down time for their boxcars that needed repairs. John Corrigan and I looked at each other and almost simultaneously said, "No further questions."

On our Chicago trip I do remember over dinner telling John that if I ever had a crossing case he had better not use that life-size train tapestry. If he did, I told him that sometime during the trial I would pretend I didn't see the train and walk right into it. He just smiled and said, "Kelly, you wouldn't be the first plaintiff's lawyer to walk into my train."

My own authenticating experience has taught me to always be aware of defense lawyer's industrious imaginations. As Einstein put it: "Logic will get you from A to Z; imagination will get you everywhere." I would only add that "everywhere" can sometimes include the real world – the world where jurors live.

And, furthermore

While defense counsel are our adversaries, it doesn't follow that we treat them all as enemies. Some may so qualify, but, for the most part, there are not that many ogres out there.

Plus, does showing blanket contempt for defense lawyers and insurance adjustors really ultimately benefit your client? I think not. When you are tempted to become unbridled at the defense, I suggest you quietly recite this mantra: "Keep the animosity down and the reserves up."

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