

CHAPTER 3

Closing Argument—Wrongful Death—Young Child

Summation by Howard L. Nations *

SYNOPSIS

§ 3.00 Summary of the Facts of the Case

§ 3.01 Opening Line—There is No Magic—Only Despair

§ 3.02 Measuring the Loss of a Child—What is a Boy

§ 3.03 Justice System Cannot Do Magic—Money Damages Are the Only Viable Compensation

§ 3.04 Sympathy Versus Justice Discussed

§ 3.05 Evaluation of Specific Damages—Life That Will Never Be—Parent's Loss of Companionship and Mental Anguish

§ 3.06 Defendant Took a Gamble With a Human Life—Do Not Let Defendant Win Their Bet

§ 3.07 Society Places High Value on the Lives of Children and Seeks to Protect Them from Danger

§ 3.08 Jury Must Send Message to Defendant—Safety Must Come Before Profit

* Howard L. Nations received his legal education at Vanderbilt University School of Law (J.D., 1966). He is a member of The Texas Trial Lawyers Association (President); Association of Trial Lawyers of America (Executive Committee); Texas Association of Certified Civil Trial Lawyers (Past President); Southern Trial Lawyers Association (Vice President); National College of Advocacy Foundations (Chairman Board of Trustees); Roscoe Pound Foundation (Board of Trustees). He is a Fellow of the Texas Bar Foundation and the Houston Bar Foundation. In addition, Mr. Nations is an adjunct faculty member of the South Texas College of Law, is on the Executive Board of the Texas College of Trial Advocacy, and is Chairman of the Board of the National College of Trial Advocacy. Mr. Nations has authored, co-authored and edited numerous books, articles and CLE papers and is a frequent speaker for various lawyer associations throughout the United States. Mr. Nations practices law in Houston, Texas.

The names of the parties, witnesses and opposing counsel have been changed.

§ 3.00 **Summation** 3-2

§ 3.09 **Placing a Dollar Value on Life—Analogy to Masterpiece Painting**

§ 3.10 **Dehumanizing the Defendant—Money is The Only Thing a Corporation Understands**

§ 3.11 **Argument for Exemplary Damages—Full Justice**

§ 3.12 **What is a Child’s Life Worth?—Discussion Regarding the Value of the Life of a Child—Analogy to Prize Fighters and Race Horses**

§ 3.13 **Closing Line—Full and Complete Justice**

§ 3.14 **General Comments About the Structure of The Argument**

§ 3.00 Summary of the Facts of the Case

In this case, a seven year old boy, the only child of a physician and his wife, died as a result of his exposure to a product whose dangerous propensities were known to the defendant manufacturer due to the filing of other claims which asserted the existence of a latent defect. While the evidence was disputed by the defendant, proof was offered by the plaintiff that the corporate defendant had notice of the defect and had rejected the option to recall the offensive product. The plaintiff offered proof that a recall would have cost the defendant approximately four million dollars. Plaintiff argued to the Court that there was sufficient evidence of a corporate decision not to recall the product to support such an argument during summation.

The evidence on this point was disputed by the defendant, and plaintiff’s counsel anticipated that defense counsel would object to a “recall argument” during summation. Since such an objection would interrupt the flow of plaintiff’s summation, plaintiff’s counsel raised the issue on the record during the Court’s charge conference and obtained the ruling that the argument that the corporation considered and rejected a recall of the product was a reasonable inference to be drawn from the evidence. The Court further ruled that defense counsel’s objection was duly noted and overruled, and that defense counsel was not to interrupt plaintiff’s summation for an objection on this point.

After a substantial verdict was awarded to the plaintiff the case was settled under a non-disclosure agreement. Hence, the identification of the parties and the product are protected and cannot be disclosed. However, this superb closing argument may be adapted for use in almost any case involving wrongful death of a child.

While reviewing this summation, it is important to note counsel’s unique methods of employing standard themes and arguments, particularly the “magic versus reality” argument, “conscience of the community argument” and “full justice versus partial justice” argument. Also, note counsel’s superb response to defense counsel’s argument regarding sympathy for the plaintiffs and the propriety of returning a compensatory award of four million dollars and an

exemplary award of treble damages, or twelve million dollars. Most importantly, pay close attention to counsel's incorporation of the numerous rhetorical devices, such as, the Rule of Three, Metaphor, Analogy, Rhetorical Question, Simile, Antithesis and the Echo Effect of Repetition.

§ 3.01 Opening Line—There is No Magic—Only Despair

May it please the Court, Mr. Smith, ladies and gentlemen of the jury. Now we talk of money. We talk of money because there is no magic. Is anyone so callous as to believe that if the jury had the power to wave a magic wand and return this child to his parents, there would be talk of money. No. There would be only exultant joy. You would witness this young couple emerge immediately from the depths of despair into the heights of happiness and leave this courtroom bound together as a happy family again. But, there is no magic—there is only despair. There is no magic—there is only reality.

Magic exists only in the world of children such as David Taylor. The magic of each new day in David's life, his new challenges, his dreams, his fantasies; the magic of new friends; the testing of David's God given talents against his friends and young cousins; hitting the ball as far, running as fast; the magic of his days, his toys, birthdays and Christmas although there were only seven and there will be no more.

COMMENT: This is a theme that can be used effectively over and over again in any case involving the death of a child. Counsel has the jury envision what it would be like if the courtroom doors could swing open and the child could run back to his mother and father. This is a great concept that has a lot of emotional impact.

Counsel also notes that nothing short of a miracle can restore this child's life and the plaintiff parents must live with this haunting reality. This provides an ideal segue to a discussion of monetary compensation, the real issue in the case. Note that counsel introduces the popular but immensely effective theme of "magic versus realty." This argument can be adapted to almost any personal injury situation. For example, there is no magic to make a quadriplegic walk, or a blind person see. The jury must then be reminded that despite these impossibilities, they have the power to render justice in the form of awarding monetary compensation. Counsel expertly weaves this theme throughout the summation and forcefully drives home the point that the parents are entitled to a substantial monetary award to compensate them for the irreplaceable loss of their son.

§ 3.02 Measuring the Loss of a Child—What is a Boy

But what is this loss which you are called upon to measure. I am reminded of the prose on "What is a Boy." Between the innocence of babyhood and the

§ 3.03

Summation

3-4

dignity of manhood, we find the delightful creature called a boy. Boys come in assorted sizes, but all boys have the same creed: to enjoy every second of every minute, of every hour, of every day and to protest with noise, their only weapon, when the last minute is finished and Mom or Dad pack them off to bed at night. Boys are found everywhere; on top of underneath, inside of, climbing on, emerging from, running around, or jumping to. Mothers love them, little girls hate them, older sisters and brothers tolerate them, and heaven protects them. A boy is a magical creature, you can lock him out of your workshop, but you can't look him out of your heart. You can get him out of your study, but you can't get him out of your mind. You might as well give up, he's your captor, your jailer, your boss, a freckled-face, pint-size, cat-chasing bundle of noise. But when you come home at night with only the shattered pieces of your hopes and dreams, he can mend them all like new with just two magic words. "Hi Dad!"

But David, Sr. will never again hear those magic words because the magic of young David's life ended on November 3, 19— and was replaced by stark reality when an inevitable time bomb which the defendant created and refused to recall, exploded and took with it the life of this young child, and the hopes and dreams and aspirations of this young family.

COMMENT: Without going overboard, counsel tugs at the jury's heart-strings. Every juror, no matter how callous or seemingly uncaring, can relate to the infinite delight and wonderment brought about by the presence of a vivacious, inquisitive and active little boy, if not through their own experience as parents, then through the memories of their own childhood. Counsel builds on these happy thoughts and memories by quoting snippets of an endearing prose regarding the marvel of a young boy. He abruptly snatches away those good feelings by suddenly recalling the death of the youth and the heartbreak felt by the plaintiff father who will never again share those special moments with his son. Counsel's presentation is extremely effective, his choice of words superb and his ability to relate the parents' loss highly impressive.

§ 3.03 Justice System Cannot Do Magic—Money Damages Are the Only Viable Compensation

Since there is no magic in our justice system—we speak of money. But we speak of money now because the defendant spoke of money in their conference room five years ago when they refused to recall this product. Why, because a recall would have cost this corporation four million dollars. So, they refused to recall and the inevitable tragedy occurred.

Ladies and gentlemen, is that the standard of safety which we will tolerate in Texas? Or, is this reprehensible corporate conduct which must not be allowed

3-5

Wrongful Death—Young Child**§ 3.05**

to occur again? That is your decision. That and the amount of money to be awarded for the value of this young child's life.

COMMENT: As every trial attorney knows, it is often difficult to discuss monetary awards without appearing greedy or callous. Above, counsel employs a very effective method to explain why money damages should be awarded in this case. He opines that money compensation is just and proper because profit was foremost on the defendant's mind when it decided not to recall the product which ultimately cost the innocent life of this young boy. The jurors will no doubt find it easier to award substantial money damages once they realize that profit was the primary concern of the defendant corporation. Counsel will amplify this passionate theme throughout the summation.

Note that throughout this summation counsel employs the use of rhetorical questions. Proper use of this technique can be very effective. The jurors answer the questions in their own minds as if they came to the conclusion independently and thus, value the conclusions more than if the information was simply given to them in lecture form.

§ 3.04 Sympathy Versus Justice Discussed

The defendant warned you against sympathy for this family. We agree. Don't look at this family with sympathy, sympathy is like charity, it is demeaning. Believe me, they received sympathy at the funeral every time they looked into the faces of their friends; they received sympathy when they returned to their jobs and saw sympathy in the eyes of their co-worker; they received sympathy when they returned to their church and saw their pastor and the church members and looked into their eyes filled with sympathy. They have received enough sympathy to last ten lifetimes. We are not here about sympathy; we are here about justice.

COMMENT: Counsel does an excellent job of balancing emotion and logic. It is always dangerous to rely too heavily on the emotional or passionate appeal because it may be deemed prejudicial or irrelevant by the court. Above, counsel downplays the inevitable sympathy for the plaintiffs and reminds the jury to concentrate on delivering justice.

**§ 3.05 Evaluation of Specific Damages—Life That Will Never Be—
Parent's Loss of Companionship and Mental Anguish**

In evaluating the damages in this case, don't look at the death of this young man, look at the life which will never be. Since there is no magic, examine closely, reality. The reality of the loss of David's society, participating with his parents in every phase of their lives; the reality of the loss of his companionship; and the reality of experiencing mental anguish every day of their lives. The

§ 3.06

Summation

3-6

reality, by which you must measure the amount of money to be awarded in this case, is that these young parents will never again share the daily joys, fears, hopes and tears of David, this gift of God to this fine couple. Reality is that young David lived only seven years, ten percent of his life expectancy. His life was like a broken film, a mere preview of coming attractions. Reality is that these parents awaken every day of their lives to the realization that David is gone forever. Reality is that watching their friends' children, young David's friends, is a constant source of devastating mental anguish to this couple as they lay awake at night and think of that young life that never will be. Reality is that they will never know if David would have followed in his father's footsteps, if he would have been the high school quarterback, the college athlete, the academic scholar to med school. Reality is they'll never know if he would have followed in his grandfather's footstep as a salesman, in his uncle's footsteps as a professional military man. But even more, the reality of their loss is they'll never know those special moments that reward parents so beautifully.

Karen will never again know the reality of hearing the four most beautiful words in the world "I love you, Mommy." They'll never experience that magic moment when young David walks in and says "Hi Mom, Hi Dad, this is the girl I'm going to marry." David, Sr. will never know the thrill of the moment when he picks up the phone and hears those words: "Congratulations, Grandpa, it's a boy." The days of joy for families: Birthdays, Mother's Day, Father's Day, Thanksgiving and Christmas are now days of mourning in the Taylor household. These are only a few of the endless litany of losses thrust upon these parents by the gamble of the corporate defendant.

COMMENT:Counsel does a superb job of personalizing the losses faced by this young couple in a manner which will touch the hearts of each juror. Again, his zealotness does not cross the line so as to become inflammatory or prejudicial.

§ 3.06 Defendant Took a Gamble With a Human Life—Do Not Let Defendant Win Their Bet

What is this child's life worth in our community? That determination is your role in the justice system, to write the final chapter before we close the books on young David's life. But, let's look at another set of books. As we speak here today, the life of young David Taylor is carried as a four million dollar profit item on the books of this corporation. This corporation, which made the willful decision to gamble, they gambled their four million dollar profit against the safety of the public; they gambled their four million dollar profit on the judicial system of this great state; and they gambled their four million dollar profit against the life of young David Taylor. We know that young David lost that gamble. The

3-7

Wrongful Death—Young Child**§ 3.07**

question is: Did the corporation that made that gamble win? That's your decision. We say that if public safety is to be served and justice rendered they must not win this horrendous gamble. That's why you are here, serving as the conscience of this community. With your verdict you have the opportunity and the responsibility to serve as the conscience of this community and one; tell the Taylors what their family and their son means to this community and the value which this community places on young David's life and the lives of all of our children. And two; tell the corporation if their gamble with the safety of our children paid off.

COMMENT:In almost every summation, skilled trial attorneys take time to stress the importance and magnitude of the jury's role and function in society, in general, and in the case before them, in particular. Above, counsel relies on the popular but highly effective "conscience of the community" argument. Counsel embellishes the argument by analogizing the defendant's actions, or more specifically, its failure to act, to gambling. The notion of gambling is inherently associated with carelessness and indifference. This will certainly strike a chord with jurors as they weigh the damages, particularly, the exemplary damages. Note that counsel again weaves the idea that the defendant valued profit over safety into the argument. As previously mentioned, this theme is repeatedly stressed throughout counsel's summation and will no doubt be remembered when the jurors retire to deliberate.

§ 3.07 Society Places High Value on the Lives of Children and Seeks to Protect Them from Danger

If there anything more precious in our society than the lives of our children? The entire country was captured for fifty-six hours by the incredible efforts to save Jessica McClure from the well and the country sighed a collective sigh of relief when she was saved. Look around us and we see our regard for the safety of our children: School Zone-Reduce Speed; crossing guards and child-proof prescription bottles. But who is to assume the responsibility for the safety of our children; parents—obviously; the schools and governments?—definitely. But there is another group which must assume their share of this responsibility: the manufacturers of children's products.

§ 3.08

Summation

3–8

COMMENT: Counsel expertly highlights the importance of children's safety to society. He recalls an incident that captured the interest and concern of the entire country. This will remind the jury that our society highly values the lives of its children and will go to great lengths to ensure their safety and well-being. To further stress this point, he lists several examples of how society seeks to protect its children. He ties these generalizations to this specific case by discussing those individuals who are responsible for protecting innocent children, which, of course, includes the defendant.

§ 3.08 Jury Must Send Message to Defendant—Safety Must Come Before Profit

Therefore, you have another role as the conscience of this community, to send a message to manufacturers. This talk about money began when the defendant talked of money in their board room, when they made that disastrous, profit-motivated decision not to recall this product because it would cost them four million dollars. When you walk through that jury room door, you will have the opportunity, on behalf of all parents, citizens and consumers in this great country, to talk directly to the Board of Directors of these corporations, because believe me, they are watching this trial. It's very likely that in serving in your role as a juror in this case, you will never again have the opportunity to do so much good, for so many of your fellow citizens, by demanding safe products for our children, by demanding protection of the public from defective products, and sending a clear message to corporations which ignore safety that such actions will be punished in the courts of this state. If your verdict is large enough, your voices will be heard by the entire industry with the message that we, the citizens of Texas, value human life infinitely more than we value the profits of corporation.

COMMENT: Counsel here scores several important points. Note that he emphasizes the impact that this jury's decision will have, not only upon the defendant, but upon the corporate world, in general. Again, discussing the value of life in terms of money can be very difficult and uncomfortable. Thus, counsel turns the tables and points to the defendant as the one who initiated the discussion of money as it was the defendant who decided to place profit before safety. Counsel specifically points out that a product recall would have cost the defendant four million dollars. Note that this is the exact amount requested by the plaintiffs as compensation for the loss of their son. Placing a value on life can seem arbitrary and capricious. Therefore, counsel attaches some logic to the task by asking for the exact amount of profit gained by the defendant for failing to recall the hazardous product. He also points out that a substantial verdict will go beyond the reaches of the defendant's pockets and be heard by manufacturers all over the country.

§ 3.09 Placing a Dollar Value on Life—Analogy to Masterpiece Painting

What is this child's life worth in our community. Is four million dollars enough? Counsel says four million dollars is too much money. How much is four million dollars? Ladies and Gentlemen, we live in a society in which paint on canvas recently sold for fifty-three million dollars. Why? Because it was the work of a master, "Irises" by Van Gogh. If this were a lawsuit for negligent destruction of that fifty-three million dollar Van Gogh painting, that would be the amount which justice would demand. If a jury decided that fifty-three million dollars is too much money and awarded only twenty-six and one-half million dollars, that would not be justice, that would be half justice and half justice is injustice.

Is the creation of the greatest Master of them all, the human life of a child, worth at least the four million dollars we are seeking? The answer is, it's priceless, because we can't replace it, so we have to talk of money. But, remember who talked of money first. Money was inserted into this scenario because the corporate board placed profits ahead of safety.

§ 3.10

Summation

3–10

COMMENT: Counsel employs a very effective and often used technique to underscore how the jury can assign a monetary value to human life. He analogizes life to a piece of artwork—but not just any artwork, he refers to the painting of a master. At first glance, the jurors may be hesitant to award millions of dollars to the plaintiffs. After all, few people have ever had to deal with one million dollars, let alone four million. He eases the jurors' minds by reminding them that people pay numerous times that amount for a mere painting, thus, they should not worry about awarding a substantial sum to the plaintiffs. His comments regarding awarding less than the value of the painting are very effective and encourages the jury not to underestimate the decedent's life.

§ 3.10 Dehumanizing the Defendant—Money is The Only Thing a Corporation Understands

Serve as the conscience of this community and assure that this never happens again. How do you accomplish this? Remember what we're dealing with here. The defendant is a corporation. A corporation has no heart, it has no soul, it has no nerve center, it has only bank accounts. It exists solely to produce profits and converses only in the language of money and is motivated only by effects of profits. How can this profit-motivated corporation receive the message that the citizens of Texas will not tolerate corporate greed over product safety? Only by an award by this jury that substantially effects profits.

Now, ladies and gentlemen, I told you that they gambled. They gambled with the public safety, they gambled with David's life and they gambled with the jury system. They gambled that their lawyers could come into this Court and could keep your verdict under four million dollars, because Ladies and Gentlemen, it would have cost them four million dollars to recall this product. So, if you return a verdict of two million dollars, they've won. There will be celebrations in that Board of Directors room because, by their treacherous decision they would have saved two million dollars. If you return a verdict of three million dollars, it's the same thing. If you return a verdict of four million dollars, they broke even but they have no motivation not to make the same decision in the future.

COMMENT: Whenever the defendant is a corporation, it is wise to remind the jury that while a corporation may be deemed a person under the law, a corporation does not have the characteristics of a person. It is a thing; a mechanism for making money and nothing more. The effect is to impersonalize the defendant so that the jury will not feel bad about depriving it of assets. Note that counsel wisely emphasizes that returning anything less than a verdict for four million dollars will be considered a victory for the defendant. This provides an excellent segue into a discussion of exemplary damages.

§ 3.11 Argument for Exemplary Damages—Full Justice

How can you best serve your fellow citizens, get the attention of the Board of Directors and render a full measure of justice to this fine family? First, by returning a verdict in the amount of four million dollars in compensatory damages; and secondly, by an award of exemplary damages. We have a simple method in Texas for what constitutes a fair, reasonable exemplary damages award in a case like this. It's called treble damages. In this case, in addition to the four million dollars in compensatory damages, the message that must go out from this jury, which will be heard resoundingly in the board room, is conveyed by an exemplary damage award in the amount of twelve million dollars. Corporations are motivated by profit. They operate on numbers and if, on a four million dollar gamble, they lose twelve million additional dollars, then you are conversing fluently in the language of corporations, and that turns their profit-motivated minds to the production of safer products.

On voir dire we told you that the evidence would support twelve million dollars. You know now what we knew then—that full justice demands both punishment and that an example be made of this defendant for the entire industry. You know now what we knew then, that the devastation visited upon this young couple cannot be compensated and justice fully served by less than four million dollars in compensatory and twelve million dollars in punitive damages.

§ 3.12

Summation

3–12

COMMENT: It is important to remember that the law of damages differs in each jurisdiction, particularly with respect to exemplary or punitive damages. For example, in Louisiana, punitive damages are not permitted in a wrongful death action, thus, arguing for such an award would constitute grounds for reversal. Texas permits both compensatory and exemplary damages in wrongful death actions and as such, counsel sets forth a forceful argument for the recovery of both types of awards in this case.

Note that counsel returns to one of his main themes; profit over safety. Without sounding vengeful, counsel explains that the jury must speak the language of the defendant corporation, and that is money. He stresses that the only way to reach the defendant is to reach into their corporate pockets, take away their profit and then some. In other words, show them that there must be an equitable balance between profit and consumer safety or they will pay dearly for the inequity. Counsel also makes the important point that full justice requires both compensatory and punitive damages.

§ 3.12 What is a Child's Life Worth?—Discussion Regarding the Value of the Life of a Child—Analogy to Prize Fighters and Race Horses

What is this child's life worth? Counsel says four million dollars is too much money to replace the life of a priceless child. In a society in which two men, Spinks and Tyson, recently split twenty-three million dollars for ninety seconds in a boxing ring, can four million dollars possibly be adequate compensation for the loss of the priceless life of a child. What is the child's life worth? If this lawsuit were not over the death of a child, but over the death of the magnificent race horse, Seattle Slew, the owners of that horse would prove ten million dollars in damages and be entitled to receive it. Why? Because checks were written for ten million dollars to buy that horse. Thus, a jury which awarded five million dollars would not be rendering justice, but would be rendering half justice, and anything less than full justice is injustice.

But we are not here about paintings and race horses and boxers; we are here about the world's most precious commodity, the life of a child. What is this child's life worth? In this case, of these facts, full justice demands a verdict in the amount of four million dollars compensatory and twelve million dollars exemplary damages.

COMMENT: In case any juror missed the point of counsel's analogy regarding the value of the life of a child compared to a masterpiece painting, counsel returns to the subject to analogize the value of a child's life to the life of a race horse. He also mentions that boxers can earn upwards of twenty-three million dollars for a single fight. These types of analogies are concrete subjects that the jurors can relate to and they tend to ease any apprehensions regarding the decision to return a large verdict.

§ 3.13 Closing Line—Full and Complete Justice

Ladies and Gentlemen, I have carried the mantle of responsibility for this lawsuit and for the value of this young man's life on my shoulders for four years, and I'm now going to lift that mantle of responsibility from my shoulders and place it trustingly in your hands. And all we ask is that when you go home to your family and they say, "What did you do in court?", you can look them straight in the eye and say, "We helped to make this country a safer place to live, we showed a family that their son was a valued member of this community, and we rendered full and complete justice."

COMMENT: Counsel concludes this outstanding summation by reminding the jurors that he trusts them to render full and complete justice. It is always good to express confidence in the jury. Paying deference to the jury has a reciprocal effect in that when counsel shows respect and belief in the jury, the jury will return the tribute in kind. He imparts a sense of patriotism and reverence which can only be attained by returning a verdict for the requested amount.

§ 3.14 General Comments About the Structure of The Argument

This summation obviously had a great impact on the jury as they awarded a very substantial verdict for the death of this child. This is especially important to note because wrongful death actions involving young children generally do not result in substantial compensatory or exemplary awards. In this case, counsel skillfully and successfully challenged this injustice. Howard Nations in this wonderful summation provides an excellent example of how to argue the death of a child and how to use the technique of verbal images weaved with rhetorical questions. This summation is a prime example that closing arguments do not have to be lengthy and cover every issue in the case in order to be effective. It is short, sweet and to the point but has enormous impact. It is an absolutely magnificent exercise in the art of summation.

PAGE 3-14 INTENTIONALLY LEFT BLANK.