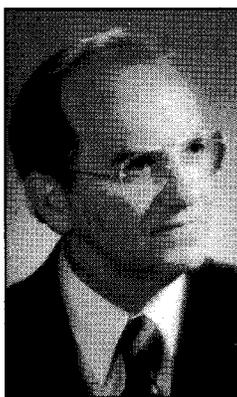


Tears, Preparation & Winnie the Pooh

By Judge Jerry Buchmeyer



The following "et cetera" column was first printed in the September 1982 issue of the Texas Bar Journal.

The experienced litigator, of course, has his Three Arguments¹ ready before trial begins. But he is also armed with other tactics — such as tears, preparation, and Winnie the Pooh.

Tears

Former U.S. Supreme Court Justice John J. Wilkes on the ethical obligation to cry:

Tears have always been considered legitimate arguments before a jury, and while the question has never arisen out of any such behavior in this court, we know of no rule of jurisdiction in the court below to check them. It would appear to be one of the natural rights of counsel, which no court or constitution could take away. It is certainly, if no more, a matter of the highest personal privilege. Indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they were indulged in to such excess as to impede or delay the business of the court.

According to "O" (Theobald Mathew), there was such a barrister — the Tearful Performer² — in the King's Bench Division, who knew all the tricks of the Trade (including the sob-stuff). Appearing for plaintiffs, he would assure the jury that he had no wish to Work Upon Their Feelings, but he was reluctant to tell them of the Harrowing Details — and by the time he got to the Blasted Reputation, the Shocking Injuries, or the Agony of Mind (as the case might be), there was not a dry handkerchief in the court. His formidable reputation alone resulted in many settlements, but his most memorable court performance was related to "O":

...One fine day, when his Engagements were Many, the Tearful Performer Rushed into Court just in time to make the Final Speech for the Plaintiff in an Accident Case. He had not Heard Any of the Evidence, and his Agitated Junior only had Time to inform him that *the Plaintiff had Admitted in Cross-Examination a Conviction for Perjury at the Old Bailey Some Years Ago*. The Tearful Performer was Undisturbed. He begged the Jury not to allow themselves to be Misled by any Red Herring which his Learned Friend might Seek to Draw across the Track. He reminded them that

the Question was whether the Defendant Driver had been Negligent, and not whether the Plaintiff's Evidence on Another and Different Occasion had, or had not been Accepted.

The Tearful Performer then Asked the Jury what they Thought of a Case which had to be Bolstered up by Deplorable Irrelevancies, and Invited them to Say that it was a Cruel Thing to Drag Out of a Crippled Man a Story which Must have caused the Utmost Pain and Distress to his Innocent Wife and Children. And (Praying the Conviction in Aid) *the Tearful Performer Inquired what was Better Calculated to Make a Man Absolutely Accurate in the Witness Box for All Time that a Sentence of Imprisonment for Perjury*.

By the time he had Got to the Bit about Praying the Conviction in Aid, the Tearful Performer was so Choked with Emotion that he could Hardly Proceed with his Address. And as at that Moment his Clerk Told him he was Wanted in Another Court he Left the Matter there.

Was the speech of the Tearful Performer a success? Of course. The jury awarded the plaintiff such Enormous Damages that the Tearful Performer advised him to accept half the amount in settlement rather than run the risk of a motion for a new trial being granted.

Preparation

There can never be too much trial preparation. Well — almost never — as suggested by the case of *The Cautious Solicitor and the Chinese Witness*.³ A solicitor who was both Learned and Cautious, never allowed himself to be taken by surprise at trial; he always had his Tackle in Order. While working on a Case of Great Importance, the solicitor suddenly realized that his principal witness, Mr. Chi-Hung-Chang was a Chinaman — and that he would have to be sworn in Whatever might be the Appropriate fashion. His trial preparation and the results:

...The Cautious Solicitor Made Anxious Inquiries and Gathered that Everything Depended on the Precise Place of Origin of Mr. Chi-Hung-Chang. It appeared that if he came from the northern regions the Breaking of a Saucer was the Central Piece of Ritual; that if he was from Kwei Chow (or the Parts Adjacent thereto) he would require a Lighted Candle which would be Blown Out at the Critical Moment; and that if he Hap-

pened to be a native of Kwangsi he would not deem himself properly sworn unless and until he had sacrificed a white cockerel in the Witness Box by cutting its throat with a steel knife.

The cautious solicitor took no risks. He procured a dozen porcelain saucers of various sizes; a box of Best Spermaceti Candles, and a box of superior quality wax ditto; and from (Leadenhall Market) a cockerel of unblemished purity, which spent the night in his bed-chamber and inconvenienced him a great deal by crowing enthusiastically when dawn broke.

On the day fixed for the hearing of the case, the cautious solicitor conveyed the saucers, the candles, and a hamper containing the white cockerel to the Royal Courts of Justice, and there awaited the arrival of the Chinese witness... On the cautious solicitor inquiring whether he would prefer a saucer, a lighted candle, or a cockerel for the purpose of his oath, Mr. Chi-Hung-Chang said he had become a bit of a Christian Scientist at Balliol, and thought, on the whole, he would like to affirm.

He then asked the cautious solicitor to come and have a drink.

Eyore for the Defense

Tears may be legitimate. Exhaustive trial preparation may be okay. But some trial tactics are just plain nasty.

Everyone has their own favorite story — "Favorite," if it happened to us — of such conduct by opposing counsel. Mine involves absolutely despicable (but extraordinarily effective) trial tactics by an attorney defending Disneyland in a personal injury suit.⁴

Winnie-the-Pooh, you doubtless remember, was always in trouble — getting his paws stuck in the honey jar, eating so much he couldn't squeeze out of Rabbit's house, falling in the Heffalump Trap, etc. Well, recently, the hapless bear did it again; Winnie-the-Pooh's human, costumed counterpart at Disneyland (an employee named Robert Hill) was accused in a \$15,000 personal injury suit of bopping a nine-year-old visitor to the amusement park with his paw.

The delicious foul tactics: The Disneyland attorney put Robert Hill on the stand — but in his full Winnie-the-Pooh costume. Then Winnie-the-Pooh (not Hill) denied the charges; testified that he had been pushed accidentally from behind; and claimed he (Pooh) had not struck the plaintiff with his paw, but with his fur-covered wiggling ear.

The result:

Winnie's testimony moved the jurors deeply. After only 21 minutes of deliberation, they acquitted him. Said Judge Jerold Oliver, who presided at the sticky trial, "Winnie-the-Pooh has been vindicated."

Rum tum tum tiddle um.

- Justice Jackson of the U.S. Supreme Court once said (and this is a paraphrase): There were three arguments in every case I had. *First*, the one that I planned — as I thought, logical, coherent, complete, convincing. *Second*, the one I actually presented — interrupted, incoherent, disjointed, disappointing. *Third*, the utterly devastating argument that I thought of in the cab ride on the way to the airport. He added, "No advocate, however able, is ever completely satisfied with any answer he has given."
- "The Tearful Performer and the Plaintiff with a Past," from *Fifty Forensic Fables* by "O" (the pen name of Theobald Mathew), published by Butterworth & Co. (London 1961).
- From *Fifty Forensic Fables* by "O" (Theobald Mathew), published by Butterworth & Co. (1961).
- Reported in *Saturday Review* (June 1980).

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