CHAPTER 35

Closing Argument—Amusement Park—Severe Neck Injury

Summation by Howard L. Nations*

SYNOPSIS

* 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 plaintiff, witnesses and opposing counsel have been changed.

§ 35.00 Summary of the Facts of the Case

In this case, the plaintiff celebrated his 16th birthday by going to Astroworld with his friend. They were very excited about riding the world's fastest and highest roller coaster, known as the Texas Cyclone. Little did Harry Gambles know that the Texas Cyclone would forever change his life.

On his fateful ride on the roller coaster, Harry mentioned to his companion that he thought he had "popped his neck." After that he began to slur his speech. He also vomited, had double vision, and began to stagger. His friend took him to the Astroworld first aid station where the employees assumed that he was drunk. Ultimately he was rushed to the emergency room of a local hospital. Almost immediately, hospital personnel realized that there was a blockage in the basilar artery and he was having a stroke. They gave him massive doses of an anticoagulant medication to break up the blood clot. However, by the time the blood clot was dissolved, the plaintiff had suffered permanent brain damage.

The roller coaster in question is a modified version of the famous Coney Island roller coaster in New York. It differs from the Coney Island roller coaster in that it has deeper drops and sharper turns. The roller coaster seats used on this particular ride were the same as those used in most other roller coasters around the United States. However, because of the additional drops and curves, the gravity forces acting upon a person's head on this ride were significantly greater than a typical roller coaster. Moreover, when a person was locked into the seat with a lap bar, he became rigid from the waist down. This applied greater centrifugal force to the head and neck as the head was whipped around like a flag in the wind.

The plaintiff's attorney, Howard Nations, had the foresight to hire a dynamist. A dynamist studies the mechanics of the forces of motion in relation to the equilibrium of the body. This particular expert was an employee of the NASA Apollo Program who had designed a seat that could withstand the G-forces that

astronauts were subjected to as they were propelled into space. The plaintiff successfully claimed that the defendant did not put enough side restraints and padding in the roller coaster seats to avoid excessive G-forces on the head and neck. It is important to note that the extra padding and side restraints were easy to design and were cost-effective. Moreover, the defendant's own expert said that if he had seen the roller coaster when it was first built in 1976, he would have made the changes at that point in time because the danger was obvious.

Records of Astroworld indicated that there were in excess of 100 head and neck complaints from people riding the Texas Cyclone and that there was one particular drop where the majority of injuries occurred. This was the same drop where the plaintiff felt his neck go sideways and pop.

The defendant claimed that the Texas Cyclone was like any other roller coaster. Defense counsel retained a NASA engineer as an expert witness who claimed that the design of the roller coaster cars and the head restraints met the standards of other roller coasters. As such, the defendant took the position that 8 million people a year ride roller coasters across the United States without having a stroke. Therefore, the defense insisted that the plaintiff's stroke was due to some physical abnormality in the plaintiff and that the defendant was not responsible for his injuries.

Ultimately, even the defense expert was forced to admit that it was better to have a head restraint system installed in such a roller coaster. In fact, all of the experts agreed that a head restraint system would decrease the probability of stretching the vertebral artery and causing either a clot to go into the basilar artery in the base of the brain or blocking the blood flow to the critical areas of the brain causing injuries such as those experienced by the plaintiff. Without such a restraint system there is a folcum effect and the force which goes from the lower body out to the head exceeds 28 G's.

As a result of the brain damage, the plaintiff suffered partial paralysis on the left side of his body and subsequently drags his left foot as he walks. He also has cognitive problems, memory difficulties, and secondary emotional disturbance which resulted in a period of severe depression. However, despite his injuries and

disabilities, the plaintiff worked at home to complete his high school diploma and at the time of trial was applying to colleges with the goal of obtaining an engineering degree.

At the end of the trial, which lasted 15 days, the jury reached a verdict of $2.5 million for the plaintiff. The case was settled on appeal.

The closing argument that follows is well structured and powerful. Moreover, Mr. Nations accomplished this task in a relatively short period of time. Note that the summation is extremely well organized and succinct. Mr. Nations does not ramble on or repeat himself. He opens the argument with the strong factual points regarding liability. He highlights the timing of the plaintiff's neurological symptoms which occurred right after he left the roller coaster. This is his strongest point and he immediately drives it home. Also note that Mr. Nations has chosen to spend about as much time on liability as he does on damages. This proved to be an important strategy in this case.

In reviewing this summation, it is clear that Mr. Nations' liability arguments are well thought out and are firmly anchored in the evidence. He also does an excellent job of emphasizing the quality of the plaintiff's experts by recalling testimony from each of the experts and pointing out that in essence, all the experts, both plaintiff and defendant, agreed with his theory of the case.

§ 35.10 Introductory Remarks—History and Significance of the Jury System

MR. NATIONS:

May it please the Court; Mr. Simon; Mr. Webbers; ladies and gentlemen of the jury: Your presence in this jury box breathes life into the Constitution and the Bill of Rights. You are the embodiment of the Seventh Amendment, every American citizen's right to trial by jury. As you enter that jury room to decide the quality of Harry Gambles' future life, you will be carrying on a vital role of citizenship that began 2500 years ago in Athens, Greece, when the Athenian leader, Solon, first summoned citizens of Athens to court to resolve the disputes of their fellow citizens. It is the highest calling of citizenship and the finest method ever devised by man for resolving our disputes. However, the role of

juror carries with it great power and great responsibilities. You have the power in this case to right a wrong, to speak for all of our citizens to demand safer amusement parks throughout America, and most importantly to the Gambles family, to determine whether Harry is to receive a full measure of justice which will fully compensate him for the disabilities which he will endure for the next forty seven years.

COMMENT: Mr. Nations has chosen an introductory theme which immediately captures the jury's attention. He explains that the jury system is steeped in history and makes the jurors realize that they are now a part of that history; a history which should be honored and revered as it is an integral part of our society. Note that he carefully weaves the plaintiff into the picture, making him a part of that history as well. This type of introductory statement uplifts the jury's spirits and gives them a sense of importance and loyalty to their responsibilities. It demonstrates that counsel has respect for them and their opinions.

§ 35.11 Duties of the Jury

When we talked three weeks ago on voir dire examination, I told you that the 12 of you who would be selected to answer the questions in this case were going to have an extremely important and difficult job; That your role would be, first, to resolve all of the factual disputes between the parties; secondly, to weigh the credibility, the believability, of the witnesses; and third, to determine what amount of money will be necessary to fully and justly compensate Harry Gambles for the wrongs done to him by Astroworld and to help restore his life to the highest degree of quality still available to him, considering his permanent physical disabilities.

We have considered a lot of evidence in the last three weeks. Let's now consider how that evidence applies to the questions which you are called upon to answer.

COMMENT: Above, counsel provides the jury with a brief summary of their duties by referring to his voir dire statements. As every successful trial attorney knows, a great deal of groundwork can be laid during the voir dire phase of a trial. By focusing the jury's attention on this phase and reminding them of their duties, counsel imparts a sense of commitment and responsibility to the case. Jurors will realize that counsel kept his word and followed

through with his promises and now it is time for them to do the same.

§ 35.20 Differential Diagnosis—Traumatic Versus Spontaneous Injury

The first issue: Was this injury traumatic in origin or was it spontaneous? The answer is clearly that the injury was traumatic in nature. You heard the doctors discuss the medical investigative technique that was used to determine whether the injury was traumatic or spontaneous, a technique called differential diagnosis. Let's review differential diagnosis in this case as the treating physicians did and we will see that it leads clearly and convincingly to an injury traumatic in nature.

COMMENT: The defendant's main defense to the plaintiff's action involved the issue of causation. The defense claimed that it was coincidental that the plaintiff suffered a stroke while on the roller coaster and opined that the cause of the stroke was actually due to an abnormality in the plaintiff's arterial system. Here counsel reminds the jury that medical experts agreed that the plaintiff's injury was traumatic in nature.

§ 35.21 Plaintiff's History Does Not Support Spontaneous Clot Theory

The first element of differential diagnosis is Harry's family history. The fact: There is absolutely no Gambles family history of any nature that would indicate a spontaneous event.

The second element is Harry's individual patient history. There is absolutely nothing in Harry Gambles' personal history that would indicate that he was predisposed to a spontaneous clot. You recall the various tests, of the defendant's hired witness, Dr. Michael Westerly. Their witness said that the underlying disease processes that would cause a spontaneous event needed to be there. We considered Harry's history with respect to every one of them: diabetes, smoking, diet pills, birth control pills, heart condition, sickle cell anemia, and, of course, the ever famous "wonton soup syndrome." None of these indicators of a spontaneous event, not one of them applies to Harry Gambles. So, the second element of differential diagnosis, patient history, supports an event being traumatic in origin.

COMMENT: As Mr. Nations points out, there is no evidence of an underlying disease process which could have possibly caused the clot that developed in this 16-year-old's brain. As will be seen, counsel concisely breaks down the issue of causation step by step in order to emphasize that the plaintiff's injury was caused by traumatic pressure to his head and neck. It is clear that Mr. Nations has thoroughly prepared for this summation by paying meticulous attention to detail and focusing on the evidence which lends the most support to his theory of the case.

§ 35.22 Biochemical Experts Support Traumatic Injury Theory

The third medical consideration in differential diagnosis is the mechanism of injury. What physiologically occurred to Harry's body to cause the injury? Is it consistent with the subsequent findings, and does it support a traumatic event or a spontaneous occurrence? The mechanism of Harry's injury is undisputed. There are two biomechanical engineers who have testified in this case: Dr. Chandler, who came in from Iowa, one of the leading biochemists in the country, and Dr. Graham, whose NASA credentials you heard. They are outstanding bioengineers. Let's look again at the video graphic re-enactment of the stretching of the right vertebral artery over the cervical disc. Notice at the level of the tearing of the artery, the so-called first cervical vertebra, the formation of the clot, movement of the clot through the right vertebral artery to the basilar tip and blockage of the basilar artery cutting off the blood supply to the brain. You watched the medical graphic and heard each doctor and biomechanical engineer testify that "yes, you whip the head around in this fashion, it can clearly result in a tear of the right vertebral artery." Defendant's own expert, Dr. Graham admitted it. There is no question about it. Four doctors testified in this case: Fuller, Weaver, Henson—and even the defendant's witness, Dr. Michael Westerly—admitted the mechanism of Harry's injury.

Consider the mechanism of injury as described by defendant's biomechanical expert, Dr. Graham, in reporting to Astroworld before the final medical reports were drafted: "the acceleration forces involved in the violent movement of the head result in high tension forces which can tear or separate the vascular bed leading

to the bleeding within the vessels themselves;" which is exactly what happened to Harry.

So, all four doctors and both biomechanical engineers agree on the mechanism of this injury; that this could occur in precisely the fashion we have demonstrated to you on the medical video re-enactment all the way through the trial.

COMMENT: In this case, the medical doctors and the plaintiff's and defendant's biomechanical engineers agreed that the plaintiff's theory of causation was a significant probability in this case. With this kind of strong expert testimony on both sides backing up the plaintiff's case on causation, it was wise to emphasize this point early in the summation. Mr. Nations refers to the testimony of the defense witness to bolster the plaintiff's theory that the vascular event was traumatic in nature and the trauma was the G-forces applied to the plaintiff's neck on the roller coaster ride.

Psychologists advise trial attorneys to always argue climax—anticlimax. In other words, put the strongest argument first. Mr. Nations does an excellent job of using that psychological principle by first discussing causation. He builds upon each piece of evidence and testimony which bolsters his client's position until there can be no doubt that the plaintiff's injuries were caused by the improper design of the roller coaster's seats and the lack of upper body harnesses.

§ 35.23 Significance of Timing of Neurological Symptoms—Neurological Signs Support Traumatic Injury Theory

The next consideration in the differential diagnostic investigation is the onset of neurological symptoms. What occurred, and when did it occur? It is significant that the onset of neurological symptoms came immediately after Harry turned to his cousin and said, "That turn popped my neck." Then what happened? The first neurological symptom. Harry is rendered unconscious for a brief period of time. When he gets off the Cyclone, he vomits. The third very important symptom he experiences is blurred vision. You remember how important that is? Because we have this question about whether this is a basilar tip syndrome or whether it is mid-basilar. Remember what Dr. Fuller said about the importance of this symptom of blurred vision? The blurred vision indicates the involvement of the Circle of Willis, which

is located above the tip of the basilar artery. The blurred vision medically indicates that there was an occipital problem, which indicates that the blockage is in the basilar tip, not emanating in the mid-brain. This clearly supports traumatic origin of injury rather than spontaneous. Considering all of the neurological symptoms, they medically spell brain stem infarction, a traumatic event.

COMMENT: Whenever a case involves complex medical issues, it is counsel's duty to simplify the evidence and present it in a manner that the average person can understand. In this case, Mr. Nations takes the time and effort to help the jury sort out the confusing medical evidence, understand the arcane language, and apply it to the facts of the case.

Note that it is not necessary to repeat verbatim the testimony of every witness or describe every shred of evidence in great detail. Mr. Nations does a superb job of presenting the most significant pieces of testimony and evidence which support his theory of the case.

§ 35.24 Clinical Examination Supports Traumatic Injury Theory

The next thing in differential diagnosis is the clinical examination. Significantly, who did the clinical examination? Harry's treating physician, Dr. Weaver did the clinical examination. What is the advantage of that? Defendant's hired witness who never examined Harry Gambles, Dr. Westerly, admits that there is a substantial advantage in differential diagnosis to Dr. Weaver as Harry's treating physician, rather than someone in Dr. Westerly's position who is paid to read a cold medical record years later. Consider this carefully when deciding whether to accept Dr. Westerly's diagnosis of a spontaneous event or all of the treating physicians' agreed diagnosis of the episode being traumatic in nature.

COMMENT: In some jurisdictions, one can obtain a charge from the trial judge stating that a treating physician's testimony should be given greater weight than that of a physician who only examines the plaintiff one time for the defense or who merely reviews the medical records. In any event, counsel is free to undermine the credibility and testimony of an adversary witness during summation. Here Mr. Nations wisely points out that the defendant's expert witness did not physically examine the plaintiff and

therefore, his testimony should be deemed less credible than that of the plaintiff's treating physician.

§ 35.25 Consultants Support Traumatic Injury Theory

Dr. Weaver then followed the next step in differential diagnosis: He brought in consultants in the relevant specialties. Significantly, consider the quality of the consultants Dr. Weaver engaged. One of the world's leading neurologists, Dr. William Fuller. There is no question about that. One of the world leading neuroradiologists, Dr. Nick Brown, who is now head of neuroradiology at National Institute. Dr. George Cage, the head of T.I.R.R., a renowned radiophysiologist. Harry had a tremendous advantage of being treated in the Texas Medical Center, which allowed Dr. Weaver to bring in some of the world's finest medical experts to assist in saving Harry's life.

COMMENT: Often in personal injury actions, the final resolution of the case boils down to a battle of the experts. Thus, counsel wants to leave the jury with the impression that the plaintiff's experts are more knowledgeable and deserving of respect and deference than the defendant's experts. Note that Mr. Nations accomplishes this feat by praising his experts as opposed to condemning the defense experts. In the following excerpt, he employs the use of rhetorical questions to highlight the differences between the parties' experts and leaves no doubt that his client's experts are more credible and deserving of more respect than the defendant's experts.

§ 35.26 Jury Must Weigh Credibility of Experts

One of your vital roles as jurors is to weigh the credibility of the witnesses, especially the medical experts in this case. We have reviewed the thorough differential diagnostic techniques utilized by Dr. Weaver, Dr. Fuller and Dr. Brown, the treating physicians whose expertise saved Harry Gambles' life. Now let's compare the methods used by the defendant's hired witness. Dr. Michael Westerly of New York: What clinical examination of the plaintiff did he perform, what test did he conduct, with whom did he consult, what test results did he review? Answer: None.

What did Dr. Westerly, defendant's hired testifier do? Did Dr. Westerly call Dr. Weaver and ask him for a first hand account

of the clinical examination? No. Did he call Dr. Fuller and ask to discuss his entries in the medical records? No. Did he call Dr. Nick Brown and inquire "Is this an underlying congenital stenosis or is this a stenosis arising from the thrombosis?" No, he did no consultations. None. He did exactly what he was paid by the defendant to do. He sat in his office in New York, read the medical records and arrived at a pre-ordained opinion precisely in conflict with the opinion of the world renowned medical experts who actively treated Harry Gambles and whose expertise saved Harry's life. We brought you those experts to give you a first hand account from the witness stand as to the depth of their knowledge of Harry's condition and each of them agreed that his life threatening injury was traumatic in nature.

COMMENT: Here counsel notes that the defense witness is biased because he is in essence a "hired gun." Mr. Nations provides us with an example of great technique in contrasting the fine work of the treating physicians with that of the defense expert who simply looked at the medical records and provided a "pre-ordained opinion." The result is highly effective and should be emulated by trial attorneys.

Also note Mr. Nations use of rhetorical questions which can be an extremely effective tool if properly used. The answers to the rhetorical questions must be apparent. The purpose is to get each juror to formulate an answer in his own mind. The result is that the juror adopts the answer as his own conclusion and does not merely consider it as an argument given to him by the attorney. Because it is his own, the juror's faith or belief in that answer will be stronger and he will be less likely to abandon that opinion during deliberations.

§ 35.27 Diagnostic Tests Support Traumatic Injury Theory

Let's consider further the objective tests conducted by Dr. Weaver, the CAT scan and the angiogram. The first test, the CAT scan shows no bleeding in the brain. That's an extremely important diagnostic tool in this case, because it eliminates subdural hematoma, A.V.M., aneurysms, and numerous types of disease processes that potentially could have been the cause of Harry's injuries if they had been precipitated by a spontaneous event. Therefore, the CAT scan is a very important differential diagnostic tool in ruling out spontaneous event.

Next consider the differential diagnostic surgical procedure, the angiogram. Now let's recapture the situation here with respect to Dr. Weaver. Dr. Weaver, the father of subclavian arteriography, who has performed literally thousands of them is confronted with a young man who is about to die. There is no doubt about that in the record. Dr. Weaver conducts the extremely important angiogram and makes four very significant discoveries.

Number one, he tries to go up the right vertebral artery, and cannot. It is occluded. He backs out and goes up the left vertebral artery.

The second important discovery: when Dr. Weaver gets the dye into the basilar artery he sees the thrombosis. Knowing that there is a 95 percent fatality rate in basilar artery thrombosis, Dr. Weaver recognizes that this young man is about to die if he doesn't take the proper immediate action. The third event happens: Dr. Weaver sees reflux into the right artery, which hesitates for three or four seconds. The dye flowing downhill hesitates. Why is that significant? Dr. Weaver explained "because there is blockage there. There is a problem here in this area." Then the dye goes through and the fourth event occurs: Dr. Weaver sees the tear in the right vertebral artery.

COMMENT: Above, counsel succinctly breaks down the diagnostic evidence which supports the plaintiff's version of the facts. He is careful to describe the angiogram in a detailed manner using laymen's terms.

§ 35.30 Defendant's Challenges to Medical Treatment Lack Merit—No Need to Repair Vertebral Artery

Now Defendant raises three issues as to Dr. Weaver's actions at this point. One, why did he not take a picture of the tear? Two, why did he not record the tear in the medical record? And, three, why didn't he do surgery to repair the tear?

The answer to the first two inquiries is Dr. Weaver was not acting as a neuroradiologist in this case, consulting with someone else and reporting to a treating physician. Dr. Weaver was the treating physician. He was the one that needed to know that the tear was there and, as he explained, the tear was not clinically

important, because Dr. Weaver could see that the tear needed no surgery. It needed no repair because it self heals.

As defendant's medical witness, Dr. Henson explained on cross-examination, "Yes, we get tears in arteries when we are doing arteriography. But you get the tear in this fashion, and then you go through adhesion and aggregation. Platelets immediately start filling in here. They adhere to this area. Then they aggregate to each other. Then they build up. They keep the aggregation going until they move into the bloodstream. The bloodstream breaks the clot loose. But when it breaks the clot loose, you have gone through a self-healing process of the artery right here. That's why there is no need for surgery, because it self-heals."

Additionally, there is no surgery that can be done in that area. You don't do surgery in the lower area, because you can't get access through the bony area because of the transverse processes. You will recall that I asked Dr. Henson on cross examination: "What corrective surgery can you perform when you tear an artery doing an arteriogram?" Dr. Henson replied "None."

To answer the defendant's inquiry as to why Dr. Weaver did not do surgery to repair the tear, first, there is no surgery needed. Second, there is no surgery that can be done.

COMMENT: Mr. Nations methodically dissects another defense argument and demonstrates that it has little, if any, merit. Anticipating defense arguments is very important during this phase of the trial. It is necessary to minimize the impact these arguments will have on the jury. Thus, it is usually best to face them head on and dispel their significance.

§ 35.31 Final Diagnosis—Traumatic In Origin—Not Made For Lawsuit

One additional factor which I suggest that you take into account in weighing Dr. Weaver and Dr. Fuller' testimony against the contrary testimony of Dr. Westerly is that not only did Dr. Westerly not consult with anyone, not have the advantage of a clinical examination, and not conduct any test. It is extremely important that you take into account that Dr. Westerly did not even bother to look at the angiograms or the CAT scans before rendering his decision that this event, which crippled Harry Gambles for life, was spontaneous in nature.

The evidence preponderates heavily that the event was traumatic in nature. Look at the medical records made at the time of the event. Dr. Fuller and Dr. Weaver wrote: "Final diagnosis: thrombosis of basilar artery, traumatic in origin."

Significantly when this medical record was made there weren't any lawyers involved then. There wasn't any lawsuit. There wasn't any jury to try to impress. The treating physicians simply wrote that because that was their diagnosis. I think it is also very important that the jury consider that when Dr. Fuller and Dr. Weaver acted on that diagnosis, the results were immediate and Harry's life was saved. Thus, Dr. Fuller and Dr. Weaver were 100% correct in their diagnosis and in their treatment and the evidence is clear that they are also 100% correct that this was a traumatic event.

Most significantly, remember the admissions by defense witness, Dr. Westerly on cross-examination: "Doctor, if you had been presented with all this evidence that Dr. Weaver saw on differential diagnosis, you wouldn't fault his decision that it was traumatic in origin, would you?"

"No, I wouldn't."

"And, Doctor, you would have made the same decision, confronted with those same diagnostic results, wouldn't you?"

"Yes."

So the vascular event is clearly traumatic in nature and the trauma was the G-forces applied to Harry's neck on the roller coaster ride.

Now let's look at what Dr. Westerly says happened and let's see what evidence there is of it. What is Dr. Westerly's theory? You will recall that I asked him on cross-examination: "Doctor, as I understand what you are saying, you contend there is a congenital narrowing of the artery rather than a traumatic narrowing. Doctor, what happened to that congenital narrowing of the artery? There is no clot. There was no event. Nothing happened. Is it your testimony, Doctor, that nothing happened?"

Dr. Westerly replied, "That's right, nothing happened."

Just like that. Out of nowhere, it all blocked up. No clot; no event; no nothing.

COMMENT: Mr. Nations successfully undermines the theories of the defense expert by demonstrating that he failed to consider important information. Moreover, he reminds the jury that the defense expert made crucial admissions as to the plausibility of the plaintiff's theory of causation. Note that Mr. Nations refers to specific questions asked by him during the cross examination of this witness. This will jolt the jurors' memories and, if they had not realized the significance of the testimony at that time, they surely do now.

§ 35.32 Jury Must Weigh Evidence and Testimony

Thus, as jurors you must decide whether to accept the medical theory of Dr. Weaver, who actually conducted the arteriogram, who personally saw the thrombosis in the basilar tip and who personally saw the tear in the right vertebral artery or you must accept Dr. Westerly's theory that nothing happened. The two medical theories are mutually exclusive. In order to accept Dr. Westerly's theory that nothing happened, it is necessary that you totally reject the medical testimony of all three treating physicians. Medical testimony aside, common sense dictates that something happened during the roller coaster ride which caused Harry Gambles to begin experiencing neurological symptoms of unconsciousness, vomiting, blurred vision, dizziness and slurred speech. The medical theory of the treating physicians, which has been demonstrated to you graphically, testified to under oath and is contained in the medical records which were written at the time of treatment, all confirm that the event which has lead to Harry Gambles' lifetime of disabling injuries was traumatic in origin and that the trauma was the violence created by the application of excessive G-forces to Harry's unrestrained neck during the roller coaster ride.

COMMENT: Mr. Nations does an excellent job of summarizing the jury's duty with respect to weighing the evidence on the issue of causation. Note that he does not emphatically demand that the jury accept the plaintiff's rendition of causation, but subtly reminds them that not only does the medical evidence support the plaintiff's theory, but so does common sense. He makes a very strong case for his argument that his client's injuries were caused by the traumatic stress of excessive G-forces.

§ 35.33 Necessity for the Administration of an Anticoagulant

Now let's address the inquiry raised by the defendant. Defendants ask: "Why did you give an anticoagulant if you had a tear in the artery?" There is a very simple answer to that. You have a blockage in the basilar artery that's killing this young man by cutting off the blood supply to his brain. The way to eliminate that blockage is to give an anticoagulant that breaks it down and allows the blood to flow again. That's what happened. It saved the young man's life.

COMMENT: One of the weaker arguments put forth by the defense was that the administration of an anticoagulant was not consistent with the discovery of a tear in the basilar artery. Mr. Nations dismisses this issue by explaining the purpose of the anticoagulant with respect to the blood clot which threatened the plaintiff's life.

§ 35.40 Testimony of Defendant's Seat Design Expert—Changes To Seat Made—Number of Injuries Dropped

The next thing we come to is the hiring of Dr. Carter Graham. Now, make no mistake about it, as a result of this suit being filed, Dr. Carter Graham was hired to aid in the defense. Dr. Carter Graham told Astroworld: "You have got a problem with the seat design on this roller coaster. You had better replace them." They replaced them. Injuries dropped drastically. So, if nothing else good comes from this lawsuit, at least it forced Astroworld into replacing the seats on this roller coaster, thereby rendering it safer for all of our children.

Let's look at the situation which Dr. Graham confronted. In his first visit at Astroworld they told him about the accidents that occurred during the first 23 days: 55 accidents; 16 major injuries; 39 minor injuries. Then they talked about Harry Gambles' case. Think how easy it was to solve this problem. After that, Dr. Carter Graham did not say, "Let me go ride the roller coaster. Let me observe the ride in action. Let me walk the track." Dr. Carter Graham said the obvious thing: "Let me look at the seats."

After 45 minutes of looking at the seat design, Dr. Graham said: "Monty, you have got a problem. These seats are not

adequate for handling the lateral loads." The ones he refers to in this letter: "You need to add padding to the lap bar. You need to add padding to the seat. You need to add padding to the back. You need to incline the seat. You need to protect and restrain the rider all the way around. Restraints on the side, restraints along the back." You saw the pictures of what he did to the cars. But one thing that you will want to consider: What happened after he made the changes? This is our evidence in the case. The year before he altered the seats, 19. ., 143 total injuries recorded, of which 59 were head and neck injuries. The year after he made the modifications: 22 total injuries, of which only seven were head and neck injuries.

Now, we went over these 22 injuries with you—remember all the knee injuries. It was a whole different problem. So, the neck problem was solved by changing the seats on the roller coaster, which they did as a result of us filing this lawsuit and proving the design defect on discovery.

COMMENT: Generally, evidence of remedial measures are not admissible, however, Mr. Nations was determined to get this information into evidence and developed several different theories as to how to justify the admission of the changes on the roller coaster. In the end, the defendant did not object to the introduction of evidence depicting the seat's modifications. The defense took the position that the the defendant was always upgrading the roller coaster's equipment and that the changes had nothing to do with the plaintiff's injuries. In fact, the the defense was afraid that if the subsequent changes were not admitted, it was likely that one of the jurors had ridden the roller coaster in the five years since the plaintiff's accident and would know about the changes anyway.

§ 35.41 Defense Expert Recommends Accelerometer Testing

Now, remember the next thing that we talked to Dr. Graham about? "Doctor, if you had been hired in 19. . would that first 23–day report, with 55 accidents in it, indicate to you that a problem existed?"

He said, "Yes, it would. I would want to do accelerometer testing to see what the forces are, and so forth." And he recommended accelerometer testing for the purpose of protecting

passengers. The defendant's representative, Mr. Jenson said, "We didn't do accelerometer readings to protect passengers. We did accelerometer readings for maintenance problems."

COMMENT: Counsel does an excellent job of summarizing pertinent testimony to demonstrate the defendant's negligence. Rather than just tell the jury that the defendant should have performed accelerometer testing to protect passengers, he refers to the actual testimony, thus, adding to the impact this information has on the case.

§ 35.42 Defendant Had Notice of Seating Design Defect

And let's talk about notice of the injuries as constituting a pattern. What notice did they have, and what they could have done in 1976.

In terms of accident history pertaining to the Cyclone, it is a fact that the incidents of injury involving the head and neck are quite high. This is to be expected, in light of the almost total encapsulation of the lower body and by the physical characteristics of the seat and associated restraint straps and lap bar. That's exactly what I questioned him about: "If you lock the lower body in, and let the upper body whip about, you are going to get this type of injury," as Dr. Graham agreed. This leaves the upper one-third of the body subject to the acceleration forces. Dr. Carter Graham told Astroworld, "Your problem is lateral forces, not having the head restrained." He solyed that problem by changing the seat design, and the injuries dropped off appreciably.

COMMENT: Note that Mr. Nations uses the testimony of the defendant's own experts and employees to verify the fact that it had notice of the hazardous condition, yet did nothing to remedy the situation. Using the testimony of the adversary's witnesses often has greater impact than referring to one's own witnesses.

The Court is asking you if the Cyclone was defectively manufactured. Now, what is meant by the term "manufactured?" You understand that there is no problem with the superstructure. When Astroworld's roller coaster generated excessive G-forces, they had the obligation to their customers to restrain them in such a way as to effectively deal with the forces. There is no problem

with normal G-forces. The forces are fine, so long as riders are adequately restrained, in order to cope with them. When the Court asks you concerning the roller coaster: "Was it defectively designed?" look closely at the definition given to you by the Court of "defective design." Is it unreasonably dangerous, taking into account the utility of the product weighed against the risk involved in its use?

COMMENT: It is always important to explain important definitions during the closing argument. Above, counsel provides a definition which is easily understandable to the lay jury.

§ 35.43 Risk Was Easily Eliminated—Change in Restraints Emphasized

Now, what is the utility of the product? A thrilling ride. What is the risk involved in its use? The risk is head and neck injuries, and injuries of other types. Can you eliminate the risk without affecting the utility? Answer: Yes. It was done. As a result of this lawsuit being filed, Astroworld made changes that greatly reduced the risk while keeping the utility. It is still a thrilling ride out there today. They still fill it with riders every time they run it, as Mr. Gorman, the park superintendent told us. So, by the definition of "unreasonably dangerous," this was a very high risk of injury to passengers that was unnecessary, which could be very easily eliminated without affecting the utility of the ride. If they had done this before Harry Gambles rode the roller coaster he would be healthy and happy today and we wouldn't be here.

And remember what they did to eliminate the risk? In their own maintenance shop they used a naugahyde padding and wood for framing. They spent $5,000 to correct this problem in 19. . that they should have corrected ten years earlier in 19. ..

Ladies and gentlemen, they have spent more money hiring expert witnesses to come to this court and deny their responsibility than they spent curing the problem. And I submit to you that it could have been done—as Carter Graham said, "If I had been hired in 19. ., I would have done the same thing then."

COMMENT: The above statement sums up the plaintiff's case in a brief and succinct manner. Counsel lets the jury know that the plaintiff's injuries could have been easily and inexpensively avoided. Counsel makes the excellent point that the defendant

spent more money hiring expert witnesses than it spent on curing the problem. Clearly this point will not be lost on the jury. The remedy to the inappropriately-designed seats was immediately available at practically no cost.

§ 35.44 Experts Agree Seat Was Defectively Designed

There have been three seat experts to testify in this case. Our expert, Dr. Ray Benton, in charge of seat design at NASA for every space vehicle from Mercury through the Sky Lab that is circling the earth today. Our expert, Ron Herman, worked on the same NASA programs. Including Defendant's expert Carter Graham, all three of those gentlemen agreed this was a defectively designed seat that needed to be corrected. How many seat design experts came into this courtroom and said there was nothing wrong with those seats and nothing needed to be done to restrain these customers and to protect our children from those violent forces? None. Not a single one.

Thus, you will have no difficulty with the question as to whether the seat was defectively designed. All of the seat experts, plaintiff's and defendant's, agree that it was.

COMMENT: Obviously, counsel has done his homework and retained distinguished experts to testify on behalf of his client. He highlights the witness's expertise in a manner which will not likely be forgotten by the jurors. Moreover, he makes the important point that even the defendant's seat expert agreed that the seat was defectively designed.

§ 35.50 Defendant's Negligence—Defendants Had Knowledge of Prior Accidents

Next, when you consider the issues on whether Astroworld was negligent, consider: Were they negligent in light of the knowledge that they had of prior accidents? The pattern that was there? Look at the nature of the injuries arising out of those accidents. Look at the compression fracture. Look at all the head and neck injuries. Look at the pattern contained in these accident reports. There was a pattern of injuries occurring in the same location: at the upper south curve, first drop; upper south curve, first drop; upper south curve, first drop; over and over and over. My neck

was popped. My neck was popped, my neck was popped. My head; my shoulder. All upper body; case after case. Those establish a pattern. As Dr. Graham refers to it, the history of injuries showed a definite pattern.

COMMENT: Counsel does a superb job of summarizing the fact that the defendant had notice of a pattern of injuries: a key issue in the case. Again, note Mr. Nations' referral to pivotal testimony to highlight the defendant's liability.

§ 35.51 Defendant's Failed to Look for Injury Patterns

But they had no one looking for patterns. They did not have anyone who sat down with those accident reports and said, "Let's compare to see what patterns are occurring here? Do we have one area of the roller coaster where more injuries are happening? Do we have a pattern of similar types of injuries that we need to address?"

They absolutely ignored it. And I submit to you that ignoring the patterns, created the problem. Ignoring the patterns ignored the problem. Ignoring the patterns failed to eliminate the problem. Ignoring the patterns constitutes negligence on the part of Astroworld.

And when you consider negligence, when you measure their conduct to decide if they were negligent, read carefully the test that the Court asks you to apply to their conduct: Is this something which a very cautious, very competent and very prudent person would have done under the same or similar circumstances? I submit to you that a very cautious, very competent and very prudent person would have recognized the pattern of injuries; would have recognized the problem, and would have achieved the very, very simple solution many years earlier. If they had done so before Harry Gambles' disastrous ride, we wouldn't be here today, ladies and gentlemen.

COMMENT: Wisely, Mr. Nations stresses that there was a pattern of injuries which occurred over the last two decades. He points out that despite this information, the defendant never reviewed the injury reports or looked for injury patterns. The reports went untouched even though there were numerous complaints of head and neck injuries related to one specific area of the roller coaster.

Whenever there is overwhelming damaging evidence such as this, it should be repeatedly driven home so that the jury cannot possibly miss its significance.

§ 35.52 Defendants Lost Early Accident Records

Even when they did a major overhaul on the Cyclone in 1981, they had accident records. Astroworld doesn't have the accident records now from 19. ., 19. ., 19. . and 19. .. So we don't know what those accident statistics were. We extrapolated the figures. We do know this: there were enough of them that they caused a storage problem. Mr. Gorman said "No, we had to move those injury reports out because they were causing a storage problem. So, we disposed of them." It is clear that in 19. . when they did a major overhaul, they did not address this problem of a pattern of similar injuries.

COMMENT: Missing evidence is always troubling, and it must be pointed out to the jury when appropriate.

§ 35.53 Defendants Negligence Stressed

Now, Mr. Simon, the attorney for the Astroworld is going to tell you that this is one isolated event out of 8,000,000 passengers who have ridden this roller coaster. That this is a stroke. That Harry Gambles is the only person that has ever had a stroke on this or any other roller coaster.

First of all, the number 8,000,000 was an estimate by Mr. Gorman as to how many people have ridden the roller coaster. I submit to you that that's not the best evidence. The best evidence would have been the turnstile count which they said they did not have. But that's not in the record. So, let's deal with the 8,000,000 estimate.

First of all, if you say 8,000,000 people rode the Cyclone, that's simply not true, because there were not 8,000,000 different people. You have the same people riding the Cyclone over and over and over. You heard Dr. Ray Benton and Dr. Fuller say that the people who would ride the Cyclone over and over would be the ones who are not experiencing the problems. The people who ride it once and never ride it again are the people who have those physiological effects. The people who ride it over and over

are the ones that get the thrill of it without having any physiological effects. So, we don't know how many different people have ridden the Cyclone.

But it doesn't matter, because we are not dealing with one clot. We are not dealing with one stroke. We are dealing with years and years and years of head injuries and neck injuries that should have put them on notice of the nature of the seat design problem. We are dealing with a failure to recognize a pattern of injuries, a failure to determine the cause of the injuries and a failure to correct the problem that caused the injuries, namely, defectively designed seats.

COMMENT: Mr. Nations does a wonderful job of summarizing the strong points of the plaintiff's position on liability and driving them home before turning to the subject of damages. One should always plan a strong ending to the liability portion of the summation by reinforcing the defendant's culpability. Notice how counsel stresses the fact that numerous injuries have occurred since the Cyclone opened and that it had a major overhaul several years later. He also reminds the jury that the defendant did nothing about these injury reports despite the fact that they were receiving repeated complaints about neck and head injuries. When there is damaging evidence, like this, one should drive it home in summation as Mr. Nations did here.

§ 35.60 Special Damages

Let's talk for a moment about the damages in the case. On Issue No. 5 there are two types of damages. First we have what we call the special damages, which would be, in this case, the medical expenses and the damage to wage earning capacity.

COMMENT: In this portion of the summation counsel breaks down each aspect of the damages. This presentation is highly effective, easy to follow and comprehend. Moreover, it underscores the devastating injuries suffered by the plaintiff. Mr. Nations draws upon the emotional nature of the damages, yet presents the information in a logical and straightforward manner without histrionics.

§ 35.61 Medical Costs Are Undisputed

The medical expense proof in this case is really undisputed. Past medical in this case is $182,648. The future medical is

$74,000, based upon the rehabilitative care that Dr. Pollock testified that Mr. Gambles needs: cognitive rehabilitation, job coaching, and psychological counseling, that total $74,000. And again, that figure is undisputed.

But let me remind you of what Dr. Pollock said: We are not in a position to effect a cure or a total rehabilitation for Mr. Gambles. He has been rehabilitated to the extent that he can. He is as good as he is going to get. Why? Because he has brain damage. That portion of the brain that was denied oxygen by the cut-off of the blood flow is dead. He is never going to regain use of his left arm, or his left leg regardless of how much therapy he has. His disabilities are permanent.

The purpose of therapy is twofold: First, to help him cope with living as a handicapped person in our society. To train him psychologically to meet job requirements, so that he can compete in our job market. Secondly, to help Harry cope with his mental anguish. We are going to talk about mental anguish more in just a moment.

COMMENT: It is important for the jury to understand that the plaintiff's injuries are severe and permanent. They must realize that the plaintiff has reached his potential in regard to his physical abilities and will not proceed beyond this point. Counsel makes certain that the jurors understand the devastating nature of the plaintiff's injuries and the medical reasons for his treatment and therapy.

§ 35.62 Loss of Earning Capacity

Now let's talk about the other element of special damage, which is wage earning capacity. In the past we are claiming nothing for the last five years. We claim no damage to his wage earning capacity. Why? Because during that time frame he would have still been in school. He wouldn't have been earning wages. He would have been a student in high school and college. So, the answer to that is zero.

The evidence of future damage to wage earning capacity comes from two sources. First of all, Dr. Cloninger testified that the average starting salary in the accounting market, if he had been allowed to complete his Bachelor's work, is $25,000 per year. You understand from Dr. Pollock that Harry is unemployable.

However, we are saying that, because of the tenacity and personal integrity of this young man, if he gets the rehabilitation, we are giving him the benefit of the doubt that he will be able to compete for a minimum wage job or $7,000.00 a year. That makes the damage to wage earning capacity $18,000.00 per year. You heard the statistics from Dr. Cloninger and his chart is in evidence. If you look at $18,000 per year, you project it over the rest of his life, and discount it to present value—which is exactly what Dr. Cloninger did—that arrives at Harry's future damage to wage earning capacity in the amount of $666,648.

The defendant's annuitist, Mr. Bass, testified that he is familiar with the Big 8 accounting firms. In addition to the salary, they have benefit packages that total 7.8 per cent of annual salary. We have to take the loss of salary and add that to it. That totals $51,000 bringing Harry's total damage to wage earning capacity to $718.646.

COMMENT: The foregoing discussion addresses the effect of the plaintiff's injuries on his future earning capacity. Although it can be a very confusing topic, counsel does an excellent job of making the information useful and understandable. Note that he does not ask for the maximum amount, instead he requests a reasonable amount. This leaves the impression that counsel is a fair man who is only seeking just compensation for his client.

§ 35.70 General Damages—Pain and Suffering

Now let's discuss Harry's general damages of mental anguish, physical pain and suffering, physical impairment and disfigurement.

The pain and suffering is obvious. Mr. Gambles still has pain down the left side of his body. He has to wear a TENS unit, a device that sends electrical stimulations in response to muscle spasticity to relieve the pain. Harry wears a TENS unit today. He has worn a TENS unit since he got out of rehabilitation, and he will wear a TENS unit the rest of his life, to help him cope with the obvious pain.

Pain has been appropriately described as a window into hell. People who are in pain often beg for death. No one begs for pain. But as a result of Astroworld's negligence, Harry Gambles has endured five years of physical pain and suffering and is confronting 47 more years for which the law says he is entitled to be fully

and justly compensated. Further, as jurors you are the guardians of that law and it is part of your duty as citizens to decide the amount of the full and just compensation to which Harry is entitled.

COMMENT: Counsel does an excellent job of describing the plaintiff's severely debilitating pain. It is important not to overstate or overexpose the jury to the plaintiff's pain and suffering because they may be psychologically overwhelmed by the thought of living in agony for the rest of their lives and inadvertently block out the picture of continuous suffering. Rather than detailing every aspect of the pain and suffering faced by the plaintiff on a daily basis for the rest of his life, Mr. Nations subtly reminds the jury that the plaintiff will require the use of a specially designed unit to decrease his pain until the day he dies. This type of understatement generally has a greater impact than a lengthy discussion of the suffering faced by the plaintiff every day of his life.

§ 35.71 Mental Anguish

The next element of damage is mental anguish. Listen to what Dr. Pollock said about Harry's mental anguish: "This young man is in the first percentile for severe depression in the world." What does that mean? That means that 99 per cent of the people in the world are less depressed that Harry Gambles.

Can we possibly identify with that level of mental anguish? That, however, is a very important part of your task as jurors. While none of us like to confront physical pain and suffering or mental anguish of others, it is absolutely crucial to the rendering of full justice in this case that you, as jurors, confront and carefully consider the value required to compensate for the mental anguish and physical pain and suffering which Harry Gambles must confront on a daily basis for the remainder of his life. Only through your willingness to discuss and evaluate Harry's physical pain and suffering and mental anguish can an adequate award be achieved or full justice rendered to this fine young man.

COMMENT: Again, Mr. Nations wisely chooses understatement as a way of discussing the plaintiff's mental anguish. Every experienced trial attorney knows that this is an area that must not be overdone with a display of histrionics.

§ 35.72 Physical Impairment

The next element of damage is Harry's physical impairment. This refers to Harry's inability to do all of those activities that he could do before the injury, which have nothing to do with his wage earning capacity. Harry doesn't participate in the church's social and athletic activities as he did before his injury. He goes to church but he doesn't interact with the other youngsters. He doesn't go fishing anymore with his dad. He doesn't go swimming at the beach anymore. He doesn't go to the social functions. He doesn't go dancing. All the long list of things that he used to do before. He doesn't walk 25 miles anymore to raise funds for crippled children as he did before the injury. Now, what does that tell you about this young man? He can't do these things anymore. That's physical impairment.

COMMENT: The physical disabilities that the plaintiff has suffered as a result of his injury have clearly had a tremendous impact on his activities. Thus, Mr. Nations takes a moment to outline a few key ways in which his client's daily life has been effected by his injuries. Again, understatement is the best route to take in such cases.

§ 35.73 Disfigurement

The next element of damage is disfigurement. Disfigurement is how Harry is perceived when we look at him. How his body is physically disfigured, and the mental anguish he suffers as a result of such disfigurement. The disfigurement in his case is that he has to hold his left arm in this fashion. And when he moves, as he testified, he has to turn his left hip, so he can walk, but not in a normal fashion. He has to walk in this fashion. And that is disfigurement. And that's something that he will have to deal with for the next 47 years.

COMMENT: The best evidence for demonstrating the plaintiff's disfigurement is his own appearance at the trial. The jurors have seen his condition with their own eyes so there is no reason for counsel to dwell on the subject during closing argument. Instead, the jury is simply reminded of the extent of the disfigurement.

§ 35.80 Segmental Approach to Damages—First Segment—Initial Hospitalization and Rehabilitation

Now we come to the evaluation of these elements of damages. While that is clearly your job, let me suggest a segmental approach, that is, Harry's history since the injury divides easily into segments. The first segment begins the day Harry regained consciousness in T.I.R.R. and lasts until he was released from rehabilitation and sent home. As you see from the chart, that was a period of 248 days. What was his condition during this 248 days? Did he experience physical pain and suffering, mental anguish, physical disability, and disfigurement? Let's review the evidence. When he awakened he was paralyzed from the neck down. He had a trach tube in. He was being fed by IVs. He could not speak. He could communicate with his family only by blinking his eyelashes. He would blink once for yes; twice for no. That's the condition he found himself in when he awoke from the coma. When you consider physical impairment, consider that this is as total as physical impairment can be - 100 per cent.

Mental anguish. It is your job to evaluate Harry's mental anguish. You must consider the fear, frustration and constant mental agony that would inevitably accompany awakening from a coma to find that you have the total inability to move any portion of your body from the neck down; that you are totally unable to speak or cry out for help and you are completely overcome with the fear that this is a permanent condition. Harry's fear was overwhelming, his mental agony was constant and all of his dreams for the future were completed destroyed.

Ladies and gentlemen you need to consider the incredible strength, courage and personal integrity of this young man, Harry Gambles. Confronted with total disability, did he give up? No. This brave young man started as a newborn child. He had to learn all over again how to say "Daddy" and "Mama." He slowly and painstakingly learned to speak, to read, to write, to learn to communicate. He had to learn to hold a knife and fork and work his way through infancy and childhood once again. Harry endured one of the longest rehabilitative programs in the history of Texas Institute Rehabilitation and Research (T.I.R.R.). But because of his personal tenacity, personal integrity, and his

willingness to fight, this very admirable young man came back. Thank God, he made a remarkable recovery. And he is not through. He is going to do better. But when you look at that 248 days in T.I.R.R.; in the hospital, when he was going through that painful and frustrating rehabilitation on a day by day, hour by hour, minute by minute basis; you have to confront, measure and evaluate Harry's mental anguish.

And you have to measure, physical pain and suffering, physical impairment and disfigurement which Harry also endured during this period.

I'm going to suggest to you that the figure that will compensate for that is no less than a thousand dollars a day. That's where this figure on our damage board comes from. $248,000 for the period in T.I.R.R.

COMMENT: In those jurisdictions which allow a per diem argument, a basic rule to follow is not to overuse the per diem argument when discussing money damages. Generally, the per diem argument should only be used in those cases involving severe and constant pain, such as the plaintiff's, and where that pain and suffering is not disputed by the defense.

§ 35.81 Second Segment—Release from Rehabilitation To Day of Trial

A second segment of time for your evaluation is the 1,478 days as indicated on the chart. This is the time from Harry's release from the rehabilitation unit through today.

1478 days after he was released from the hospital Harry is still suffering physical pain, physical impairment, mental anguish, and the pangs of disfigurement 16 waking hours of every day.

There is not one waking moment of one hour of one day that Harry is free from physical disability, mental anguish and disfigurement, which he suffers as a result of Astroworld's negligence. Since Harry suffers minute by minute, and hour by hour, let me suggest that you evaluate his suffering in the same manner, hour by hour. Determine what will fairly and reasonably compensate Harry Gambles for one hour of mental anguish that he must endure. I submit to you that for this time segment, from Harry's rehabilitation release to the time of trial, a period of 1478 days,

that at least $10.00 per hour represents a minimum figure for fair and just compensation for the mental anguish which Harry endured during that time frame.

How do we measure the mental anguish monetarily? One thing to consider is what do we pay to avoid physical pain and mental anguish. We pay $30.00 for a shot of Novocain to avoid 30 minutes of pain and suffering in the dentist chair, and think nothing about it. How many of us have gone to the dentist and said, "No, just get out your drill. Forget the Novocain shot. I'll take the pain. I want to save my $30." That's a dollar a minute we gladly pay to avoid pain and mental anguish. If we pay one dollar per minute to avoid physical pain and mental anguish, does $10 per hour begin to reasonably compensate for the enduring of the constant mental anguish which Harry Gambles has lived with, minute by minute, hour by hour and day by day for the last 1478 days. That is your determination.

In this second time segment which is delineated as phase two on our damages chart, Harry has suffered sixteen hours of mental anguish per day for 1478 days for a total of 23,648 hours. If you determine that $10.00 per hour is enough to compensate for Harry's mental anguish during this time frame, then you should award $236,480.00 for the phase two mental anguish.

COMMENT: In this segment, Mr. Nations has done an excellent job of analyzing the day-by-day, minute by minute torture that the plaintiff still suffers. He highlights the mental anguish, depression, impairments and disability for every waking moment. Notice how reasonable Mr. Nations appears by not asking for a dollar per minute but cuts it down to ten dollars an hour. It is always wise in a serious injury case such as this not to overreach.

Note the use of the Novocain analogy. This is an analogy that every juror can relate to. This is a tried and true analogy that has been used by numerous trial attorneys for many years. Although it has been used before, there is no reason why it cannot be used in every summation where it is applicable. Lawyers may have heard this analogy before, but jurors have not. Counsel should note however, that this analogy should only be used in serious cases where there is proven unrelenting physical pain.

§ 35.82 Phase Two Figure For Physical Impairment Suggested

The next element of damage is Harry's physical impairment during the phase two time frame. We respectfully suggest that his physical impairment was so overwhelming, so frustrating and so devastating to him during the time from the release from the rehab through the present date, that the same figure of $10.00 per hour would be a fair and reasonable compensation. Therefore we suggest $236,480.00 for the phase two physical impairment which Harry has suffered through today.

With respect to pain and suffering and disfigurement during phase two we suggest that two dollars per hour is a reasonable compensation for physical pain and two dollars per hour is a reasonable compensation for physical disfigurement. When you consider the litany of disabilities which Astroworld has thrust upon Harry Gambles, remember that, as Americans, we have a Constitutional right to be free from pain and mental anguish. The government of the United States and the various states can inflict death but, in our society, physical pain and suffering is viewed with such horror and disdain, that we have a constitutional right to be free from it. That right has been taken away from Harry Gambles by Astroworld.

COMMENT: A perplexing problem faced by plaintiff's attorneys is that a verdict of money damages will not restore the plaintiff to his former self, thus, juries are often hesitant to award large verdicts. It is always important that the jury fully understand that the only way to administer justice in personal injury cases is to award money damages. Mr. Nations does a superb job of getting this point across.

§ 35.83 Phase Three—Future Damages—$5 Million is Reasonable

We are going to talk more about the future damages, which are delineated on our damages chart as phase three. However, since Harry has the burden of proof, I have the right to open and close the argument. I have the privilege of addressing you now, and Mr. Simon will argue and then I will have the final opportunity to speak to you. We will talk more about Harry's damages at that point.

As we sit here today, this young man has a 47–year life expectancy. He is looking into the year 2,036. And you have got to remember that on voir dire examination I asked you: "Is there any member of this panel who, if you are chosen as one of the 12 jurors in this case, who will not be able to project damages and award damages for 47 years in the future?" Because the fact is, with irreversible brain damage, this young man is going to be physically impaired in the year 2,030. He is going to have mental anguish in the year 2,020. He is going to always have the disfigurement. So, it is your job to project 47 years into the future and award damages accordingly.

You will also recall that I asked you on voir dire examination, is there any member of this jury panel who, if the evidence in this case supports it, cannot bring back a verdict in excess of $5 million? Ladies and gentlemen, the evidence in this case clearly supports damages in excess of $5 million.

You say, but $5 million is so much money. True, 52 years of having a large portion of your life destroyed and living with the remains is a lot of mental anguish. It is a lot of disfigurement. It is a lot of physical impairment. It is a lot of physical pain and suffering.

Is $5 million nearly enough money to fairly compensate Harry for a lifetime of disabilities? How much is $5 million to compensate for 47 years of physical pain and suffering, mental anguish, physical disability, disfigurement, damage to wage earning capacity and medical expenses? Ladies and gentlemen, we live in a society in which $53.9 million was recently paid for what? Paint on canvas. Irises, by Van Gogh. Why? Because it was the work of a master. Is $5 million, less than ten percent of the cost of that painting, nearly enough compensation for waking up every morning of your life for 47 years confronting Harry's physical disabilities, his mental anguish, his physical pain and his disfigurement? Is 10 per cent of the price of a painting enough compensation for a lifetime—a lifetime—of waking up every morning of your life with this physical disability? And with this mental anguish? Is $5 million nearly enough for 52 years of pain and suffering, mental anguish and physical disfigurement? I submit to you it is not. Not at all.

COMMENT: Here counsel does an excellent job of making a very large figure sound reasonable. When discussing future damages, even the most experienced trial attorney can have difficulties expressing the significance of a period of time, such as 47 years, and how to assign a value for living with injuries for such a long time. This is particularly true when discussing damages in the millions of dollars because the average juror has difficulty relating to such large amounts of money. Most jurors cannot conceive of having that kind of money in their collective lifetimes.

Here, counsel helps the jury to accept his figures through one of the most powerful tools one can use in summation, analogy. He refers to the "Iris" painting by Van Gogh which recently sold for $45.9 million. He then analogizes that to a verdict for human pain and suffering over 47 years and concludes that 10 percent of the price of a painting is not an unreasonable figure. In any case where large damages are sought, this type of analogy can be used.

§ 35.84 Race Horse Analogy—Half Justice is No Justice

We talked about evaluating one hour of mental anguish at $10.00 per hour. Counsel for the defense will say $10.00 per hour is just too much money to reasonably compensate for a devastating level of mental anguish which places Harry, according to Dr. Pollock, in the highest one percent of the world's misery index. But your job, among others, is to apply our societal standards to reasonable compensation. Ladies and gentlemen, we live in a society in which two men by the names of Spinks & Tyson recently split $23 million for 93 seconds in a boxing ring. Can $10.00 per hour even begin to reasonably compensate Harry Gambles for what he is destined to endure for the remainder of his life. That ladies and gentlemen is your determination.

Ladies and gentlemen, my last plea to you before I sit down is going to be that you meet your obligation as jurors and render full, complete justice for Harry Gambles. Full, complete justice means awarding absolutely full, total compensation for the disabilities which this young man is forced to endure. Anything less than full justice is injustice. Permit me, if you will, to give you one last example of what I mean by full justice.

Assume that instead of injuring Harry Gambles on a roller coaster, an Astroworld truck in the Astrodome parking lot had

run into a horse trailer and killed Seattle Slew, the great ten million dollar racehorse. If we were in Court today seeking damages for the destruction of that great horse and we offered as evidence proof that checks had been written in the amount of $10 million for the purchase of Seattle Slew, then that would be the actual value of the horse and that would be the amount of loss caused by Astroworld's negligence. If the jurors retired to the jury room and said yes, they were negligent. Yes, the horse cost $10 million dollars. But that's just too much money for a horse. Why don't we award them $5 million?

Well, ladies and gentlemen, $5 million, in that case, would be half justice. And half justice is injustice. In fact, anything less than total justice is injustice.

I submit to you that the evidence in this case supports an award in the total amount of at least five million dollars in order to achieve full justice.

COMMENT: Analogizing monetary damages to the value of a race horse is a tried and true analogy used by many trial lawyers throughout the country. Counsel analogizes the value of a race-horse to a verdict for pain and suffering which will occur over 47 years and concludes that his figures are not unreasonable. Note how Mr. Nations connects the analogy psychologically to the defendant amusement park by suggesting that if one of its trucks backed into a horse trailer containing a famous horse in a parking lot and killed the horse, no one would question $10 million as the value of the horse because that is what someone actually paid for it. This is an apt analogy to use to justify a $5 million verdict.

§ 35.90 Verdict Form Reviewed

Now let's consider the issues which you are called upon to answer:

No 1: Were they negligent? Yes. Clearly.

Issue No. 2: Did they defectively design it? Yes. Clearly.

Issue No. 3: Were they negligent by an ordinary care standard? Yes. Clearly.

Did the roller coaster or the defective design cause the injury? Absolutely.

Issue No. 5, damages: Past damages, pain and suffering, mental anguish, $550,000.

Nothing on loss of earnings. Disfigurement, 55,000. Physical impairment, $550,000. Medical, 182,648. Future damages, pain and suffering, mental anguish, two million two million five hundred thousand. Damage to wage earning capacity, $718,646. Disfigurement, 550,000. Physical impairment, $550,000. Medical expenses, $74,000.

That, ladies and gentlemen, is what the evidence supports in this case, that is what minimum standards of justice require and that's how we ask you to answer the Issues in this case.

Now I'm going to sit down now and listen, along with you, to the hardest part of the trial for me, which is listening to Mr. Simon talk about the case. But let me say this: If Astroworld feels that the $5,000,000 figure on this board is too much money for 52 years of physical impairment, 52 years of mental anguish, 52 years of physical pain and suffering, 52 years of disfigurement, Harry's damaged wage earning capacity and his medical expenses then let Mr. Simon come to the board, I will leave a blank here, and fill in the amount of money which Astroworld says would fairly and reasonably compensate Harry Gambles for his 52 years of misery.

Thank you very much.

COMMENT: Mr. Nations does a fine job of presenting the plaintiff's case in a nutshell by reviewing the verdict form as a way of concluding his closing statement. This was an excellent way to close the argument. In a case like this, where the evidence is overwhelming and practically unrebutted, it is a good technique to challenge the defense to come up with a reasonable figure for damages. Usually, the defense will fall into the trap by coming up with a very small figure and thereby aggravating the jury into returning a verdict for a much larger amount.

It is important in every case where there is a jury verdict form, to go over the form step by step. Recently, I had very good results in a case with a very complex jury verdict form. In that final argument, I blew the form up and took the legal language of the form and made it plain, easy, and understandable for the jury.

§ 35.100 Rebuttal Argument—Applicable Standard of Care Reviewed

May it please the Court; Mr. Simon; Mr. Webbers.

We are not asking that Astroworld or the Texas Cyclone be judged by NASA standards. We are asking that Astroworld be judged, as it must, by the standard given to you by Judge Cartwright in the Charge.

And you recall on voir dire examination I said: Will each of you promise to follow the Court's Charge in the case, whether you agree with the law or not?

The Court gives you the law. The standard is right here. It is not a NASA standard. The Court defines to you, in Issue No. 1, negligence. My friend, Mr. Simon, kind of skipped over a couple of words in the definition, so I thought I would bring them to your attention. Negligence, when used with respect to the conduct of Astroworld Inc., means failure to use a high degree of care. This is not the NASA standard. This is the legal standard. This is the standard that the law imposes upon companies who have rides on which they carry the public for hire. Failure to use a high degree of care. What does that mean? That is failing to do that which a very cautious, very competent and very prudent person would have done under the same or similar circumstances. That's the standard in this case.

There is a standard on the fourth Issue, also. It is the ordinary care standard. They are also held to the standard of ordinary care, that which an ordinarily prudent man would have done under the same or similar circumstances. But make no mistake about the standard. So, let's examine what they did in light of that standard.

COMMENT: It always a good idea to review the applicable standard of care during rebuttal, particularly when it is obscured by defense counsel during his closing argument. Note that Mr. Nations reminds the jury of their voir dire promise to rely on and apply the judge's instructions, whether or not they are in agreement with the charge. The jurors will feel a sense of obligation to do as they promised during jury selection and apply the law given to them by the court and not use the definitions provided by the defense.

§ 35.101 Reinforcement of Plaintiff's Expert's Credibility

Let's talk about Dr. Graham versus Dr. Benton. Let's talk about Dr. Benton for a moment. When NASA decided to get into

the space shuttle business the first man that occupied an office at NASA to start the whole shuttle program was Ray Benton. He was the project manager. He is the first man who sat at a desk and put pencil to paper and started designing the Space Orbiter. And just so there is no question about it, what he designed was the Space Orbiter, the spacecraft that flies in orbit around the earth and returns to land. Ray had nothing to do with the booster system, which is the part that caused the tragedy.

Defendant displayed a rather high degree of temerity in disputing Dr. Ray Benton on the subject of G forces. Why not debate Bear Brownt on football? But if Ray Benton, the man who designed the shuttle, the man who received an award from NASA for his brilliant work in modifying the wings of the shuttle after it was first used; if the man who modified the wings on the shuttle that flew, left this earth, went out into orbit and landed back on this earth while this trial was going on, if that man doesn't understand the calculation of G-forces, then NASA is awfully lucky that their plane got back in with a re-entry speed of 16,500 miles per hour without the forces tearing it apart. Ray must know something about G-forces.

One last thing on Dr. Benton. I mean, I'm belaboring the obvious, and I know that. But when we sent men to the moon, we were orbiting the moon. And we needed to get them from the orbiting spaceship down to the moon and back again. Who did NASA choose to design the lunar lander? Dr. Ray Benton. He designed the whole system for getting man from the spaceship to the moon and back again. And it worked beautifully. So, if you believe Ray Benton knows nothing about how to calculate G-forces or how to do amplitudes on G-forces, how to transfer them from the seat of its roller coaster up to Harry's neck, where it really matters, there is nothing else I can tell you.

COMMENT: Personal injury cases often boil down to a battle of the experts. Often, the testimony can be confusing and it is wise to highlight the credibility and veracity of one's own witness during summation, particularly when that witness is attacked by opposing counsel. Note that in this case, Mr. Nations does not choose to undermine the defense witness, but instead saliently concentrates on bolstering the image of the plaintiff's expert.

§ 35.102 Review of G-Forces and Need For Adjustments to Passenger Restraints

What I can tell you is this: The statement that 20 Gs will rip wings off planes, that's beyond human tolerance, that's not the testimony in the case. You remember what we discussed about human tolerance? That 20 Gs is the low end of human tolerance. That's where you begin to see physiological affects in human beings. That's where some people will start to get dizziness; blurred vision. But that's what they deal with in jet fighter pilots. They are flying multi-million dollar aircraft, blurred vision to a fighter pilot can be the end of it. That can be death, because they can lose control of the aircraft.

Now, is Dr. Graham really in conflict with Dr. Benton? No. The problem on the Cyclone is not the G-forces. The G-forces haven't changed. When Mr. Cobb testified I said, "you understand, sir, we have no problem with the way you designed that structure. That structure is still the same. Those G-forces are still the same." But what did Mr. Cobb say when I asked: "Mr. Cobb, when you finished designing that structure, who was supposed to take care of the cars?" He replied: "That's Astroworld's job to pick the cars." Astroworld claims "well, these are the cars they use all over the United States." How could those be bad. Very simply, there had never been a roller coaster with the dynamics of the Texas Cyclone. It is the most thrilling, the most exciting, and it has different curves and banks than the rest of the roller coasters. So, cars that work on one roller coaster will not work on another roller coaster. And you have to make adjustments in passenger restraint to compensate for the added G forces.

COMMENT: Here counsel makes an excellent rebuttal point. Defense counsel had apparently argued that the cars used on this particular roller coaster were safe because they were the same ones that are used on roller coasters all over the world. Mr. Nations quickly picked up on this point and reminded the jury that the defendant advertised the roller coaster as the most thrilling and dangerous one in the world, with drops and curves no other roller coaster has. Therefore, it has additional G-forces and adjustments must be made to the passenger restraint system to compensate for these additional forces. This is an excellent point to highlight here.

§ 35.103 Passenger Restraint System Is Main Issue

Where they failed miserably in this case was, after the first 23 days of operation with 55 injuries, they failed to recognize that they had a problem that they needed to address. The pattern of injuries to necks and heads of their passengers put them on notice of the problem but they chose to ignore the pattern. That's where they failed.

Dr. Graham said; "They are asking us these days if the airplanes we are flying are too hot. And the answer is a resounding 'No,' so long as we properly restrain our pilots." The answer is exactly the same on the Texas Cyclone. You heard me ask him: "Doctor, isn't it true that the G-forces on the Cyclone don't really matter, so long as you restrain and protect the passengers?" He agreed. So, there is no great conflict here about G forces; or about human tolerance, the conflict is about failure to properly restrain passengers.

COMMENT: In cases which involve scientific principles and complex technical terms which are generally not known or understood by the average juror, it is often necessary to highlight the main issue throughout the case as it is easy for the jury to lose sight of the real issue. Above, Mr. Nations takes the time to remind the jury that the main issue in this case is the restraint system.

§ 35.104 Analysis of Economic Evidence

Let's talk about a couple of other disputes that exist in the case. Dr. Cloninger versus Mr. Bass. I'll agree with one thing that Mr. Simon said about his hired gun annuitist. He said, "Mr. Bass puts his money where his mouth is." And he certainly does. Mr. Bass told us on cross-examination that he makes $200,000 a year testifying as a witness in cases like this. That is definitely putting your money where your mouth is.

But the fact is, in this case, Dr. Cloninger has given us the calculations that have projected Harry's future earnings, and discounted them back to present value.

Now, recall what I asked Mr. Bass about his starting salary when he entered accounting with Peat Marwick, one of the big eight. "What did you make as a starting salary?"

"Seven thousand a year, 22 years ago."

We don't know what he makes today, as a salary. But what we do know is this: If we took the one quarter per cent per year—that's what he said, one-fourth of one percent a year—that he would attribute to Harry Gambles for his own growth potential in earnings, applied it to that $7,000 a year for Mr. Bass, he would have the ability to earn $30,000 a year. That's the standard he wants to apply to Gambles.

But what do we know about Mr. Bass? We know that Mr. Bass makes $240 an hour. $240.00 an hour, on a standard forty-hour week, is $500,000 a year. So, he completely failed to take into account the ability, the tenacity, the personal spirit, the ability to fight back that this young man, Harry Gambles, has demonstrated.

He took nothing into account except Harry's junior high grades. I would sure hate to be evaluated based on my junior high school grades. And I don't think that's the basis for your evaluation, either, ladies and gentlemen.

COMMENT: Again, counsel wisely takes the time to bolster the credibility of the plaintiff's expert witness. He points out that the defense witness is a professional witness, implying bias on his part. This is a standard, yet highly effective argument, particularly when large fees for the expert's services are involved. Mr. Nations also points out that the plaintiff is not looking to get rich quick, he is making every effort to improve his lifestyle despite the devastating injuries.

§ 35.105 Plaintiff Requires Justice Not Sympathy

I think the basis for your evaluation is to look at the condition this young man was in on July 8, 19. . and look at the condition he is in today, and see how he got there. He got there by a willingness to fight back; a willingness to overcome handicaps; and a willingness—an absolute drive—to improve his life. This young man is brain damaged, and he is out there right now competing at the college level. And he is not in handicapped courses. He is taking regular, college-level courses. And he is doing everything he can to get through them. And he is going to make it. He is definitely going to make it.

We are not concerned about that. We know this young man, this courageous, persistent, hard working young man. He will make it.

Now, Mr. Simon appropriately said, as the Court tells you, "Do not let sympathy or bias play any part." We don't want sympathy. Harry Gambles doesn't need sympathy. He got enough sympathy in Methodist Hospital. He got enough sympathy at T.I.R.R. for 248 days. He got enough sympathy from his friends when they saw the condition he was in when he attempted to return to school. He has had enough sympathy to last him three lifetimes. We are not here about sympathy. We are here about justice.

COMMENT: In every serious injury case, the plaintiff has to overcome the concern the jury may have for deciding a verdict based on sympathy. To overcome this obstacle, Mr. Nations uses an effective technique which has been used time and again by various trial attorneys. It was first created by the late great attorney from New York, Moe Levine. Whenever serious and permanent injuries are involved in a case, this argument should be employed by counsel. In essence, it says that the jury should not be concerned with sympathy, because sympathy is a form of charity. The plaintiff does not need to be demeaned by charity in the courtroom because he receives it from all sorts of people all of the time due to the extent of his injuries. He did not come to court for sympathy, he came for justice.

§ 35.106 Jury Must Deal With Reality—No Magic in the Real World

So, let's talk about justice. Now, we talk of money. We talk of money because there is no magic. Magic exists only in the world of children. We have to deal with reality. If this jury could wave a magic wand and return that young man in his former, healthy, happy condition to those two people sitting right there, Mr. and Mrs. Gambles, and say, "Here is your son back, healthy," there is no one who can possibly believe that they wouldn't leave here in the 99 percentile of happiness in the world rather than where Harry is—the bottom one per cent—of severe depression. But we are not dealing with magic. We are dealing with reality. We are dealing with severe realities.

It is reality that Harry Gambles has reached his maximum level of rehabilitation. That's undisputed.

It is reality that Harry Gambles experienced 248 days of horror. Quadriplegia. Vegetative state. Communicating with his eyelashes.

It is a reality that he endured 23,648 hours of adjustment to reality from the time he got out of rehabilitation until today. The life expectancy table is in evidence. It is a reality that his damages are based upon 47 additional years from today of future damages. At 16 waking hours a day, it is a reality that this young man will endure 274,000 hours of mental anguish in the future, because he will never be free of physical pain and suffering and mental anguish.

It is a reality that he will endure 274,000 hours of physical impairment in the future, because he is never free of it.

It is a reality that he will endure 274,000 hours of physical pain and suffering in the future, because he is never free of it.

It is a reality that he will endure 274,000 hours of disfigurement in the future, because he is never free of it.

Another reality is that he has to compete in a job market at the toughest entry level there is.

And those are the realities, ladies and gentlemen, that you have to deal with. Because that's your role in the judicial system, to tell these folks what amount of damages equate to justice for Harry Gambles.

COMMENT: This is an excellent argument given by an excellent lawyer. Notice the contrast of magic to reality. This is an excellent use of contrast to make a very important point. Mr. Nations also employs the use of a repetitive phrase, "it is a reality . . . " to drive home the point that there is no magic available to his client—only reality.

§ 35.107 Future Years Contrasted With Past Years—Effects of Inflation

Now, 47 years of future damages—it is easy to stand here and say "47 years in the future." But that's a hard, hard concept to grasp, that we are talking about damages that exist to the year 2036. We are talking about in the year 2,025 this young man will still get out of the bed in the morning and he will still have a crippled left arm and a crippled left leg. That he will still be

suffering mental anguish. That he will still have the physical impairments. And they will never go away.

One way that we suggest that you might want to consider in trying to get a perspective on what 47 years in the future is, is to look back 47 years. If we did that, the end of 1941, Pearl Harbor, all the way through World War II. If this had happened then, and they had been projecting 47 years, this young man would have awakened on the morning of December 7, 1941 with his physical handicap, his mental anguish, his pain and suffering, his physical disfigurement and he would have gone through all the ensuing years enduring every waking moment with those physical impairments. All through the Truman years; the Korean War; all the way through the Eisenhower years. Every day of his life, awaking to the physical pain and suffering, mental anguish, physical disability and disfigurement that will plague him for the remainder of this life. Harry would not have danced to the music of Elvis or the Beatles since he would have been sentenced by his physical disabilities to the role of spectator in many of life's most enjoyable experiences. Bringing it through the Kennedy era, he would not have been able to appreciate and enjoy the Camelot days of the Kennedys, as other youngsters would, because of the problems that he has in dealing with society, primarily due to his physical disfigurement.

The great accomplishments of going to the moon and back. When Ray Benton was over there designing the lunar lander, this young man would have still been, every day, fighting to cope with basic problems of life arising from his physical disabilities.

When the Astrodome was built, when the Summit was built, when the Houston Rockets moved here, and the Houston Astros, this young man wouldn't go to those games because he couldn't cope with being jostled by the crowds.

If you look back at it that way, you can get some idea of what 47 years in the future is, which is what he is looking at today.

If we also look back 47 years and a jury in 1941 was awarding damages to Harry to compensate him through the remainder of his 47 year life expectancy, those jurors never would have believed the cost of living in America in the 1960's, the 1970's and the 1980's. The verdict they would have returned for Harry in 1941, which would have been designed to last him through

the next 47 years to 1988 would have been woefully inadequate because the purchasing power of the dollar has depreciated so substantially since that time. They would have failed to look into the future and give an actual evaluation of 47 years of future damages. We are asking this jury sincerely not to experience that same failure. None of us are economists and we can probably all agree that if we laid all the economists in the world end to end we would never reach a valid conclusion. However, we all have common sense and as we look back over the depression, recessions, booms, valleys and peaks, we know that the cost of living in America since 1776 has gone one way and one way only: straight up!! We can also reasonably conclude, based upon our common sense and experiences in life, that the cost of living over the next 47 years will continue to rise. Your verdict to Harry Gambles must predict, project, and fully compensate him through the year 2035 and for all the intervening years and the verdict which you return in this case is going to determine the destiny of this young man for the next 47 years. We cannot come back if your projection is wrong and the compensation is inadequate. Your verdict is not written in pencil, it is written in indelible ink and cannot be changed if it is inadequate. Therefore, despite the fact that waiting for the jury to conclude deliberations is always the most difficult part of the trial for all of the clients and the lawyers; we are going to ask you to take all of the time you need during your deliberation to carefully consider your verdict so that the collective wisdom which goes into the verdict which you return will produce full and complete justice.

COMMENT: A verdict is written in indelible ink. Above Mr. Nations does an excellent job of weaving together the standard comparison of 47 years from the past to 47 years in the future taking into account the effects of inflation. Of particular note is his comment that you don't need an economist to reach these conclusions. It only takes common sense. Common sense tells us that the cost of living in America has steadily risen since 1776 and that it can be expected to do so in the future. Whenever there is a personal injury action involving serious injury with long term disability, this is an argument that must be made. Mr. Nations provides an excellent example of this argument.

§ 35.108 Calculate Damages on Per Diem Basis

The quality of the first sixteen years of Harry's life was the responsibility of his parents, the quality of the five years since this tragedy was dictated by Astroworld's actions, the quality of the rest of his life is in your hands. As we discussed, three weeks ago on voir dire examination, the 12 of you will have the difficult and unpleasant task of confronting, carefully considering and calculating a dollar value to compensate Harry for 52 years of physical pain and suffering, mental anguish, physical disability and disfigurement. Such a grizzly audit is difficult, but indispensable. You and I only have to discuss the physical pain and suffering, mental anguish, disability and disfigurement to understand the grizzly nature of such an audit. Harry has to live with it every waking moment of his life.

After this trial is over I move on to my next trial, the judge calls a new case, the defendants return to their jobs at the amusement park, hopefully wiser and more safety conscious, but Harry will continue to live with the results of Astroworld's conduct for the next 47 years, minute by minute, hour by hour, day by day. There will not be one day during the year 2000, 2010, 2020, or 2030 when Harry does not have to cope directly with his inability to use his left arm. When he can walk without dragging his left leg or when he can speak clearly. Since Harry has to confront his pain and suffering, mental anguish and physical disability for 274,000 waking hours in his future, justice demands that in your role as jurors, you directly confront Harry's pain and suffering, mental anguish, physical disability and physical disfigurement for a few hours in the jury room. None of us like to confront pain, to talk about it, to listen to others talk about it or to try to put a dollar amount on enduring pain. But if full and complete justice is to be rendered, you must meet your full and complete duty as jurors and directly and thoroughly confront, discuss, consider and evaluate Harry's lifetime companions, physical pain and suffering, mental anguish, physical disability and physical disfigurement.

What will it take to compensate Harry for 47 years of future pain and suffering, mental anguish, physical disability. We have projected the damages, on a per diem basis. Consider 47 years, break it down into the number of days; the number of waking

hours, we conclude that Harry will endure 274,000 waking hours of future disability as a result of the injuries inflicted on him by the actions of Astroworld. How do we apply the per diem calculation to the future damages which Harry will endure? Follow me on the damages board as we review each of the elements of damage which Harry will suffer in the future.

Consider the mental anguish. What amount of damages would fairly and reasonably compensate this young man for one hour of the severe depression; of the mental anguish that he faces every hour of his life? We suggest to you that $8.00 per hour for the mental anguish and $2.00 per hour for the physical pain and suffering, for a total of $10.00 per hour for future physical pain and suffering and mental anguish. As you can see on the damages board that would generate $2,740,000.00.

In computing disfigurement, at $2 an hour for the remainder of this young man's waking hours, it totals $550,000.

We suggest the same calculation for physical impairment, which he clearly will have for the rest of his life, at $2 an hour, that totals $550,000.

The medical, Mr. Simon has told you, there is no real issue about that.

Then we ask that you answer the Issues Yes, Yes, Yes, Yes. And return the damages issues in the manner in which we have indicated them on the board.

Ladies and gentlemen, that totals $5,700,000.

§ 35.109 Changes in Plaintiff's Life Emphasized

As we discussed three weeks ago on voir dire, we have seen two Harry Gambles' in this case: one an energetic, active, fun loving extrovert; the other a depressed, withdrawn, inactive introvert. One a bright, optimistic, hard working student; the other a brain damaged, pessimistic, struggling student. One a physically fit, athletic youth; the other a physically handicapped hemiplegic. One a happy, healthy Harry Gambles before Astroworld's tragic mistake; the other Harry Gambles for the next forty-seven years.

Ladies and gentlemen, the numbers which we have suggested to you for use in the calculation of Harry's future damages total $256.00 per day. If we placed an ad in the Houston Post tomorrow which said: "Job available. No education necessary. No experience necessary. Pay: $256.00 per day. Only two requirements - one, you must suffer mental anguish, physical disability, physical pain and suffering and physical disfigurement every waking moment for the next 47 years and two, you can never resign." Ladies and gentlemen, how many people do you think we would have applying for that job? Unfortunately, that is the job which Harry Gambles holds, not by his own choosing, but as a result of the actions of Astroworld. The only remaining question is what will be his compensation for holding that job. That is your determination.

So on behalf of the Gambles family we sincerely pray that in serving in this vital role as jurors that God gives you the individual and collective strength and wisdom to render full and complete justice in this case. This is Harry Gambles' last day in Court. The lawyers have now finished our work, the Judge has completed his role and the clients await justice. Ladies and gentlemen, who is to render full and complete justice for this courageous young man who has had a lifetime of disabilities inflicted upon him? If not you, who? If not now, when? Thank you very much.

COMMENT: In every case, the last words in rebuttal argument should always be a call for the jury to take action. Here, Mr. Nations provides an excellent example of such inspiration. Note that he uses contrast to emphasize the plaintiff's plight in the first segment of his closing line and then illustrates the depth of that plight by pointing out the fact that nobody would want to live like the plaintiff. He closes by exalting the jury to take action and render complete justice. He then employs the technique of rhetorical questioning, which is highly effective. He asks the jury who is going to render full justice to his client. He emphasizes that by asking: "If not you, who? If not now, when?" The obvious answer for the jurors is "Me and now." What a wonderful way to evoke the jury to take the required action and render a verdict in favor of the plaintiff.