

# **USING MEDICAL ILLUSTRATIONS AT TRIAL - SOME ADVICE FROM THE EXPERTS**

Compiled by Stephen Mader, Artery Studios Inc.

## **NOTIFY DEFENCE COUNSEL OF YOUR INTENTION TO USE ILLUSTRATIONS<sup>1</sup>** (Carnwath)

When medical illustrations are prepared for a case, defence counsel must be notified that they will be used at trial. Send a letter stating that:

- the illustrations will be used in the trial
- the illustrations are in your office
- defence may review them during regular office hours
- if there are any objections they can be sorted out before trial

Most likely, the defence team will not follow up on your offer and will not review them.

## **USE THE ILLUSTRATIONS IN YOUR OPENING STATEMENT<sup>2</sup>** (After McLeish)

Presenting the illustrations in your opening statement will pique interest and create excitement in the jury – and will add a dynamic start to your case. Judges will permit the use of this demonstrative evidence in your opening provided that it meets all the requirements of admissibility (see 1 below).

## **ARGUMENT TO COUNTER OBJECTIONS<sup>2</sup>** (After McLeish)

If there is an objection over use of the illustrations during your opening or at any time during the trial, your argument on the use of exhibits may follow this pattern:

1. The chart meets all of the criteria for admissibility:
  - the information presented in the chart is relevant
  - the information is accurate – it was compiled from hospital records, doctor’s clinical notes, etc., which will be entered as evidence
  - the chart is fair and in no way misleading
2. All the content of the chart can be verified by people qualified to do so (e.g., medical expert).
3. The chart is the only way the jury will be able to understand, remember and organize the information and this will help ensure a quality verdict.
4. The only reason the defendant’s lawyer wants to keep the chart out of evidence is so the jury will become confused and not understand, remember, or be able to organize the information depicted in the chart. This will increase the chances of an unfair verdict.
5. The chart contains no editorial comment or argument.
6. The use of the chart will considerably shorten the trial.

### **USE OF DEMONSTRATIVE VISUALS DURING EXPERT TESTIMONY<sup>3</sup> (Legate)**

Many experts testify with the aid of some demonstrative evidence. Their technical and often boring but important testimony is lost on the juror who cannot follow or is uninterested in following the evidence of the expert. Consideration of what the expert will use in support of his or her testimony, well in advance of trial, is important to ensure its admissibility.

(Legislation) requires that the report of an expert be served prior to the commencement of trial (time frames vary in different provinces). If the report contains a reference to a demonstrative aid or it is intended that the witness shall refer to a demonstrative aid that can be considered to be a document, it must be produced for inspection (see first section above).

### **ENTER EXHIBIT AS EVIDENCE DURING EXAMINATION OF EXPERT WITNESS<sup>2</sup>** (After McLeish)

The steps to introduce an exhibit into evidence are as follows:

1. Show the exhibit to the witness (this assumes the opposing counsel has already seen it)
2. Lay the foundation for the exhibit (see script in next section)
3. Move for admission of the exhibit into evidence

Where it is apparent that you can establish a foundation for the chart, the judge will allow you to place the exhibit before the jury while the foundation is being established. Display the exhibit where the judge, jury and counsel can all see it. If you need it in your opening and before your attempted introduction of the chart formally into evidence, the last chance your opponent has to oppose the chart going in, is at the time you attempt to have it marked as an exhibit. To try to oppose the introduction of the chart into evidence at this time, the defendant's lawyer is going to have to ask the judge to deal with the chart in the absence of the jury. By asking the judge to ask the jury to leave will probably irritate the individual jurors and in the process bolster your case. When the jury returns and you have successfully been allowed to put the chart into evidence, your first question to the witness should start off something like this:

**Counsel:** As I was saying, before we were interrupted by the defendant's lawyer's groundless objection...

### **USE THE EXPERT WITNESS TO SUBSTANTIATE THE ILLUSTRATIONS<sup>4</sup> (After Morgan)**

The requirements for admissibility may be established by your expert witness who is a specialist in medical science. Although the illustrator will readily testify, it is not necessary to put the illustrator on the stand to prove the authenticity of the illustrations. Introduce the medical illustration as part of the testimony of your medical doctor who can substantiate its validity. The following interaction demonstrates this methodology:

- Q.** Doctor, I'll show you Plaintiff's Exhibit #1 and ask you what it is.  
**A.** This is a schematic drawing of the bones of the right ankle joint.

**Q.** Is it medically correct and accurate?

**A.** Yes, it is.

**Q.** Doctor, will this medical illustration – Plaintiff’s Exhibit #1 – help you explain your testimony to the jury?

**A.** Yes, it will.

**Plaintiff’s Lawyer:** Your Honour, Plaintiff offers into evidence Plaintiff’s Exhibit #1.

**The Court:** Any objection?

(Hopefully, all objections will have been dealt with before trial).

You can add further credibility to the illustrations by obtaining more information from the medical expert:

**Plaintiff’s Lawyer:** Doctor, I’ll show you Plaintiff’s Exhibit #1 and ask you what it is.

**A.** It is a schematic drawing of the bones of Mr. Smith’s (plaintiff) right ankle, showing the comminuted fracture to the talus, as well as the callus formation at the fracture site after healing.

**Q.** Doctor, does this show the condition of Mr. Smith’s ankle at the time it was injured, and the way it is now?

**A.** Yes it does.

**Q.** How can you be certain of this?

**A.** I worked with the medical illustrator who drew these illustrations. I provided the x-rays to him which were taken at the time of Mr. Smith’s accident, as well as those which we took eight months later. I have since compared the illustrator’s drawings on this exhibit with the x-rays, and I know that the exhibit is an accurate drawing of the x-rays at the time they were taken.

**Q.** Doctor, will the use of Plaintiff’s Exhibit #1 help you explain your testimony to the jury?

**A.** Yes, it will.

The lawyer has met the technical requirements for admissibility. Equally important, he has emphasized the accuracy and credibility of the illustration so that the jury can have total confidence in it. This means that the defendant will have great difficulty impeaching it.

#### **OBTAIN A WRITTEN STATEMENT FROM YOUR EXPERT WITNESS**

Another way to add further credibility to the medical illustrations is to have any experts who have produced reports on the case, particularly those who will be testifying, write a brief letter attesting to the accuracy, concepts presented and didactic merit of the illustrations.

## **ANCHORING AND THE USE OF DEMONSTRATIVE EVIDENCE<sup>5</sup> (Oatley)**

Whether your client's action has to do with a mild head injury or chronic pain, the problem is the same. The problem is that without an injury to look at, such as on an x-ray, (it is very difficult for lay people to) grasp that a physical injury has occurred.

The solution is the use of demonstrative evidence and, in particular, the use of as many different forms of demonstrative evidence that you can possibly think of. Use it in its different forms during the jury opening and during the evidence as often as you possibly can. The more the jury and the judge visualize the body parts involved, the more likely it is (that) the injury will be perceived as physical. You must get the trier's mind off the pain and onto the body parts where the pain comes from. Use ... medical legal illustrations and slides... If you are seen as explaining the injury to the jury the judge will listen with interest.

This strategy will only work if the visualization takes place over and over again. This technique is known as anchoring. Anchoring is the repeated use of a physical behaviour or demonstration in constant association with a concept you wish to enforce.

## **INCREASE ACCEPTABILITY BY EXPLAINING THE MECHANISM OF INJURY<sup>5</sup> (Oatley)**

This strategy is different than the strategy of anchoring, but you will often employ it through the use of demonstrative evidence. Picture, if you will, an orthopaedic surgeon who is pointing ... at a colourful slide ... which illustrates the parts of the spine. The judge and jury will be fascinated because we all love colour, we all love to learn and it is a pleasant break from the monotony of the trial. Then the surgeon calls up the next slide. It illustrates the motion of the head and neck in rear-end collision. As the judge and jury visualize the body parts and achieve an understanding of the mechanism of the injury they will become more accepting of, and indeed will expect, that a physical injury has occurred.

## **USE ILLUSTRATIONS TO REPEATEDLY REINFORCE YOUR ARGUMENT<sup>5</sup> (Oatley)**

Every time the judge and jury see the exhibit, the more real the forces of the impact become and the more believable a chronic physical injury will be ... use the demonstrative evidence, which you obtain, early in the trial and as dramatically as possible.

## **REFERENCES**

1. Comments made by: Carnwath, The Hon. J.D. Ontario Trial Lawyers Association (OTLA) 1995 Spring Conference.
2. McLeish, J.A.: *Winning Strategies in Jury Trials* – paper presented at the OTLA 1995 Spring Conference.
3. Legate, B.L.: *The Use and Admissibility of Demonstrative Evidence in Jury Trials: Applying The Principled Approach to the Law of Evidence* (1995).
4. Morgan, P.: Trauma, Volume 27, No. 5. *Getting the Most from Medical Illustrations*, February 1986, 5:61-5:103.
5. Oatley, R.G.: *Strategies for Proving that Chronic Pain is Physical* – paper presented at the OTLA 1995 Spring Conference.