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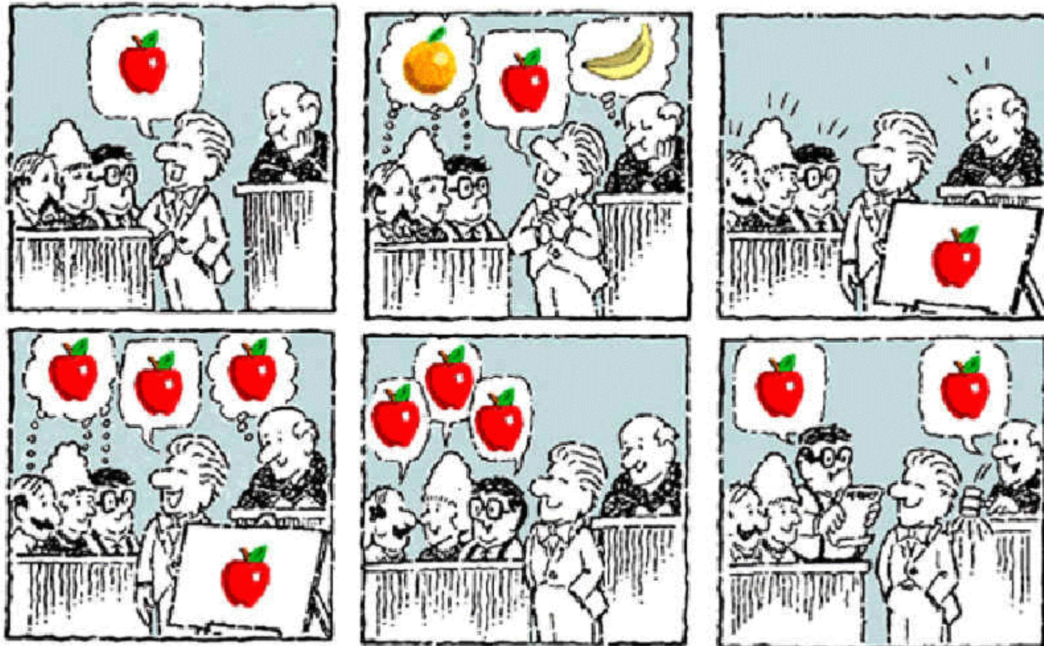

Evidence Law for the Civil Litigator

Professional Development Program
Continuing Education
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The above cartoon is from the website of a Texas attorney, Craig Ball www.craigball.com and is © Browning & Co.

Illustrative Evidence in Civil Litigation

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"One Picture is Worth Ten Thousand Words"[1]

Introduction

An American high school media teacher instructing his students about the impact of images to make a point observed that "500 years ago, when less than 5% of the population was literate, Martin Luther, the Protestant reformer, resorted to the use of persuasive images disguised as art to deliver his message. Now, in our mostly literate society, we still see the use of images as a major means of influence in TV, movies, and especially political campaigns as the most effective persuaders."[2]

Perspective of the Ontario civil litigation lawyer

Our judges are experienced, intellectually-sophisticated triers of fact. Most civil cases are document-intensive. Legal argument is complicated and often based on decisions which run many pages and are intelligible only to lawyers. Most of our cases are not decided by a jury. Indeed, most cases do not reach trial at all. Even in cases tried by jury, the jurors are all literate; many are university- educated professionals and all are exposed to our high-tech, internet-based society.

We live in a world which permits us very little time to get our points across. Ours is the era of the

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[1] Fred R. Barnard, in *Printers' Ink*, March 10, 1927, p.114, referred to on the website: www2.cs.uregina.ca/~hepting/proverbial/history.html. The cartoon on the cover page was downloaded from www.craigball.com/demoevid.html: "Internet Resources for demonstrative evidence" and is subject to the copyright of Browning & Co.

[2] David R. Macdonald as explained on the website http://score.rims.k12.ca.us/activity/worth

30-second commercial and the 15-second sound bite. Our courts now require that counsel estimate accurately how long examination of a witness will take. Legal argument is limited to 15 minutes in some courts. Judges routinely chastise counsel for taking too long to complete the evidence or submissions. In appellate courts, you must sit down when your time is up whether your argument is finished or not. Submissions or evidence introduced after the allotted time are rushed and are generally not persuasive.

So, as experts in legal persuasion, litigation counsel must awaken to the reality that we have to get point across more quickly. The way to do this is by recognizing that images persuade much more effectively than words. Moreover, the points learned through images are remembered better than a jumble of often convoluted words. When counsel can show the judge or jury a picture, a chart or an animation of what s/he has in mind, the thought is more likely to be understood as intended. The cartoon on the cover of this paper makes the point clearly. No explanation is required.

What is illustrative evidence?

Evidence that shows rather than tells is demonstrative or illustrative. The forms are ever-expanding. Almost any type of expert evidence can be aided by the use of illustrative evidence, though it particularly lends itself to technical, scientific, numeric, and complex information. Illustrative evidence is the means by which a witness, usually an expert witness, explains evidence to the court. Although illustrative evidence is usually given by expert witness, this is not necessarily so. A witness of fact may testify with the aid of a graph, photograph or other visual aid.

When well-prepared, the illustrative evidence, whatever its form, becomes a very powerful tool to convey the opinion of an expert as to what happened or to understand the evidence of any witness. The illustration conveys a vast amount of technical, scientific, complex information which the trier of fact might not understand or remember if it were lost in a sea of words. As will be seen, illustrative evidence is also used to show, rather than tell, in trial opening and settlement negotiations

Here is an short and very inexhaustive list of illustrative evidence possibilities:

computer animations	monitors/screens	thermography, x-rays	charts
accident reconstruction	re–enactments	graphs	easels
powerpoint graphics	how-to videos	posters	aerial photography
day in the life videos	photographs	geological samples	scale models
failure analysis animations	surveys of attitudes	surveys of land	weather reports
topographical maps	cutaway views	storyboards	results of focus groups

Use of Illustrative Evidence in Canada

Our Anglo-Canadian litigation tradition has been slower to adopt demonstrative methods of proof than our American counterparts. A number of factors have contributed to this development, including, but not limited to: the guarantee in the U.S. Constitution to trial by jury even in most civil cases, and perception that jurors will be more persuaded by images than words;[3] the prospect of

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[3] Seventh Amendment to the Constitution of the United States, passed in October 1787: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." For more detail about the courts where the guarantee is applicable in civil cases, see http://caselaw.lp.findlaw.com/data/constitution/amendment07/index.html

multi-million dollar damage awards; contingency fees; and perhaps, the tendency to hype, which might still be more pronounced in some parts of the U.S. than it is here.

In Canada, the use of demonstrative evidence in accident and medical malpractice cases has become the norm. In my recollection, this was spurred more than 25 years ago by the work of Windsor, Ontario counsel, Martin Wunder, QC, who emphasized the benefit of using pictures and accident re-enact images, day-in-the life videos and other images in personal injury cases but it has now become part of the arsenal of every good counsel, of insurance companies and adjusters.

In construction cases, expert evidence of failure analysis or faulty construction is always supported by photographs, sketches, diagrams or of defective work. This is imperative for at least two reasons. First, most lay persons, including most judges, will not be familiar with the scientific elements of the problem. Second, images are always more effective than words in assisting comprehension. This point is emphasized where the words are technical jargon which the judge is unlikely to understand.

To make the point, if in a construction case, you tell me that "the caissons and footings were not properly installed because the cages were not visible", I may have heard all the words (in some context) but I have no idea what you are talking about unless I happen to be an excavation contractor or an engineer. But if you show me a series of photographs, the point is rather easy to explain. In the more sophisticated case, such as an accident on the construction site, a re-construction or computer animation of the evidence is useful. Whether counsel resorts to an animation will depend

on whether the issues of liability and whether the potential damages are large enough to warrant it.

In cases involving the failure of a machine, the disintegration of material, the occurrence of some process which caused loss, a computer animation can be constructed to assist the judge to visualize the scientific explanation of the expert.

In cases involving an element of economics, such as the fluctuation of the price of a share, the rate of inflation, or any of myriad of other factors, a coloured chart or graph, whether on paper or in a computer presentation, has the prospect of making the presentation more easily understood.

In a shareholder or corporate dispute, the corporate flowchart showing the names of the corporations and their hierarchy in the corporate structure can be effectively displayed on a large easel in the courtroom, where it will be available for constant easy review.

In nearly every case involving the calculation of damages, the forensic accountant's report will contain charts and graphs which help to show the loss more effectively.

Admissibility of Illustrative Expert Evidence

The admissibility of illustrative evidence at trial and its utility in the litigation process are the first issues to consider. You can't just show up and expect to introduce illustrative evidence at trial. In fact, some judges may resist demonstrative and other expert evidence completely.

For instance, in *Green v. Winnipeg*[4], a 1996 decision of the Manitoba Court of Queen's Bench, the presiding judge had this to say about the admissibility of expert scene reconstruction evidence:

> In my view, counsel would be well advised to critically consider whether evidence of this kind (or expert evidence of any kind on any issue) is truly necessary given the cost both in dollars and time, to the litigation process.

Expert evidence, even photographs can be overdone. In *R. v. J-L.J.*[5]., Binnie J. of the Supreme Court of Canada said:

> Expert witnesses have an essential role to play in the criminal courts. However, the dramatic growth in the frequency with which they have been called upon in recent years has led to ongoing debate about suitable controls in their participation, precautions to exclude "junk science", and the need to preserve and protect the role of the trier-of-fact....

In *Alie et al. Bertrand & Frère Construction Co. et al.*[6], Roy J. of the Superior Court of Justice made this observation at the beginning of his reasons for judgment:

> Over the course of the next 16 months, some 110 witnesses were called of which 15 were experts. Close to 600 exhibits, representing tons of paper, were put into evidence. Massive amounts of expert evidence were introduced, representing the opinions of leading world experts in concrete. Thousands of photos were utilized as evidence showing, from every possible angle, the deteriorating concrete over the last ten years.
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> Briefly, there was an overload of evidence. Too many witnesses, too many experts, too many exhibits, too many questions and answers. Unfortunately, class action proceedings were not available when this proceeding was

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4 Green v. Winnipeg (City) Police Department, [1996] M.J. No. 219, p.6, per MacInnes J.

5 R. v. J.-L.J. [R. v. J.J.] 2000] 2 S.C.R. 600, [2000] S.C.J. No. 52

6 [2000] O.J. No. 1360 (Ont. S.C., Roy J.)

> started. Nevertheless, the issues and facts did not warrant such a lengthy trial and massive amounts of evidence.

Not surprisingly, even judges are susceptible to "sensory overload". However, these caveats will not prevent counsel from calling expert evidence nor from "overloading the evidence." It is an element of trial practice all counsel confront. We practice in fear of not calling evidence on some issue in the case. As a result, all counsel tend to call too much evidence. How much demonstrative evidence is enough? The best answer is the least helpful: Just enough to persuade the judge or jury without annoying. Of course, we cannot say how much that is until after the case is complete.

The reality is that experts will often "make or break the case". The evidence of a reliable expert witness is often the basis the judge relies upon to find or deny liability or, in the case of the forensic accountant or economist, to establish the heads and the quantum of damages. Illustrative evidence helps to "package" the expert witness' opinion evidence to make it more persuasive to the judge or jury. An expert opinion lost in a sea of words is unlikely to be persuasive.

Origins of expert evidence

The late Justice John Sopinka, (before he was appointed to the Supreme Court of Canada)[7] observed that experts originally served as impartial assistants to the Court. With the growth of the adversary system since the 18th century, the practice has been for experts to be called by the parties, to testify on behalf of one side or the other.

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[7] John Sopinka, QC, "Providing the Court with Specialized Evidence", CBAO CLE 1980

The adversary system, is based on the assumption that "truth is best discovered by powerful statements on both sides of the question." It becomes the function of counsel on cross examination to expose the weaknesses in the opposing expert's testimony. He suggests that where conflicting versions of facts are not highly technical, the court requires no more than for counsel to do their jobs.

This principle was emphasized by the Ontario Court of Appeal in *Phillips v. Ford Motor Company*[8] where all members of the Court chastised the trial judge for apppointing an expert to advise the court and in effect, conducting an inquiry into the causes of a brake failure.

Admissibility and Judicial Resistance

In general, evidence which is relevant and which is not excluded by any rule of evidence, is admissible. However, the introduction of diagrams and illustrations to prove a point met with judicial resistance as recently as 29 years ago. In *Shipman et al. v. Antoniadis et al.*[9], decided in 1975, the Ontario Court of Appeal held that:

> A detailed description of the operative repair techniques employed by a surgeon dealing with an internal injury is not related to the existence of continuing or permanent impairment of the patient as a result of the injury, and diagrammatic material, however useful to one who would be interested in assessing the operative technique, is not significantly useful to an appreciation of the continuing or permanent impairment. *A vividly coloured chart showing the human trunk laid open to disclose its internal organs thus has negligible probative value and may well have the effect of aggravating in the jury's mind the extent of compensable damages suffered.* [Emphasis added]

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[8] Phillips et al. v. Ford Motor Co. of Canada Ltd. et al. [1971] 2 O.R. 637 (Ont. C.A.)

[9] (1975), 8 O.R. (2d) 449 (Ont. C.A., per Kelly J.A.)

Nearly 30 years later, the prevailing view seems to be that trial judge's discretion as to relevance and admissibility will not be interfered with lightly by the Court of Appeal. To this effect is the 2000 decision of the Court of Appeal in *Marchand v. Public General Hospital Society of Chatham*[10], where the following test was confirmed:

> In *R. v. Lavallée* (1990), 55 C.C.C. (3d) 97 (S.C.C.), the Supreme Court of Canada reviewed the circumstances in which expert opinion evidence may be admitted, notwithstanding that the opinion is based upon hearsay evidence. Wilson J. reviewed the Supreme Court's prior decision in *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 (S.C.C.), and at 127-128 interpreted *Abbey* as standing for the following propositions:
>
> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4. Before any weight can be given to an expert's opinion, the facts on which the opinion is based must be found to exist.
>
> Thus, *Lavallée* establishes that an expert opinion based upon hearsay will be admissible; however, the weight to be attached to that opinion is an issue.

The net effect of Sharpe J.A.'s analysis is that expert evidence and the demonstrative evidence upon which the expert relies is admissible but the trial judge must determine the weight to be attached to it. In fact, where, the expert evidence is based both on facts proved in evidence and facts not proved, special problems must be addressed. Quoting from Sharpe J.A. in *Marchand, supra.* at para. 61:

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[10] (2000) 51 O.R. (3d) 97 (Ont. C.A.)

> Where the factual basis of an expert's opinion is a mélange of admissible and inadmissible evidence, the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies.

As the appeal in *Marchand, supra*. demonstrated, the Court of Appeal will resist interference with a trial judge's admission or rejection of expert evidence expect in the most extreme cases. Even where trial judge adopted an incorrect test for admissibility, the Court of Appeal will first assess whether the error as to admissibility seriously affected the final result of the case.

Use of Illustrative Evidence in the Opening Statement

Another issue is whether the demonstrative evidence, including, charts, models, even a powerpoint presentation can be used by counsel in the opening to the jury or to the judge.

In *Whitford v. Swan*[11], Logan J. of the Superior Court in Barrie, Ontario considered this issue and held illustrative evidence may be used if it is not misleading or inflammatory and subject to counsel's undertaking to prove it during the trial. Logan J. issued these caveats:

> The purpose of an opening statement is to outline the case to be presented. It is not to mislead or inflame the jury. The former is informative and the latter, prejudicial. Prejudicial comments made in an opening address may well taint the integrity of the trial. Demonstrative depictions in the opening statement may assist the jury in understanding their subsequent trial responsibilities. If, on the other hands the demonstrative depictions mislead or inflame the jury, they should be excluded from the opening statement.
>
> Each aid must be assessed on its own merit It may mislead if counsel does not undertake in advance to prove the aid. It may inflame the jury if common sense dictates that the aid in question is excessively

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11 [1995] O.J. No. 4189, per Logan J. Ont S.C.

demonstrative.

Again, we note the cautious tone of the Court in not permitting an aid which is too demonstrative. No useful guideline can be given about what is "too demonstrative". It will depend on the circumstances of each case for counsel to assess what illustrative aid assists persuasion without overkill. In each case, the trial judge falls back on the discretion which arises from the oft-cited principle established by the Supreme Court of Canada in *Draper v. Jacklyn*[12], where Spence J. held that "probative value v. prejudicial effect" test for the admissibility of demonstrative evidence.

In *Draper v. Jacklyn, supra.*[13], the plaintiff sustained a surgically repaired fracture of the jaw. The treatment consisted of inserting of wires which protruded from her cheek, with corks on the ends, for two weeks after discharge from hospital. Counsel sought to introduce the photos taken in the two weeks after discharge through the treating surgeon.

The trial judge admitted the pictures on the basis that they were not so offensive as to inflame a jury, that the plaintiff's facial expression did not convey pain or suffering and that the photos could assist the doctor in explaining the condition of the scar. The Ontario Court of Appeal overturned the trial judge's decision on the basis that the pictures added little to the evidence of the doctor or plaintiff and further that they may be a shock to a jury, leading a jury to reach an erroneous opinion and overlook the medical evidence of relatively moderate pain and suffering. The photos were found to

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12 Draper v. Jacklyn [1970] S.C.R. 92 (SCC per Spence J.)

13 Draper v. Jacklyn [1970] S.C.R. 92 (SCC per Spence J.)

be inflammatory as they could not better explain other evidence, i.e. The medical evidence of the treating surgeon.

The Supreme Court of Canada restored the trial judge's decision. Spence J. held that there was no doubt the photos were relevant and therefore admissible. The surgeon had said he found it difficult to describe in words the appearance of the plaintiff. The photos showed the condition of the plaintiff's scar. Spence J. explained the test in these words:

> The occasions are frequent upon which a judge trying a case with the assistance of a jury is called upon to determine whether or not a piece of evidence technically admissible *may be so prejudicial to the opposite side that any probative value is overcome by the possible prejudice* and that therefore he should exclude the production of the particular piece of evidence. In the case of photographs, this occurs more frequently in the trials of criminal offences and more usually in murder trials. The matter is always one which is difficult for the trial judge and in *itself essentially a decision in which the trial judge must exercise his own carefully considered personal discretion.* [Emphasis added]

Admissibility of Expert Evidence

In *R. v. Mohan*,[14] the Supreme Court of Canada has held that the admission of expert evidence depends on the Application of the following criteria:

a. Relevance;

b. Necessity in assisting the trier-of-fact;

c. The absence of any exclusionary rule; and

d. A properly qualified expert.

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[14] [1994] 2 S.C.R. 9 (S.C.C.)

Relevance, as a question of law, is a threshold requirement to be decided by the judge. However, logically relevant evidence may be excluded if its probative value is overborne by its prejudicial effect, if the time required is not commensurate with its value or if it can influence the trier of fact -out of proportion to its reliability. Reliability vs. Effect has special significance in assessing the admissibility of expert evidence. Expert evidence should not be admitted where there is a danger that it will be misused or will distort the fact-finding process, or will confuse the jury.

To be necessary, the evidence must be outside the experience and knowledge of a judge or jury… The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions. Experts, however, must not be permitted to usurp the functions of the trier-of-fact causing a trial to degenerate to a contest of experts.

Expert evidence can be excluded if it runs afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which s/he undertakes to testify.

In *R. v. J.-L.J, supra.*[15], Binnie J. described the approach to scientific evidence as follows:

> [R. v.] Mohan kept the door open to novel science, rejecting the "general acceptance" test formulated in the United States in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and moving in parallel with its replacement, the "reliable foundation" test more recently laid down by the U.S. Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579

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15 R. v. J.-L.J. [R. v. J.J.] 2000] 2 S.C.R. 600, [2000] S.C.J. No. 52

> (1993). While Daubert must be read in light of the specific text of the Federal Rules of Evidence, which differs from our own procedures, the U.S. Supreme Court did list a number of factors that could be helpful in evaluating the soundness of novel science (at pp. 593-94):
>
> (1) whether the theory or technique can be and has been tested: Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.
>
> (2) whether the theory or technique has been subjected to peer review and publication: [S]ubmission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected.
>
> (3) the known or potential rate of error or the existence of standards; and,
>
> (4) whether the theory or technique used has been generally accepted:
>
> A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific [page616] community and an express determination of a particular degree of acceptance within that community."

In the same case[16], Binnie J. went on to indicate that "a case-by-case evaluation of novel science is necessary in light of the changing nature of our scientific knowledge: it was once accepted by the highest authorities of the western world that the earth was flat."

It should be recalled that in *R. v. Mohan, supra*.[17], Sopinka J. emphasized the "special scrutiny" to be given to a novel scientific theory or technique too determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a

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16 *R. v. J.-L.J. [R. v. J.J.]* 2000] 2 S.C.R. 600, [2000] S.C.J. No. 52

17 [1994] 2 S.C.R. 9 (S.C.C.) at p. 25, See f.n. 14 supra.

satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

Introduction of specific types of illustrative evidence

Photographs

It is long- established that there are three essential criteria for admissibility of photographs: accuracy in representing the facts; fairness and absence of intention to mislead; verification on oath by a person capable of doing so.[18] A picture not only contains but conveys a vast amount of information that would be lost or rendered unwieldy and less meaningful if conveyed verbally by a witness.

Day in the life videos

As with photographs, day-in-the-life-of videos require that the same three criteria be met , but also with concern for the process itself, having regard to editing issues, constant speed and other factors to satisfy the court that the video is a fair reflection of the evidence and not an exaggeration or camouflage of the facts.

Counsel must call the videographer and anyone else involved in the production process as a witness to satisfy the court about the process used. This is especially important because it is generally understood that television and film are capable of deceiving with technological wizardry. The

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18 *R. v. Creemer*, [1968] 1 C.C.C. 14 (N.S.C.A)

judge or jury will be persuaded about the content of the video but also about that the images are genuine.

In this context, counsel should take into account how a photograph, video or other illustrative evidence might be attacked, or conversely, how to attack. A diagram might mislead because it is not to scale. A photograph could give an incorrect impression because of the angle at which it was shot. A chart or graph could mislead if it does not begin at zero or if the scale is inaccurate. These are just a few examples. Some errors are unintentional. Not surprisingly, some demonstrative is calculated to actually mislead.[19]

Surveys of attitudes

Surveys done by experts in the formation of their expert opinion, can be acceptable as long as it can be demonstrated that approved statistical methods and social research techniques have been employed.[20]

Computer Animations

The advent of computer technology has spawned an industry of professionals ready to produce

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[19] See the interesting article, James Gripp, "Lies, Damn Lies and Deceptive Demonstrative Exhibits" 09/03/02, found at www.legalarts.com/pages/articles/damnlies.html

[20] Saint John v. Irving Oil, [1966] S.C.R. 581.

animations of virtually every element of proof in a case.[21]

Counsel's preparation for introduction of this evidence begins long before the trial. In preparation for this article, I found a particularly useful series of articles by James Gripp of Legal Arts Communications on the role of the design consultant, laying the foundation for demonstrative evidence and related matters.[22] Although prepared with U.S. litigation in mind, these articles are clearly adaptable to a Canadian context.

In respect of computer animations, counsel should be prepared to respond to objections to admission. In *McCutcheon v. Chrysler Canada Ltd.,*[23], considered the objection to and admission of computer generated animated video. Plaintiff's counsel sought to introduce this to show the difference between the plaintiff's pre-morbid and post-accident gait, both with and without a leg brace. The animation introduced details of the plaintiff's walking gait and the scene would change at various times to show the bone structure of the legs and feet, pre- and post accident, and included split screen comparisons.

Shaughnessy, J. held a voir dire to determine whether the animation should be admitted. The Court

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21 Resources for demonstrative evidence are described in a CLE program put on by Law Society of Upper Canada on October 8, 2002, which is available online: ecom.lsuc.on.ca/html/cle/CLE02-0010501.html Some of the myriad of impressive resources found on the Internet for demonstrative evidence are: www.legalarts.com, www.doar.com/trial/graphic/index.asp, www.forensic-media.com, www.clearcaselegal.com/cases.html, www.cyberetta.com/legal.htm, www.forartist.com/forensicpage.htm,, www.trialvis.com, medpics.findlaw.com/findlawindex.php,

22 www.legalarts.com/pages/articles.html

23 [1998[O.J. No. 5818 (O.C.J.) per Shaughnessy J.

accepted the video animator as qualified to give opinion evidence as a professional animator. His report gave technical detail as to hardware and software used in the 3D models employed.

Defence counsel had no serious objection to the technical aspects, accepting that the equipment and software was state of the art for computer generated animation. However, defence objected the animation was not a fair and accurate depiction. in that the pre-morbid animation did not clearly delineate the pre-morbid leg shortage relating to the plaintiff's polio condition. Counsel argued that depiction was prejudicial because it could mislead the jury and while technically admissible, its prejudicial effect outweighed its probative value.

Citing *Draper v. Jacklyn, supra.*[24] Justice Shaughnessy found the video animation to be relevant to the issues, helpful to the jury, that the hardware and software methods employed had been verified by an expert witness and further that the animation accurately represented the plaintiff's comparative gaits. He allowed the demonstrative evidence.

Guidelines for Demonstrative Evidence

In the course of research for this paper, we discovered the website of Craig Ball, an attorney in Texas.[25] Mr. Ball has developed some useful guidelines for the submission of demonstrative

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24 *Draper v. Jacklyn* [1970] S.C.R. 92 (SCC per Spence J.)

25 http://www.craigball.com/demoevid.html

evidence. His "Ten Commandments of Demonstrative Evidence" may be somewhat overstated and perhaps not entirely applicable in Ontario litigation, but are still worth keeping mind.

1. Keep it simple.
2. Use images and contexts familiar to the audience
3. Pay attention to scale, color and contrast
4. Anchor key points and issues with a common visual theme.
5. Test your audience on men and women of different ages and backgrounds (applicable to jury trials)
6. Develop one or two key visuals early and use them consisently in the discovery process.
7. Prepare your witnesses and experts using demonstrative evidence.
8. Use a demonstrative aid with every witness.
9. If you hope to get it in (i.e. the evidence admitted), don't spring it on your opponent at the last minute.
10. Never just tell when you can show and tell.

The Settlement Brochure on CD-ROM

As counsel know, most cases settle well before trial. There is only a 2% to 5% likelihood that judge or the jury will have see the illustrative evidence counsel has to marshall. Rule 53.03(1) of the Rules of Civil Procedure require that expert reports be served 90 before trial. With this mind, counsel should recognize that the judge and jury are not the only audiences for the illustrative evidence.

In an article Igor Ellyn wrote in 2003,[26] it is suggested the target audience of statement of claim is at least 23 people, even if the case does not reach trial. These include opposing counsel, the defendant, the defendant's insurer, the mediator and the opposing party's experts, who might be

[26] I. Ellyn, Q.C., Persuasive Pleadings Promote Satisfying Settlements Sooner available in .pdf format online at www.ellynlaw.com/includes/pdf/Persuasive%20Pleadings%20Promote%20Settlements.pdf

called "analyzers of facts". To settle the case in a favourable manner, counsel must persuade several of these analyzers of facts.

Marshalling demonstrative evidence in time for mediation, for example, provides counsel with an opportunity to highlight the strengths of its case and perhaps foster settlement. This strategy must be approached cautiously. As soon as the demonstrative evidence is submitted to the opposing party, it loses its litigation privilege. Therefore, the material submitted even for mediation purposes should be the material counsel is prepared to rely on at trial.

An industry has developed[27], particularly in the United States, in the preparation of Settlement Brochures on CD-ROM. An American provider[28] John Gripp, describes the concept as follows:

> Attorneys are generally reluctant to show everything to their opponent during settlement negotiations, but there are occasions when a strong showing with demonstratives can help motivate settlement. In personal injury cases, the settlement brochure is a common method to hammer home the salient evidence and anticipated emotional appeal of a case. These brochures, which can range in medium from a notebook to a fully interactive, multimedia presentation on DVD, can be simple or elaborate. They generally include background of the victim, his or her family, the circumstances of the injury, which may include expert reconstruction of the event, followed by medical and expert reports and a demand for damages.
>
> Apart from settlement brochures, demonstratives are a good medium for organizing the facts and evidence, and presenting a compelling story that can be taken back to the decision-maker.

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[27] See for example, www.trialvis.com/settlement.asp, www.legalarts.com, and see f.n. 21, supra.

[28] J. Gripp, "Pre-Trial Uses of Demonstrative Exhibits" www.legalarts.com/pages/practicetips/pretrial.htm

Conclusion

Early in the 21st century, most commercial litigators are still wordsmiths. We still believe that words are the best tools for persuasion. For legal concepts, this may always be true. However, we live in the technological age, where superior graphics are a few clicks of the mouse away. Moreover, for those of us who have not mastered turning mouse clicks into persuasive graphics, there are service providers ready to assist. It should not be long before most advocates hone their skills to persuade by using images more often in place of words.

Toronto, October 2004.