THE PREPARATION AND UTILIZATION OF "LAY n WITNESSES IN PERSONAL INJURY AND WRONGFUL DEATH CASES

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"My friends at the Trial Bar of this Country ... have helped me to believe that the equation of suffering and redress is a meaningful way of life."[1] Moe Levine (1908-1974)

INTRODUCTION

The late great trial lawyer, Moe Levine, aptly described the trial of a civil lawsuit involving personal injuries or wrongful death as "the equation of suffering and redress". In order to work through this "equation" and reach a verdict which provides the proper measure of "redress" for the plaintiff's suffering or the decedent's death, the jurors must be given a catalyst which will motivate them to return a sufficient verdict. One of the more effective means of providing this catalyst in a personal injury or wrongful death lawsuit is through the testimony of "lay" witnesses. Unfortunately, this potent weapon in the trial lawyer's arsenal is often ignored or given perfunctory consideration when planning case presentation. Effective "lay" witness testimony can enhance the recovery in almost any personal injury or wrongful death case.

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The adjective "lay" is defined as "not belonging to or endorsed by a learned profession a lay opinion".[2] Other sources say that the adjective "lay" is synonymous with the words "earthly, worldly, ordinary, non-professional, and amateur".[3] Thus, when we speak of "lay" witnesses in the trial of a civil lawsuit, we are generally speaking of non-expert witnesses who testify concerning one or more aspects of a case. The scope of this article is generally directed towards the presentation of "lay" witness testimony concerning the issue of damages in personal injury and wrongful death lawsuits.

The presentation of "lay" witness testimony is somewhat difficult to discuss in the abstract. Every case involving personal injuries or a wrongful death is different. The character, personality, and life circumstances of each victim is different. The manner in which lay witness testimony is employed in one case as opposed to another depends in large measure on who the victim was and what the victim did during his or her lifetime prior to the injury or death.[4]

The presentation of effective testimony concerning damages in a personal injury/wrongful death lawsuit can be described as partially a science and largely an art. It is partially a science in that there are rules and fundamentals which can be employed when preparing and utilizing lay witnesses so as to enhance the damages presentation by each witness in almost any

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case. However, the presentation of lay testimony is more an art than a science because like an artist, the trial lawyer must engage in a purely subjective, creative enterprise in order to create a tangible result. The advocate must first visualize the image which needs to be portrayed to the jury and then transform that vision into a moving, compelling case presentation in the courtroom.

The trial lawyer must first select the proper array of witnesses. Then he/she must order and time the sequence of the testimony of these witnesses so that the substance and tenor of each witnesses' testimony is appropriate to the needs of the case as the trial progresses. If the testimony concerning the victim's losses are exaggerated, too emotional, or otherwise not properly adjusted to the setting and unique chemistry of the particular case's needs at the time the witness takes the stand, then the image which the trial lawyer intends to be portrayed will be distorted. Thus, the trial lawyer must take into account many different factors as he/she intuitively develops a "feel" for a particular case's individual needs. More importantly, the trial lawyer must be able to adapt his/her examination of each witness to the case's particular needs as the trial progresses because these needs can change.

A. THE CASE FOR USING LAY WITNESS TESTIMONY

There are a number of good and obvious reasons for utilizing lay witness testimony during the trial of a personal injury/wrongful death lawsuit. The courtroom is not a place which should be devoid of human feeling. It is the trial lawyer's

duty to evoke human understanding concerning the victim's injuries and losses so that the jury is motivated to reach the proper measure of compensation in this sophisticated equation between an individual's suffering and their right to redress.

Most human beings would rather be "motivated" than "persuaded" to make an important decision. Jurors are no exception. While it is definitely the trial lawyer's duty to "persuade" the jury, this duty of "persuading" is made easier if the jury feels "motivated" for some reason or another to render the verdict desired by the plaintiff. Lay witness testimony by its very nature is a "motivating mechanism" because it gives the jury definitive information in a positive fashion as to why the jury should return a verdict for the full measure of the plaintiff's damages.

As advocates employ modern litigation techniques such as the use of accident reconstructionists, scale models, and computer simulations during trials, it is readily understandable how the jury's focus becomes shifted away from human loss which has resulted to a human being because of tortious conduct. Utilizing friends, family members, neighbors, co-workers and supervisors of a plaintiff or decedent to testify concerning the effects of an injury or loss resulting from a death insures that the jury will focus upon the plaintiff's losses from the perspective of one human being to another. In essence, the real importance of lay testimony is that it humanizes and individualizes the victim and brings the jury's focus back away from the necessary, but sterile, technical information they have otherwise received

through testimonial and demonstrative evidence during the trial.

Jurors will do the right thing if they are given proper information and proper motivation. It is particularly important in tort cases where there are no aggravating circumstances to motivate the jury into punishing the tortfeasor that the jury be otherwise motivated into returning a verdict which represents full justice. This is done by making the jury fully appreciate the victim's losses from the victim's perspective through the testimony of another ordinary human being. Lay witnesses are amateurs, just like the jurors. They are more apt to speak in language and share information which the jurors can relate to than expert witnesses who are being compensated for their time working on the case. Thus, effective damages testimony from lay witnesses takes the focus off the professionals involved in the trial and forces the jury to focus upon the case from the vantage point of the injured plaintiff as the law requires.[5]

A further advantage of utilizing the testimony of several "lay" witnesses during the trial of a personal injury or wrongful death lawsuit is that in cases where evidence relative to liability is presented first and evidence relative to damages is presented second, the plaintiff can take control of the tempo of the trial. There is usually little defense counsel can ask a lay witness by way of cross-examination if such witnesses are carefully screened and properly prepared. A string of stirring testimonials from two or three convincing lay witnesses towards the end of the plaintiff's case in chief can deal the defense a

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devastating blow from which these adversaries never recover.

Trial lawyers should be careful to remember that jurors come to the jury box with few preconceived notions about who they expect to testify in a given case. Jurors do not know that it is conventional wisdom to have a plaintiff's treating physician testify. Jurors credit a lay witness' testimony just as they do any other witness -- based mainly upon what type impression the witness makes and what information the witness imparts from the witness stand. Experience proves that jurors are very receptive to "lay" witness testimony so long as the lay witness has had an adequate opportunity for forming any opinions they express or making any observations which they make concerning the plaintiff or decedent. This is all the law requires.[6]

B. PLANNING LAY WITNESS TESTIMONY

In every case involving substantial or catastrophic injuries, it is advisable to have a "damages theme". Such a theme need not be esoteric and often leaps out at the trial lawyer from the facts of the particular case.

Once the plaintiff's team has adopted a damages theme for an individual case, then preparation of the lay witnesses for testifying at trial can begin. The testimony of each lay witness in one respect or another should elicit certain information in furtherance of the underlying damages theme. Often, the testimony of a single lay witness can set up the "cornerstone" of the plaintiff's closing argument concerning the issue of damages.

C. THE SELECTION OF LAY WITNESSES

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Once the plaintiff's team has gained some basic information concerning the victim and begun to formulate a damages theme for the case, the trial lawyer can begin to canvas the entire menu of lay witnesses.[7] It is important to survey as wide a pool of witnesses as possible in each case, despite the time constraints of modern law practice, because one may miss the best witness of all, if the search is limited to only four or five people. Oftentimes, it only takes one superb lay witness to make the damages presentation sparkle.

Potential lay witnesses should be studied and critiqued based on three general criteria. They are:

(1) Appearance/first impression:

It is critically important to take into account the general appearance and first impression which a witness makes. It is usually easy to tell based on a first impression whether a witness is going to give the impression of being forthright, genuine and sincere. A mere appearance on the witness stand by an executive officer or supervisor from the plaintiff's place of employment can make a powerful impression. At the same time, the testimony of one of the plaintiff's co-workers at an on-line assembly plant can also be equally compelling if that person projects the image of sincerity and genuineness.

(2) Content/extent of useful knowledge:

Jurors want to hear from people who really know something about the plaintiff. If the witness' contact with the plaintiff has been sporadic or limited, such a person's testimony

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will "go flat" in front of the jury. Thus, each witness presented at trial needs to have enough personal knowledge to impart meaningful information to the jury. Lay witness testimony should never be redundant.

(3) Articulation/ability to communicate:

Some folks have the innate ability to communicate, if only in simple terms. Other people are nervous and simply cannot talk before a group. While many of the best lay witnesses have to be "coaxed" a bit in order to bring out the best of their potential testimony, it is critically important to pick lay witnesses who have the capability to communicate their information in a favorable manner to the jury.

While the trial lawyer can have little or no impact on the general appearance which a lay witness makes or the amount and type of information which a lay witness has to impart to a jury, the advocate can make a great difference in improving the witness' demeanor, delivery and articulation. First, the trial lawyer should make the witness realize they have meaningful information which is important to the case. The witness should be assisted by the advocate in terms of what to wear, body language, how to act on the witness stand, and how to respond when questioned on direct or cross-examination. The trial lawyer can be especially helpful in assisting "lay witnesses" with their articulation by suggesting that the witness choose words which will paint a vivid picture for the jury. However, it is critically important not to "rehearse" the lay witness, or modify the witness' spontaneity or natural manner of speaking. The so

called "mock trial" is suspect for this very reason -- it robs witnesses' naturalness and spontaneity and causes witnesses to begin to think not what should be said in response to a question but what the lawyer wants the witness to say. A jury can easily perceive such witnesses are giving "canned testimony" from the subtle hesitations, eye movements, and discomfort which a witness projects when he or she is so "rehearsed" that he or she responds to a question not by focusing on the truth but by trying to remember the "script".

When first approaching lay witnesses, it is preferable to meet with that witness out of the office in a setting which is comfortable to that witness. Lawyers are generally perceived to be arrogant, and when the lawyer takes the time to go to a witness' home, or place of employment, it makes the witness feel important and helps the trial lawyer build an individual rapport with each witness. Most people are reluctant to discuss their feelings with a total stranger, but a personal meeting in a setting comfortable to the witness can often disarm these normal human reservations. Following the individual meeting with each lay witness, it is advisable to try to set up some sort of group meeting near the time of trial with all the lay witnesses who are most likely to testify at trial. A group meeting of this type serves as "an idea session" and often brings to light additional information which is within the purview of the individual witnesses which has not previously come to counsel's attention.

D. PREPARATION OF THE LAY WITNESS FOR DEPOSITION AND TRIAL

The following are some general rules which are often

applicable in cases where lay witnesses are to give testimony by deposition or at trial:[8]

(1) The most important rule of preparing a lay witness to be deposed prior to trial is to imbed in the witness' mind that the witness is not to volunteer any information not specifically asked for by opposing counsel. Lay witnesses and many lawyers routinely come to depositions believing that the purpose of a deposition is to convince the opposing counsel or insurance company how bad the plaintiff is hurt and how great the plaintiff's case is in terms of recoverable damages. This type of attitude is usually folly. Tell the witness to answer truthfully and completely any questions which are specifically asked but to volunteer no information not specifically requested by defense counsel. Cases should be prepared for trial -- not for settlement. One can either let the defense side know everything, or let them know as little as possible under discovery requirements. Human history through the ages proves that humans fear the unknown much more than the known. Since the defense side is motivated by fear and not altruism to settle cases, full disclosure, such as "settlement brochures" or "settlement videotapes", can allay more fear than they create and may therefore be manifestly self-defeating.

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(2) The next most important rule is to explain to the witness that it is critically important not to embellish or exaggerate the extent of the plaintiff's injuries. Always err on the side of conservatism when describing injuries or their after effects. The witness should be made to fully appreciate that the general idea is to give a complete, realistic, yet modest testimonial concerning the nature and extent of the plaintiff's injuries. The chronic exaggerator is poison to the case -- especially if the exaggerator is the plaintiff. This is documented by research done by social scientists.[9]

(3) The witness should be educated as to what to expect by way of cross-examination and how to handle expected questions. A typical subject for cross-examination of a lay witness is for defense counsel to elicit information concerning the plaintiff's bias by virtue of being a friend, co-worker, or neighbor of the plaintiff. An additional potential problem exists where the deponent possesses either personal or hearsay knowledge concerning how the injury occurred. In cases where a lay witness who is to testify concerning the issue of damages has any information at all concerning the way the incident occurred, such witness should be given a thorough explanation as to the plaintiff's theory of liability so that the witness does not innocently testify in conflict with other witnesses or give erroneous information.

(4) Explain to the witness thoroughly what the character and nature of damages testimony is going to be from the

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other lay witnesses. For example, if some lay witnesses testify that the plaintiff still hunts even though he has a shoulder injury and other lay witnesses testify that the plaintiff doesn't hunt anymore, this creates an obvious conflict upon which the defense will capitalize. Find out the truth and present only the truth.

(5) When meeting with a potential lay witness, always ask about the negative information which the witness knows concerning the facts surrounding the incident, the plaintiff's character and reputation, and the effect of the injuries upon the plaintiff. It is the height of embarrassment to have a lay witness testify who unexpectedly gives damaging information to the plaintiff's cause when cross examined.

(6) When preparing the lay witness for cross-examination at trial, make sure each witness understands that every question which defense counsel asks the witness upon cross-examination may present a golden opportunity for the witness to reiterate the points already made on direct examination or to establish points not previously made during direct examination. However, lay witnesses should never argue with defense counsel.

(7) It is terrible practice to let any lay witness (or any witness) give an estimate or guess concerning time, distance, or speed, if that opinion relates to any important issue in the case. Unless the witness has a stopwatch, tape measure, radar gun, or other adequate means for having formed an accurate opinion, it is advisable to discourage such a witness from giving

an opinion relative to time, distance, or speed. It is only human nature for the witness to guess when these questions are posed and the response is never accurate. These questions are usually calculated and carefully phrased by defense counsel so that the response may be taken out of context.

(8) When defense counsel deposes the lay witness and gets the lay witness to explain in general or specific terms all of the information which the witness has concerning the plaintiff's current problems, limitations, etc., it is advisable to suggest that the witness qualify his/her response "that is all I can recall at present" when defense counsel poses the inevitable question, "Is that everything you know about the plaintiff's injuries?"

(9) Tell the lay witness to pay close attention to any objection which may be stated by plaintiff's counsel during the deposition or at trial. If defense counsel is taking testimony out of context, or asking a question that is in some way unfair or illegal, the witness should listen to the stated objections so that he/she will be aware of the semantic trap or potential pitfall which lies ahead.

(10) Explain to the potential witness the importance of dress, general appearance, body language, and choice of words.

(11) Make every effort, personally and through your staff, to accommodate the witness regarding meetings, scheduling, and waiting to testify at trial so that giving lay testimony will be a minimum of inconvenience for each witness. This builds rapport and breeds new business! Most lawyers abuse witnesses

generally, and especially at trial, by being arrogantly insensitive to the witnesses' own needs and problems. Remember: That witness does not owe you anything, sir or madam. He or she doesn't need you; YOU need the witness. Schedule witnesses reasonably so they won't have to wait around at trial any longer than is absolutely necessary.

Any witness who is important enough to place on the witness stand during a trial is important enough to spend sufficient time with prior to trial so that the witness will be adequately prepared. The object is to get the best possible testimony from every witness.

E. RANDOM SUGGESTIONS CONCERNING THE UTILIZATION OF LAY TESTIMONY IN PERSONAL INJURY AND WRONGFUL DEATH CASES

Here are a few random suggestions for presenting lay witness testimony:[10]

(1) Don't be afraid of a blemish or two in your client's background. Accentuate the positive, but don't totally ignore the negative. The jury will appreciate the positive attributes of your client but they will appreciate them even more if you acknowledge a blemish or two in your client's background if they are so noticeable that they will come up anyway. NOBODY'S PERFECT ALL OF THE TIME. Give the jury a realistic view of the plaintiff, plaintiff's capabilities and limitations, and the plaintiff's life circumstances.

(2) Don't follow an accepted practice merely because it is conventional wisdom. Every witness that testifies in a trial

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should be placed on the witness stand for a specific purpose. Doctors almost always equivocate concerning the extent of the injury and the extent of recovery except in the most obvious catastrophic cases. If medical testimony is weak, consider trying the case without introducing professional medical testimony. Second, consider not using an economist in a wrongful death case unless provable economic loss is substantial. If you do so, you run the risk of setting a "ceiling" on your damages which may otherwise be virtually unlimited under wrongful death law which allows recovery for the intangible/non-economic component of the decedent's life.

(3) Take advantage of the fact that a juror's imagination is much more vivid than any motion picture or photograph. Let lay witnesses describe spectacular testimony or gruesome injuries. Lay witness testimony is three dimensional, whereas photographs and demonstrative evidence are often only one dimensional. The jury's collective imagination is many times more powerful than a series of photographs.

(4) In the trial of a lawsuit involving personal injuries, let lay witnesses other than the plaintiff talk as extensively as possible about the plaintiff's problems, limitations, etc. No one likes to hear anyone else complain about their physical ailments. If an injury is obviously catastrophic, little probably needs to be said about the injury itself. If the effects of the injury upon the plaintiff are subtle, what might be perceived as the plaintiff's whining quickly becomes credible evidence when described by a neighbor, co-worker, or family member.

(5) Have the lay witness be modest and subtle when describing physical injuries or talking about the effects of injuries which are obvious or gruesome. Take into account the plaintiff's feelings and do not humiliate your own client before the jury. Have lay witnesses other than the plaintiff talk about what the plaintiff's eye looks like without the prosthesis or what the plaintiff's stump on his amputated leg looks like rather than having the plaintiff discuss these embarrassing matters before the jury.

(6) Make sure that the lay witnesses give the plaintiff some dignity!![11] Serious injuries are debilitating, but the jury needs to understand that the plaintiff was and still is a proud and self-reliant person. Paint a positive portrait. You want the jury to understand the plaintiff is trying to get along as best he/she can with the problems which the injury has caused, rather than merely sitting around and feeling sorry for themselves.

(7) Words are important -- they are the currency of the courtroom. While it is important not to get a witness to substitute lawyer's words for their own and thereby destroy the spontaneity and individuality of the witness' testimony, it is important to help the witness express the information they possess in convincing terms that will "ring in the juror's ears" after the witness has left the stand.

(8) Try to employ a varied mix of individuals to testify as lay witnesses at trial. It is good to have a cross section of family members and people who have a more formal relationship with

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the plaintiff, such as a banker, employer, pastor, etc. People with a more formal relationship with the plaintiff are perceived as being less biased.

(9) In every case, give the jury a realistic view of the plaintiff's station in life and life circumstances. Don't stretch. Don't attempt to make simple, ordinary folks into movie stars.

(10) Make your lay witnesses humanize and individualize your client through the use of appropriate anecdotes. Have the witness paint a specific picture of memorable incidents or daily activities which the victim enjoyed prior to his/her injury or death which illustrate an important characteristic of the victim's character and life.

(11) Don't elicit "filler testimony" from lay witnesses unless there is a specific reason for doing so. Oftentimes, you only want to make one point with a given witness and if this can be done in five questions rather than fifty, do it. Brevity is usually best. Every word and piece of demonstrative evidence revealed to the jury should have a clear, essential purpose. If not, don't clutter up your case with claptrap.

(12) Enough is enough. Don't overdo lay witness testimony by introducing redundant information or having too many lay witnesses. Just enough spice will whet the jury's appetite. Too much spice and they will push away from the jury rail. Be especially careful in cases where there is a punitive component to the defendant's conduct not to destroy a jury's focus upon the defendant's heinous conduct by having too much testimony from damages witnesses.

(13) Get away from a prepared script. Don't be afraid to call an audible if the lay witness is on the witness stand and the line of testimony is not going as well as expected. Either redirect the line of questioning or cut it off gracefully and go sit down. It only takes one witness to exaggerate and embellish upon the truth to destroy the jury's perception of the reasonableness and fairness of the plaintiff and plaintiff's counsel.

(14) If you don't have good lay witnesses, don't use any lay witnesses. Some people are loners. Other people maintain a circle of contacts who don't make a good impression. Don't put up lay witness testimony merely to have some lay witness testimony. Use lay witnesses only if they are good and if they serve a specific purpose in the overall context of the case.

(15) Always try to finish your damages presentation with a flourish. Pick one of your best witnesses to be the "closer" and if the opportunity is there and the atmosphere is right, inject some drama into the case.

CONCLUSION

The task of planning the presentation of evidence concerning damages in a personal injury or wrongful death case presents the trial lawyer with a unique challenge to present his/her client's case in the best light possible. Along with that challenge, comes on the opportunity to engage in a purely creative exercise which can have a substantial impact upon the ultimate outcome of a case and/or the amount of damages awarded. Effective presentation of damages testimony through the "lay" or before/after witness is a simple, yet potent weapon in the trial lawyer's arsenal. The keys

to effective presentation of lay witness testimony are careful selection of a damages theme, thorough investigation of the potential sources of lay witness testimony, and thorough and meticulous presentation of each witness selected to testify at trial.

FOOTNOTES

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1 *Levine, The Best of Moe: Summations*, p. 3 Condyne/Glanville Information Services, Inc., Oceana Publications, Inc. (1983).

2 Funk & Wagnalls Standard Encyclopedic Dictionary, J.G. Ferguson Publishing Company, page 67.

3 The Synonym Finder, Warner Books, Inc., page 647.

4 See, *Southern Bell Telephone & Telegraph company v. Cassin*, 111 Ga. 575, 576, 36 S.E. 881 (1900).

5 In personal injury cases see, *Chattanooga, Rome and Columbus Railroad Co. v. Huggins*, 89 Ga. 494, 15 S.E. 848 (1892); *Central Railroad v. Coggin*, 73 Ga. 689 (1884). In wrongful death cases see, *Atlanta Valdosh & Western RR Co. v. McDilda*, 125 Ga. 468, 54 S.E. 140 (1906); *Polland v. Boatwright*, 57 Ga. App. 565, 196 S.E. 215 (1938); *Reliance Ins. co. v. Bridges*, 168 Ga. App. 874, 317 S.E. 2d 193 (1983).

6 *Pollard v. Page*, 56 Ga. App. 503, 193 S.E. 117 (1937); *United Security Agency v. Sims*, 161 Ga. App. 167, 288 S.E. 2d 117 (1982), Green, *Ga. Law of Evidence* § 110 (3d ed.); Agnor, Georgia Georgia Evidence § 9-1 (2d ed.). See also Imwinkelried, *Evidentiary Foundations*, pp. 20-21, The Michie Co. (1980) for excellent

suggestions concerning laying the foundation for lay witness testimony.

7 For a general discussion about planning lay witness testimony, see *The Anatomy of a Personal Injury Lawsuit* (2d ed) pp. 334-339, published by the Association of Trial Lawyers of America, 1981.

8 See also Keeton, *Trial Tactics and Methods*, § 2-14, Little Brown and Company, 1954, and Tanford, *The Trial Process*, pp. 503-506, The Michie Co. 1983 for excellent suggestions for witness preparation. Additionally, the Lawyers and Judges Publishing Co., Inc. of Tucson, Arizona publishes an excellent pamphlet for distribution to potential witnesses which is entitled "About Your Deposition - 95 Questions and Answers".

9 Coates, Wortman & Abbey, Reactions to Victims, New Approaches to Social Problems (I. Freize, et.al. eds 1979).

10 For an additional source providing suggestions about witness preparation and examination see Bracken, *Direct Examination*, Trial Magazine, June 1987, published by the Association of Trial Lawyers of America.

11 For some excellent ideas concerning recovery of damages for destruction of dignity and pride see Levine, *The Best of Moe: Summations*, pp. 203-218, Condyne/Glanville Information Services, Inc., Oceana Publications, Inc. (1983).