



DAMAGES: USING LAY WITNESSES TO MAXIMIZE DAMAGES

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INTRODUCTION

In presenting evidence on damages in a personal injury case, there are many factors that may be significant: medical testimony, life-care plans outlining future care costs, photographs, the plaintiff's testimony, etc. But in my view, one of the most important factors is testimony of lay witnesses. It is through such testimony that the jury can get a "people's view" of the damages and can relate to the plaintiff and how the injury has impacted his/her life. If the lay witness is credible and presentable, and has no stake in the outcome of the trial, the testimony can contribute to the story you are trying to tell in a fashion that cannot be duplicated by health care providers or the plaintiff and his/her family.

Lay witnesses may be able to testify to the immediate consequences of an injury if they witnessed it, can validate the vocational impact of an injury, and can provide key information on the plaintiff's "loss of enjoyment of life." It is the latter aspect of damages where lay witness testimony can be most important. A plaintiff who tells the jury how much an injury has reduced his/her enjoyment of life can appear to be a whiner or trying to extract more money from the jury. A credible lay witness can help to paint a picture of that intangible loss that is much more effective and believable.

In many cases, the jury's perception of the character of the plaintiff can be

important in their verdict. Lay witness testimony about the plaintiff and his/her life can help establish in the jury's mind that the plaintiff is a good person and deserving of a substantial award.

ESTABLISHING MEDICAL/ VOCATIONAL FACTS

In many cases, the injury to a plaintiff is not defined well—or at least not vividly described -- by the medical witnesses. A doctor may testify about a "comminuted fracture of the fibula/tibia of the left lower extremity" or other technical medical terms. A lay witness who witnesses the injury can talk about the "bones sticking out of the leg and the plaintiff was screaming in pain."

Longer term medical consequences of an injury can also be established by lay witness testimony about the plaintiff's symptoms and pain. A lay witness can express opinions about the mental or physical condition of a person, *State v. Kinard*, 39 Wn.App. 871 (1985), or about the symptoms persisting at the time of trial, *Bitzan v. Parisi*, 88 Wn.2d 116 (1977). A damage instruction for future pain, loss of earnings, and disability may be given even if only based on such lay testimony.

Lay witness testimony about the ability of a plaintiff to perform his job duties can be most effective. Even if you have vocational experts or physical capacity examiners testifying about range of motion and physical abilities, it may not be as effective as your client's

co-worker describing the actual, day-to-day physical demands of the job. If the jury already knows what limitations are present through other lay testimony, it can use its own imagination to conclude that the plaintiff could not possibly perform the described duties.

ESTABLISHING GENERAL DAMAGES

The standard jury instruction on damages will mention pain and suffering, disability, disfigurement, and loss of enjoyment of life. It is these general damages that can be presented—or corroborated—most effectively by lay witness testimony.

Who Should Testify?

Locating the best lay witnesses can be difficult and time-consuming, but well worth the effort. Of course, you should ask your client to identify those friends, neighbors, co-workers, or others who know the client and have had an opportunity to observe the consequences of an injury. I have often found that the client's perception of who would be a "good witness" is far from accurate, and the last person on his list of ten people may provide the most valuable testimony. It is often best if a non-lawyer from your office contacts the lay witness initially, because a call from an attorney can be intimidating and produce less valuable information. It will take time to interview each potential witness, but without detailed information about what each

witness knows and can testify to, you cannot make good decisions about trial witnesses.

Terry Abeyta presented excellent written materials on this subject at a WSTLA seminar in December, 1999, at “Trial Masters at Work: Excellence in Damages.” He included a “lay witness checklist” in his materials, which I have duplicated and attached as an exhibit to these materials, along with a checklist of potential problems a client may be experiencing after an injury (also included in Terry’s materials). In addition, attached is an “activities of daily living” checklist we use in our office to help establish the disabilities and problems resulting from an injury. The use of these checklists can be helpful in eliciting information from a lay witness who otherwise will only give generalities like “the plaintiff isn’t as active now as he was before,” or “he used to do a lot more before he lost both his arms.”

Sometimes you don’t have a lot of choice in selecting lay witnesses, because the plaintiff didn’t have a lot of friends or people who witnessed the effects of the injury. In other cases, you will have so many people on the list provided by the plaintiff that it is hard to choose. You clearly don’t want to present cumulative testimony from many witnesses, and the court may prevent you from doing that in any event. You want to present different witnesses, if possible, who will each support some slightly different aspect of the general damages.

If you have choices among people, consider the witnesses’ occupation. Each year, Gallup does a poll on which occupations are most respected. The

pre-September, 2001 poll has nurses first, pharmacists second, veterinarians third, physicians fourth, and grade school teachers fifth. I have heard that a recent poll now has firemen in first place, with nurses second. At the bottom of the list are used care salesmen and telephone solicitors. Given a choice and other things being equal, good testimony from a grade school teacher will probably be much more credible than that of a car salesman.

There is also some advantage in trying to “mix” the witnesses in terms of gender and age. One of my goals is to have lay witnesses that jurors can identify with; older jurors may respond better to a witness in their age group, for example, and blue collar jurors may respond better to a blue collar worker. If a juror identifies with a witness, that witness’ testimony about the plaintiff may resonate and have more impact.

What Should a Lay Witness Testify About?

I think the most important goal of a lay witness’s testimony will be to convey a “word picture” about the plaintiff’s damages. Generalized testimony is almost useless, in my view. For example, people will easily say such things as “the plaintiff seems to be in a lot of pain,” or “the plaintiff doesn’t do as much as he did before.” What you want, however, is for jurors to hear the lay testimony, and decide for themselves how terrible the injury has been for the plaintiff. A conclusion reached by the jury itself is held more firmly than one you tell them to reach.

One way to highlight limitations or disabilities is to present a lay witness who only testifies about the pre-injury activities. By talking about all the things

that the plaintiff did before the injury, but without contrasting it with the post-injury situation, the witness is more credible and less likely to be seen as trying to persuade or influence the jury. Other evidence will establish the plaintiff’s present condition, and the jury can use its collective imagination to contrast that with the pre-injury situation. It is often more effective to let a jury reach its own conclusions than to point out those conclusions to the jury.

I have found that the most effective lay witness testimony is the use of anecdotes or vignettes to illustrate the point being made. It can be amazingly difficult to pull such stories from witnesses, however. I like to call these the “I remember when ...” stories. A few examples:

“I remember when John got tickets to the Mariners for himself and his young son. He was a baseball fan and pretty excited about going, and his son was even more excited about going with his dad. Then John called me that morning and asked if I would take his son instead, because he was in too much pain to go.”

“I remember when Fred tried to get up from his chair, and he fell backwards when his leg gave out. That happened quite a few times.”

“I remember asking Bill after he got out of the hospital if he wanted to go fishing in my boat. We used to go almost every weekend when the weather was good. But he told me he couldn’t do that anymore because he couldn’t get in and out of the boat because of his back. He had tears in his eyes when he told me that.”

“I remember the time Mary was going to sing in the church concert on a Sunday evening. She’d been a member of the choir for many years and had a beautiful voice. But she had to cancel that afternoon because she was no longer able to stand long enough to participate.”



These kinds of short stories or anecdotes are the verbal equivalent of photographs. They paint a picture of the plaintiff that stays with a jury much longer than generalized descriptions or conclusory testimony. They can also illustrate aspects of the plaintiff's character or lifestyle that you want to bring out: how dedicated the plaintiff is to his/her children – how much they treasured such things as fishing with a friend, or singing at church – or the indignity and embarrassment of not being able to get out of a chair without assistance. These things can resonate with a jury, and you have accomplished two things with the anecdotes: established the level of pain of disability and how it affects that person's life, and how much of a "good person" the plaintiff is.

It isn't always easy to pull these anecdotes from lay witnesses. Some people have a difficult time being specific and will resort to generalities repeatedly. It may be necessary to "talk" the witness through a day, or a week, or a month of the plaintiff's life, and ask about specific things they recall about what happened during that time period. Usually, you can find something that witness can tell the jury that helps illustrate your client's damages, but sometimes it is a hopeless task. In some cases I have had a group meeting with a half dozen witnesses to collectively talk about what they know and can recall, and that can trigger memories of events that can be used in testimony.

In terms of the order of testimony, think about having one or more lay witnesses testify before the plaintiff takes the stand. If you have good witnesses who the jury can identify with, and good testimony about the

plaintiff's character and activities, you may not have to use the plaintiff as much as you thought. The jury will feel they already "know" the plaintiff and what he has gone through. In effect, you have buttressed the plaintiff's testimony before he gives it.

At the risk of telling one too many war stories, we used that principal 25 years ago in a trial. Our client was a strong, husky man—an electrical line-worker—who had a failed back surgery and chronic back pain. He was also a stoical person who didn't like to complain. We knew if we put him on the stand and asked him how he was doing, he would say "I'm doing pretty good" and wouldn't want to seem to be whining about himself. So we had several lay witnesses talk about this characteristic of his, and how he tried to pretend he wasn't hurting when around his friends. We did not have him in the courtroom during that testimony. By the time we had him on the stand and asked him how he was doing, and he said "I'm doing OK," the jurors were nodding their heads because they knew he was really in great pain and didn't want to complain about it.

A few words about preparing the lay witness: explain to the witness that what they do around the courthouse may be witnessed by jurors. Do not have lay witnesses sit with each other in the courtroom or on a bench outside the courtroom. If they are seen talking, jurors may assume they are discussing and preparing their testimony together. If they share a laugh about something, a juror may think they are not taking the case very seriously. Do talk about what they should wear: I usually tell people to wear the kinds of clothes you'd wear

to a PTA meeting or dinner out with friends. Tell them to be honest, not argue with the defense attorney, use plain language, and not to embellish or exaggerate their testimony.