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James Dooley

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## *How to Try a Personal Injury Case*

*James Dooley\**

**P**ROPER PRESENTATION of a case in court is dependent upon proper preparation. Proper presentation means an intimate knowledge of the facts, the parties, possible witnesses, and, of course, the governing legal principles. Indeed, proper preparation means far more than knowledge. It embraces true comprehension.

Before an advocate can present his client's cause or meet his adversary on equal terms, he himself must completely understand the problem. Clear expression of an idea is impossible without a clear understanding of it.

In the adversary climate of the courtroom, the importance of a full comprehension of the matter of the litigation is particularly obvious when we consider the prime duty of the advocate. It is not only to express thoughts. It is to convince others that the ideas expressed not only are correct, but actually control the issues to be determined. The subject matter, for example, may involve the customs and practices followed in an industry, or a mechanical or chemical problem, to say nothing of a particular physical condition.

True, a complete knowledge of any subject involves detail. But, as we have noted, comprehension of the subject carries with it an understanding. Understanding is arrived at through the advocate's self-education. He must take this thorough knowledge of the subject matter, place it in focus with his understanding of the case, and cast out the unimportant. Only thus can the advocate obtain his goal—simplicity. Any case is decided by those who have but a passing experience with the facts. Witnesses do not repeat themselves. Indeed, the importance of a fact adduced on the first day of the trial may not be appreciated until the last.

Simplicity means stripping the litigation so that the kingpins are obvious. No matter how complex any lawsuit may be, its outcome will be determined by one or two facts. These we like to call the kingpins of the case. Choate referred to them as the hub of the case. Thus effective presentation commences long

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\* Of the Chicago Bar.

before the case is called for trial. We were constrained to make these remarks about preparation since only through proper preparation can the case be properly presented.

In the very nature of things, one could dwell at length on various phases of a trial. We shall comment upon a few. That we have omitted to discuss certain aspects does not, of course, mean that they are in no wise unimportant. Indeed, a trial is like a chain—it is only as strong as its weakest link. One error can be fatal. The tragic part is that we never know whether there is error, and the import of it, until the jury's verdict. Hence we look to experience for assistance.

It has been our experience that if there is any question concerning the admissibility of evidence which can be resolved at the outset, it is well to do so. The same may likewise be said with reference to any particular trial mechanics, such as the taking of notes by jurors in a protracted case.

For example, the remarriage of a widow neither bars nor mitigates her pecuniary loss arising out of the death of her husband. Indeed, in an opinion which collects these authorities,<sup>1</sup> a court pointed out that a widow may frequently be much better off after her husband's death than she had ever been in his lifetime, or, on the other hand, she might be much worse off pecuniarily by reason of her remarriage. Yet if it is brought to the attention of the jury that the widow has remarried, even by showing what her present name may be, the uniform effect has been that the damages are diluted. The jurors, being human, believe that she is no longer a widow and can hardly separate her present condition from the fact that her cause of action vested at the time of her husband's death.

We have encountered situations where the defendant states that it has the right to know the present name of the widow, notwithstanding that from such pretrial procedures as interrogatories and depositions it is well informed. Several judges have stated they would allow this inquiry, but not in the presence of the jury.

Again, your client may be a railroad employee who, since the time of his injury, has retired and is drawing a pension pursuant to the provisions of the Railroad Retirement Act. Can the jury be advised of the fact that he is receiving a pension? Al-

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<sup>1</sup> *City of Rome*, 48 F. 2d 333 (S. D. N. Y. 1930).

though it was generally held that such was not admissible,<sup>2</sup> nonetheless on occasion it was held to be either non-prejudicial or admissible for a limited purpose.<sup>3</sup>

The Supreme Court, in a case where the Circuit Court of Appeals held that evidence of a pension received by a railroad employee was admissible to show the reason for the plaintiff's not returning to work, reversed the judgment on that sole ground, holding that "evidence of collateral benefits is readily subject to misuse by a jury."<sup>4</sup>

Or assuming, as is frequently the situation, the injured has received workmen's compensation benefits or the proceeds of certain policies of accident insurance. It is, of course, well established, as one court stated the rule, that "No injustice is done to a person negligently injuring another in requiring him to pay the full amount of damages for which he is legally liable without deduction for compensation which the injured person may receive from another source which has no connection with the negligence, whether that source is a claim for compensation against his employer, a policy of insurance against accidents, a life insurance policy, a benefit from a fraternal organization or a gift from a friend."<sup>5</sup>

The courts realize that when the jury knows that plaintiff has received some compensation benefits it is not inclined to compensate the plaintiff for a loss which some other source might have made good to a limited extent.<sup>6</sup>

Then too, a tortfeasor is not entitled to profit from plaintiff's foresight in providing himself with accident insurance.<sup>7</sup>

Suppose the case will be protracted and there are multiple parties. Would it not be worthwhile to have the jurors take notes whenever they saw fit?

<sup>2</sup> *New York, N. H. & H. R. R. v. Leary*, 204 F. 2d 461, 468 (1st Cir. 1953), cert. den'd. 346 U. S. 856 (1953); *Sinovich v. Erie R.R.*, 230 F. 2d 658, 661 (3rd Cir. 1956); *McCarthy v. Palmer*, 113 F. 2d 721, 723 (2d Cir. 1940), cert. den'd. 311 U. S. 680 (1940).

<sup>3</sup> *Page v. St. Louis S. W. Ry.*, 312 F. 2d 84, 94 (5th Cir. 1963).

<sup>4</sup> *Eichel v. New York Central R.R.*, 375 U. S. 253 (1963).

<sup>5</sup> *O'Brien v. Chicago City Ry.*, 305 Ill. 244, 137 N.E. 214 (1922). See, *Oleck, Damages to Persons & Prop.*, Sec. 280 (1961 rev.).

<sup>6</sup> *Tipton v. Socony Mobil Oil Co.*, 375 U. S. 34 (1963); *O'Brien v. Chicago City Ry.*, *supra* note 5; *Burnett v. Hernandez*, 263 F. 2d 212 (9th Cir. 1959); *Smith v. Majestic Iron Works*, 2 N. Y. 2d 544, 161 N. Y. S. 2d 425 (1957).

<sup>7</sup> *Brynstesen v. Carroll Const. Co.*, 22 Ill. 2d 63, 174 N.E. 2d 172 (1961); *Montgomery v. Simon*, 309 Ill. App. 516, 33 N.E. 2d 642 (1941); *Consolidated Coal v. Shepard*, 112 Ill. App. 458 (1904).

Where the question has arisen, courts have unanimously held that it is entirely proper for jurors to take notes, either on their own volition or upon motion of counsel, and have agreed that the practice of taking notes is largely a matter of discretion.<sup>8</sup> As a reputable law journal noted,<sup>9</sup> it would be inconsistent to permit a trial judge to take notes of the evidence and to deny jurors the right to this aid to their memory during deliberations. To deny this right to the jury would mean that men are divided into two groups mentally—those who have the benefit of notes and those who, on the other hand, while obviously in greater need, are denied this aid.

This is particularly helpful in a protracted trial or in one wherein there are multiple plaintiffs with different elements of damages. We believe that at the outset of any complex case this question should be taken up with the Court and permission obtained for the jurors to make what notes they desire.

Let us turn to the opening statement.

The opening statement makes the setting. There the advocate creates the climate in which the facts will be presented and the atmosphere in which they will be received. Of course, the whole objective is to make that atmosphere as receptive as possible.

An opening statement has perhaps less rules than any other part of a trial. It is not argument. But it must not be made in any fashion which indicates doubt or uncertainty. Through its warp and woof there must be a certain subtle positiveness. This can be accomplished only if one will utilize to the highest degree possible the magic of the spoken word. Remember, the spoken word is as different from the written word as a man is from his portrait. The spoken word actually breathes. Call it inflection, but nonetheless it has life.

Such expressions as "We expect the evidence to show" or "We hope the evidence will show" do not add strength to your opening statement. Why not merely state the facts as you expect them to unfold from the evidence? If you display doubt, how can you expect to convince others? Be certain, and yet not over-certain. If there is an objection, of course it can be understood that you are merely stating what the evidence will be.

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<sup>8</sup> 154 A. L. R. 879; 89 C. J. S., Trial, 80; *United States v. Campbell*, 138 F. Supp. 344 (N. D. Iowa 1956); *United States v. Carlisi*, 32 F. Supp. 479, 483 (E. D. N. Y. 1940); *Thornton v. Weaver*, 380 Pa. 590, 112 A. 2d 344 (1955).

<sup>9</sup> 33 J. Am. Jud. Soc. 57, 58 (1949).

Above all, keep in mind the purpose of the opening statement. It is to acquaint twelve persons, completely unfamiliar with the case, that which makes it—the facts. It is to give them a kaleidoscopic view of that which is to come. Moreover, the facts must be laid out so that the issues are understandable, never forgetting that whatever is done in the trial of a lawsuit should make for simplicity.

How, then, can this be done? We suppose every advocate has his own particular way of accomplishing this objective. Regardless of the method employed, the facts upon which you expect to obtain a verdict should be laid out. For illustration, let us assume an injury case. Describe the scene so that all can visualize it, using certain aids such as counsel table, the jury rail, and anything which can make the matter simple. Fill in with minutiae, such as the weather conditions. Drive home with a certain amount of force the nature of the occurrence, so that regardless of what may later come, the jury knows and are for the cause you represent.

Tell what happened to your client subsequent to the occurrence, pointing out that a lawsuit is not composed solely of pleasant facts, and that it is your duty to relate the unpleasant, simply because it happens to be a part of that which makes the case.

Then too, take the thunder out of your opponent's case. This can be done by your description of the weaknesses in your case. When you state those weaknesses, they do not appear as such. When you leave it to your opponent, they are portrayed as such.

These may be prior injuries, congenital conditions making the plaintiff more susceptible to injury, or even a criminal record. When you have disclosed what you know your adversary is depending upon, how can there be fire to his side of the case?

Whenever you represent a plaintiff who has been convicted of a crime which is competent to affect his credibility, you are in a quandary. Does the defendant know about it? Assuming the defendant knows about it, will he attempt to use it? You may be certain that in almost all instances the defendant knows if the plaintiff has a criminal record. However, in many instances the defendant decides that it is not good judgment to make such proof. If you have reason to believe that his criminal record will not be gone into, then, of course, why should you mention it? How you can tell whether your adversary will indulge in

this evidence, we do not know, unless it may be in discussing the merits of the case among yourselves, or at a pre-trial hearing.

Regardless of what anyone may say concerning the opening statement, the test always remains the same. It is this: If the jury were to then retire after the opening statement, would they be compelled to return a verdict for the plaintiff? In other words, your opening statement must be such as to convince the jurors of the correctness of your position.

Nothing in a lawsuit is inflexible. This is best demonstrated by the experience of a lawyer as related to us. It seems that the plaintiff was seriously injured in a rear end collision. However, there was about \$10 damage to the plaintiff's automobile. In the first trial he described the occurrence and also, for approximately thirty minutes, the disabilities as a result of the ruptured cervical disc. Defendant, on the contrary, concentrated on the amount of damage to the car. The verdict was for the defendant.

Before the retrial, however, plaintiff had been operated upon for the cervical disc and his condition had grown far worse. His counsel's opening statement at the retrial ran thus: "My client was stopped at a light. The defendant ran into him and he sustained injuries." Defendant's counsel, who was prepared to again laugh plaintiff out of court by comparing the damage to the automobile with the alleged injury, was thus deflated. Plaintiff was successful on a retrial and obtained a very substantial verdict.

The greatest legal pitfall involved in the opening statement is admissions inadvertently made by the advocate. Where definite, unqualified admissions are made in the opening statement, they can well be binding and be classified as admitted facts. Thus where respective counsel for defendants admitted in their opening statements their clients were operating the vehicles involved in the occurrence, and the plaintiff failed to make proof of such facts, the defendants were estopped on appeal from asserting want of proof of their involvement.<sup>10</sup> Again, where the defendant admitted in his opening statement that a loan had been made, he was foreclosed from arguing lack of proof of this fact on a motion to direct a verdict.<sup>11</sup> Remember, the power of the

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<sup>10</sup> *Peterson v. General Rug & Carpet Cleaners, Inc.*, 333 Ill. App. 47, 77 N.E. 2d 58 (1947).

<sup>11</sup> *Mutual Life Ins. Co. of N. Y. v. Gregg*, 32 F. 2d 567 (6th Cir. 1929).

court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced.<sup>12</sup>

Some ask whether an opening statement should be made. Whenever one represents the party having the affirmative of the issue, an opening statement should always be made. After all, you are there to obtain some affirmative action by a jury. We can well appreciate that an opening statement, from the defense aspect, may do nothing other than to educate the plaintiff and his attorney as to defendant's theory. If defendant believes an opening statement will not aid it, it should not, in our opinion, simply waive the opening statement. On the contrary, he should make a very brief one. This may be in substance a suggestion to the jury that they closely follow the evidence and after they have heard all the evidence and the instructions of the Court they will appreciate the correctness of the defendant's position.

What about the witnesses, or the actors in this drama? Should reference be made to them in an opening statement? We believe that only in exceptional cases should the witnesses be described. It is only too often that after further consultation with the witness, you believe that he may not be of aid to you. Thus, you do not call him. However, if you have named him and described in detail what he will testify to, you, of course, are subjecting yourself to exposure in closing arguments.

Again, even before the opening statement and always before the presentation of evidence, be certain to obtain a ruling excluding witnesses. The very objective is to aid in the discovery of truth. Witnesses who listen to others testify are inclined to adopt as their own the testimony of another. Then too, the cross-examination of a witness who has listened to the cross-examination of others is more difficult. The witness has been "prepared" by hearing the cross-examination of another. In a word, presence of witnesses takes from the trial that spontaneity characteristic of the individual witness.

The opening statement in this drama has been completed. In what order should the witnesses be called? The order of appearance is very important. Generally speaking, we believe the opening statement itself fixes the order in which the proof will be adduced. A pattern should be adopted and adhered to. When considering the order of proof, always be conscious never to overtry your case, to present so many witnesses about un-

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<sup>12</sup> *Oscanyan v. Arms Co.*, 103 U. S. 261, 263 (1880).



necessary details that the "jugular vein" of the litigation is hidden. Again, remember that in the presentation of the plaintiff's case, your evidence is being constantly criticized through objection and cross-examination. The result is that usually your case will be much stronger at the close of all the evidence than at the close of the plaintiff's case. Why? Simply because defendant's evidence has corroborated many of plaintiff's contentions.

Proof of the situs in a personal injury case should be first. This makes it possible for the jury to understand the subsequent testimony of witnesses. Then too, references to landmarks have some meaning for them.

We agree there are certain *pro forma* witnesses, such as hospital record librarians, who can be called at any time. However, after you have made proof of your situs, whether it be by plats or photographs, the first witness on any controverted matters should be your best. He marks your case. He is in a position to create that very important first impression. He can give the jury an opinion of the righteousness of your cause that your adversary cannot overcome. If, on the other hand, he is impeached or makes a poor impression, you have an uphill problem.

Many say—and we subscribe to this belief—that your last witness should be your second best witness. But in how many cases do you find yourself dealt such a hand? We shall be happy to settle for one important, unimpeached witness who makes a good impression.

What about the plaintiff? Never put him on at the outset of the case. At that time, there are many facts in controversy. As you proceed with your proof, there will be confessions of fact. Again, at this particular stage, the jury does not know what he has undergone physically. The cross-examiner can subject him to harsher questioning than he would undertake when his condition had been demonstrated and the jury and himself had become fully aware of it.

There is another reason. At the early stages of the trial, every weakness in your case will be brought out on the cross-examination of the plaintiff. There will be no evidence of extenuating circumstances. For illustrative purposes, assume it is a situation wherein the custom and practice is to violate a certain company rule. Evidence of customary disregard of a rule

is, of course, admissible.<sup>13</sup> If proof is made of the custom after the plaintiff has testified, it might appear as an effort to cover some vulnerable area.

Then too, if the plaintiff is presented in the early stages, you will have the climax of the drama reached in the first scene. What I mean is best demonstrated by a particular case. Let us consider it.

The plaintiff's injury was loss of memory, without objective symptoms of any consequence. It was apparently a case of hysteria. He had been injured while doing his work as a switchman, and after the occurrence worked a couple of hours. He got into his automobile and, instead of going home, drove to another town. He was driving around the streets of the town aimlessly when he saw a police car and asked where he was. He was taken to a hospital, where many tests were performed upon him, but nothing objective found, other than a few bruises. It was a rather pathetic situation. He was married and the father of three children. He likewise had certain skills, such as that of a carpenter. He did not know his wife, nor did he recognize any of his children. Moreover, he had, in large measure, forgotten the skills of the carpenter.

At the time of the trial, he appeared healthy. He acted normally.

As the trial progressed, it did so in his absence, primarily because of a desire not to embarrass him with testimony concerning his prior and subsequent condition. Day passed after day. Witness after witness described his conduct before and after the occurrence, showing his complete loss of memory. Eventually, the court attaches themselves were asking if the plaintiff was coming to court.

Finally, when on the ninth day he appeared and testified, the jury was intense. Indeed, when he took the stand, the breathing in the courtroom could be heard. Astute counsel on the other side handled him gently. Do you think that if this normal-appearing person had come on the scene at the outset, he would have been accorded this reception? Of course not. But the jury had listened to various descriptions of his handicaps and greeted him as one of mankind's less fortunate. Again, had he appeared early on the scene, the memory of the jury when it received the case would not be as fresh.

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<sup>13</sup> *Doering v. Peoria & Pekin Union Ry. Co.*, 196 Ill. App. 129 (1916).

This, we hope, establishes our belief that the plaintiff's appearance on the stand should, in cases of any consequence, be brief and near the end of his case.

Should you have the plaintiff in the courtroom during the selection of the jury or during the presentation of the evidence?

All of you have known jurors who excuse themselves when defense attorneys examine them on the question of sympathy. They look at the plaintiff. They consider the question. They have a natural feeling for an injured person, as any human being would. They feel that because they have this natural feeling they cannot serve, when of course, the sympathy which disqualifies them must be sympathy which would make it impossible for them to return a verdict on the evidence and the law. More than that, you will find conscientious persons disqualifying themselves as jurors. Certainly, both plaintiff and defendant want conscientious jurors. The loss of such is a loss to both plaintiff and defendant. As a matter of fact, it is our firm opinion that the plaintiff should not be present during the trial, except to testify. The less time the jury has to scrutinize the plaintiff and his movements, the better off he is.

Jurors watch the plaintiff. They watch him more than anyone in the courtroom. They become familiar with his movements, how he stands up at a recess, his gait as he walks into the corridor, and many other characteristics which may leave a definite impression as to the nature of his injury.

When the plaintiff comes to court, he makes a clean appearance. He usually looks fairly good, no matter how seriously he may be injured. Suppose he has had a bad back injury. This, of course, is not obvious, but if he is to sit for several hours on the hard benches of the courtroom, that may have meaning for a juror.

How many times have you become frozen in your chair when defense counsel has argued to the jury that this man could not be so seriously hurt because he remained seated for two or two and one-half hours at a time, and because he has gotten up in a normal way and walked in an apparently normal way about the courtroom? That can be a very effective argument. Do not give the opposition that opportunity.

Suppose the plaintiff wants to know how his case is being presented. And, of course, he ought to. Tell him to send his wife or a friend in whom he has confidence to sit in the court-

room during the trial and report to him how the case proceeds.

In this drama of the law, who will be the actors? The experienced advocate recognizes that his cast, composed of witnesses, is very, very important. We have heard it said that a plaintiff should call all witnesses who have any knowledge whatsoever about the matters in issue, regardless of how damaging some might be, or how cumulative the proceedings will be. With this thinking, we are in thorough disagreement. Why call someone to hurt your cause? It is much like presenting the other side for one's adversary.

Unless a witness is necessary, do not call him. Each time you place a witness on the stand, you afford your opponent the opportunity of penetrating your case. The witness may be impeached. The witness may develop contradiction in the testimony of other witnesses. The witness may establish the defense. Remember, many matters are proper on cross-examination which could not be gone into on direct examination.

What, then, shall we use as guidelines to determine what witnesses are to be employed? Is the witness one who is necessary to prove a fact? If he is not, do not call him. Is the witness one who, on cross-examination, will fortify the defendant's case? If so, do not call him. Is the witness one who has given a signed statement or a court reporter's statement, the contents of which he does not recall? If so, do not call him unless absolutely necessary. It cannot be stressed too much that there is nothing that damages a case more than the impeachment of a witness. It stigmatizes a case as false.

Whenever there is a possible choice of witnesses, select only those who can answer questions intelligently, make a good impression, and will not be impeached. A good witness must be like Caesar's wife—above reproach. We believe in this even though it may mean not using certain eye witnesses.

The examination of witnesses has always interested us. There seems to be a general tendency on the part of a lawyer to make himself the witness. Most questions asked on direct examination are too cumbersome. Many are in the nature of statements which the witness is asked to confirm. This, perhaps, is the result of enthusiasm.

The function of the advocate is impersonal. Thus, be impersonal in the examination of the witness. Seek to have the attention of the jury focused on the witness and what he has

to say. Always remember that the witness is to overshadow the interrogator.

Simple examinations are the best. Introduce him. This means his age, employment record and residence record, and his ties of friendship or relationship with any of the parties. Then move on to what the witness knows. Have him tell it, not blurt it out, since in your preparation you have advised him of the type of questions you will ask, so that his knowledge will not be lost in a single answer. After you have obtained from him what he knows, stop. Never try to get more out of the witness than you know he knows.

In all lawsuits there are different types of witnesses. We wish to call your attention to the witness we like to refer to as the forgotten man. We mean the lay witness. What can he testify to? He may express his opinion as to the physical condition of the person observed. He may state whether, in his opinion, such persons are in good health, have the ability to perform work, whether they are suffering pain, are conscious or unconscious, in possession of mental faculty, have testamentary capacity, and a host of other matters which would appear at first blush to be conclusions. They are, of course, in fact, conclusions. But, in the very nature of the law of evidence, many conclusions are admissible.

As one Court quoted:<sup>14</sup>

"It has also been held that witnesses who are not experts may express their opinions as to the physical condition of persons whom they have observed,—that is, they may state whether, in their opinion, such persons are in good health, have the ability to perform work, whether they are suffering pain, are conscious or unconscious, in possession of their

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<sup>14</sup> *Lauth v. Chicago Union Traction Co.*, 244 Ill. 244, 91 N.E. 431 (1910) citing *Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 85 N.E. 327 (1908). The general rule applied to such testimony is stated in 20 Am. Jur., "Evidence" Sec. 823 as follows: "The emotions displayed by a person furnish an apt illustration of the necessity and value of non-expert opinion evidence; for it is practically impossible to describe another's appearance in such manner as to convey to the jury an actual picture of the emotion manifested by him at a given time. Human emotions and human passions are not, in themselves, physical entities susceptible of proof, as such, for they are seen only in the effects they produce. By necessity, therefore, the existence or absence of the emotions of fear, anger, joy, excitement, nervousness, \* \* \* and the mental state of a person may be proved by opinions of non-experts as deduced from the appearances and conduct observed by the witness \* \* \*. All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual which he cannot otherwise communicate except by an impression of results in the shape of an opinion."

mental faculties, etc. (Citing cases) \* \* \* Nor will he [the injured party] be presumed to feign disease, pain or distress under those conditions in which he is ordinarily observed by strangers or his friends and neighbors."

Adopting the rule laid down in another decision, the Court, after discussing the case in question, stated:

It was proper to prove his condition by persons who had observed his physical condition, demeanor and conversation through the years both before and after the time of the injury, and to show by them what, if any, change they observed in him after he received the injury.

The lay witness is particularly effective in cases where there is a dispute as to the causal relationship between the injury and the condition of ill being. You show: First, the man's prior activities and apparent good health; second, the injury; and thirdly, the effects which have taken place in him from the time of the injury.

When the case is cast in such posture, it becomes difficult indeed for the opposition.

All men believe that for every effect there must be some cause. In our experience, where the contention is that the particular occurrence was not the cause of the condition of ill being, lay witnesses have proved it even more effectively than medical testimony.

What lay witnesses should you call? Their selection determines the significance of their evidence. Whenever possible, avoid relatives, members of the family or close friends. Instead, call those who have no interest in the outcome of the case. In this category, you find school teachers, merchants, fellow employees, and other similarly related parties.

There is another reason for the use of lay witnesses. This is a vehicle of proving plaintiff's disability, including his suffering. None of us enjoys listening to the complaints of another. A bore has been defined as a person who, when asked how he feels, tells you the truth. All of us have had the experience of actually shuddering before we ask a plaintiff, "How do you feel?" We know that in some instances that simple question would produce a torrent of words for seven or eight minutes.

Thus, whenever possible, avoid having the plaintiff himself describe in detail his own complaints.

Those conditions can be proved by lay witnesses and also through the subjective symptoms given by a treating doctor. It

is possible to prove all the disabilities of the plaintiff without his having uttered a single word about them. For example, an elderly man had lost two legs and one arm while alighting from a suburban train.<sup>15</sup> When asked by the defense how he felt, he merely smiled and said, "Fine." He did not have a single complaint other than that he did not like the wheelchair. The impact upon the jury of his attitude is such that he gained their respect and admiration. Had he sought their pity, they, no doubt, would have felt sorry for him. But pity is not such a moving force as are respect and admiration. These emotions actually move others to favorable acts.

When you present the plaintiff, you thus will not be presenting him in the role of a complainer. Then too, it will abbreviate the direct examination. An intelligent cross-examiner will also be brief. If he elects to go into the man's disabilities, it is the cross-examiner rather than the plaintiff who is responsible for this description by the plaintiff. It is the cross-examiner who is creating the unpleasant climate. But, there is more. By the time the plaintiff has taken the stand, the jury knows his condition. It may be a very severe one.

Medical presentation likewise presumes proper preparation. This includes a conference with the doctor. At that conference, all medical records, including hospital records, should be available. If the doctor is to be an effective witness, he must be refreshed as to what was found and done. Thus, he should familiarize himself with his records, as well as those of the hospital. It will bring back to his mind this particular case. After a patient has been discharged, the doctor is concerned with other problems and thus must renew his knowledge of this particular case.

It has been our experience that there is no intelligent doctor who cannot be a good witness, if some time is spent with him. He should be advised of the problem at hand. That problem is to have him describe the injury and all its aspects so that those who have but a single encounter with it may understand it. He should know the necessity of simplicity. Simplicity usually means being illustrative and graphic. Above all, it means understandable language.

Proper preparation of the medical witness includes the form of questions which he will be called upon to respond to. He must

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<sup>15</sup> *Goertz v. Chicago & N. W. Ry Co.*, 19 Ill. App. 2d 261, 153 N.E. 2d 486 (1958).

know that if he is asked as to whether he has an opinion upon a given subject, he must answer either yes or no. He must be told that after stating that he has an opinion on the subject, he will be given an opportunity to express that opinion. It is to be noted that in expressing an opinion, he should be educated in the language of the law, so to speak. In those jurisdictions where a witness can express an opinion on the ultimate issues to be decided by a jury, he will state that a given condition is the result of a given injury. In other jurisdictions he might be permitted only to state that a given condition could or might have resulted from the injury or that the injury was sufficient from a medical point of view to cause the given condition. He must, in a word, know that he must follow the language of the question. Thus, in a jurisdiction such as Illinois, his answer would be, "My opinion is that this particular condition could or might be caused by an injury," not that it was brought about by the injury.

If the doctor is so educated, many objections and motions to strike his testimony will be obviated and the jury will have a running account of the witness's evidence without a multitude of distractions which only serve to dilute expert evidence.

And, of course, the medical expert should know the question upon which he will be called upon to express an opinion. This can assume many shapes.

In those jurisdictions where the "could or might" rule is in effect, the witness can be asked whether or not, in his opinion, the condition could be caused by an injury, referring, of course, to no specific injury or occurrence.<sup>16</sup> One court wisely pointed out that such a question is not an invasion of the province of the jury because the question does not refer to the specific occurrence, but is directed at the character of the injury.

Then too, what about indirect as distinguished from direct violence causing the injury? That is a proper subject of interrogation.<sup>17</sup>

Many of us overlook proof of the painfulness of the conditions by the doctor. We are prone to rely solely on the plaintiff. Why not ask the doctor if the condition, as such, in his opinion, can cause pain?<sup>18</sup> He can describe what physical condition

<sup>16</sup> See *Walsh v. Chicago Rys. Co.*, 303 Ill. 339, 135 N.E. 709 (1922).

<sup>17</sup> *Ryan v. City of Chicago*, 181 Ill. App. 642 (1913).

<sup>18</sup> *Chicago, B. & Q. R.R. v. Martin*, 112 Ill. 16, 1 N.E. 111 (1884).



caused the injured to have these complaints. His testimony will not only be explanatory but corroborative of the plaintiff.

Nor should we overlook making inquiry of the doctor as to whether this condition is one which is reasonably certain to cause pain in the future. This, of course, is proper.<sup>19</sup> Then too, it affords an evidentiary basis for the damage instruction listing future pain and suffering as one of the elements to be considered in fixing the award.

Frequently we encounter situations where there is an inference that the injured is a malingerer. This is usually injected into the case in a subtle way by the employment of innuendoes. When such is inferred, why not meet the innuendo head on and bring it out into the open? What better way is there than to ask the attending doctor whether, in his opinion, the injured is feigning or falsifying his complaints? This specific question, "Was he feigning them [his complaints] or making believe?" was held proper in a given case.<sup>20</sup>

What about permanency? Everyone knows the simple question can be asked of any doctor whether or not the condition is temporary or permanent.<sup>21</sup> However, x-rays also demonstrate many conditions of a permanent character. Why not ask the doctor, when the x-rays are being interpreted by him when he is describing certain abnormalities, as to whether they are, in his opinion, temporary or permanent? Through this mode of examination there can be brought out the multiple facets of the permanency of the injury.

So also is it recognized that congenital conditions which render the plaintiff more susceptible to injury or require an unusual time in healing are a proper matter of inquiry.<sup>22</sup>

What about future conditions? Can the medical witness establish it? This is a rather delicate field. Unless the advocate is careful, he will be vulnerable to the charge of calling for speculative testimony. This is a phase of the examination which requires preparation and foresight as well as the developmental technique. In many cases, medical science knows rather specifically what effects are reasonably certain to follow. In more cases it does not. Nevertheless, the right to make inquiry on this

<sup>19</sup> *Lauth v. Chicago Union Traction Co.*, *supra* note 14.

<sup>20</sup> *Chicago, B. & Q. R.R. v. Martin*, *supra* note 18.

<sup>21</sup> *Metz v. Yellow Cab Co.*, 248 Ill. App. 609 (1928).

<sup>22</sup> *Cooney v. Hughes*, 310 Ill. App. 371, 34 N.E. 2d 566 (1941).

subject exists, limited, of course, by the rule against speculative testimony.

Free from difficulty are matters concerning whether the condition is progressive or static. An opinion can well be based upon the condition as observed, or as known in medicine. Moreover, consequences reasonably certain to follow, in his opinion, can be testified to.<sup>23</sup>

How is the doctor's opinion elicited? As a rule of thumb, if every request for an opinion is prefaced with this expression, "Do you have an opinion, based upon a reasonable degree of medical and surgical certainty," you will be on solid ground. Except in unusual instances, such a preface will remove your question from the category of the speculative. The witness is giving his opinion, based upon a reasonable degree of medical and surgical certainty.

Then too, doctors are frequently asked for their opinions, but not for the reason for that opinion. An opinion without the reason for it is usually meaningless. Without the witness's reason for his opinion, the juror is not given an opportunity to accept or reject the opinion. Why not ask for reasons? The witness can dilate and simplify his position so that all can not only understand, but be convinced. Indeed, such a question gives the witness an opportunity to make an argument on behalf of his opinion. And remember, doctors, like everyone else, are protagonists when it comes to opinions.

Interestingly enough, it has been held reversible error for a court to refuse to allow a doctor to give the reasons for his opinion, a fact of which many trial judges are not aware.<sup>24</sup> As a matter of fact, courts have frequently commented upon naked opinions which are not supported by the witness's reasons or by supporting facts.<sup>25</sup>

If the doctor is to make a good presentation, he should know what he may anticipate on cross-examination, a matter which almost all medical witnesses worry about.

Methods of cross-examining a medical witness where there is a real injury fall into but a few categories.

First, there is the flattery approach: "Now, doctor, you did everything you could for this man, didn't you?" And the doctor,

<sup>23</sup> *Lauth v. Chicago Union Traction Co.*, *supra* note 14.

<sup>24</sup> *Quincy Gas & Electric Co. v. Schmitt*, 123 Ill. App. 647 (1907).

<sup>25</sup> *People v. Faber*, 199 N. Y. 256, 92 N.E. 674 (1910).

having on his mind a possible malpractice case, naturally says, "Yes." And, "Doctor, there isn't anything that any other doctor could do?" and the doctor naturally says, "No."

Finally, after a series of such questions, the doctor is asked, "Doctor, because of the excellent way you treated this man, there was a good result, wasn't there?" Then the doctor, no matter how permanently injured the man is, is placed in a quandary. If he says he obtained a bad result, he might be admitting that he was guilty of malpractice. So it is easier to say, "Yes," and that is what he usually says, unless he is properly prepared.

Then there is the "other causes" approach to cross-examination: "Now, Doctor, what are the other causes of this condition?" The doctor admits there are causes. The doctor admits that people who have never been in an accident have suffered from this condition. He further admits that people may be born with it. Indeed, the cross-examiner usually runs the gauntlet of "other causes."

But if the doctor knows there is to be a redirect examination, he won't be worrying when he says "yes" to these other causes. He will know that on redirect examination you will cover every cause the examiner alluded to and exclude all except the injury in question.

Another misconception prevalent among the medical profession is that it is almost sinful for a doctor to state that he relied upon what the patient told him. Yet that is the method by which medicine is practiced day in and day out throughout the world. The first thing any doctor asks the patient when he comes in is, "How do you feel?"

Disabuse the doctor of the idea that he needs to fear stating that he relied upon subjective symptoms.

Another field which, although touched upon, is not used to its fullest extent is expert testimony. Whenever there is the possibility of the use of an expert, do not overlook it. An expert can explain your case, translate theory into plain, understandable language so that the jurors fully comprehend it. More than that, an expert can, in fact, make your case. Thus, consider this situation: A car repairman working on a railroad car in the yards fell from a wooden straw horse. On the face of it, it does not seem there could be any negligence. However, it was developed that other railroads used different and safer methods. This testimony came through that of employees familiar with the practices

in the industry.<sup>26</sup> They were as much experts as he who had a Ph.D. degree.

Expert testimony is admissible when the subject matter of the inquiry is of such a character that only persons of skill, experience and knowledge on the subject are capable of forming a correct judgment as to facts connected therewith. Expert evidence is not confined to particular classes or professions, but is admissible whenever the witnesses offered as experts have peculiar knowledge or experience which is not common to the world, and which renders their opinions, founded upon such knowledge and experience, an aid to the jury in determining the questions at issue.<sup>27</sup>

In such regard, it is well settled that persons specially qualified by skill or experience may state expert opinion as to scientific matters, as to the management and operation of vehicles, machinery, railroads, and other appliances, and as to matters of custom and usage in business.<sup>28</sup>

There is nothing new about expert testimony. In 1874 it was held reversible error to exclude the testimony of a witness as to why, in his opinion, an emery stone had broken.<sup>29</sup>

Eighty-one years later, it was held proper for an industrial engineer to express his opinion that a grinding wheel had burst because of a lack of uniformity in its structure.<sup>30</sup>

Likewise, an expert has been permitted to testify that if metal had been properly fused it would not separate and to express an opinion that a chisel had broken because it was improperly welded.<sup>31</sup>

The gauntlet of expert testimony is indeed a long one. In one case an architect was permitted to testify that a plank, being used as a pry, would break at a weight of 3,971 pounds.<sup>32</sup> Where a floor had collapsed while in the process of being jacked up,

<sup>26</sup> *Margevich v. Chicago & N.W. Ry. Co.*, 1 Ill. App. 2d 162, 116 N.E. 2d 914 (1953), cert. den'd. 348 U. S. 861 (1954).

<sup>27</sup> *Thompson v. Hughes*, 286 Ill. 128, 121 N.E. 387 (1918); *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077 (1911); *Hays v. Place*, 350 Ill. App. 504, 113 N.E. 2d 178 (1953); 18 I.L.P., Evidence, Sec. 321.

<sup>28</sup> 32 C. J. S., Evidence, Sec. 533; 18 I. L. P., Evidence, Secs. 323, 325; 47 Ill. Bar J. 604 (1959).

<sup>29</sup> *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417, 422 (1897).

<sup>30</sup> *Brown v. Sterling Abrasives Division*, 5 Ill. App. 2d 1, 124 N.E. 2d 607 (1955).

<sup>31</sup> *Pfeifer v. Eastern Metal Works*, 258 Ill. 427, 101 N.E. 548 (1913).

<sup>32</sup> *Devine v. Mathis Bros. Co.*, 160 Ill. App. 122 (1911).

on the basis of the appearance after the accident testimony was permitted that one of the jacks had buckled and cracked a block.<sup>33</sup> What caused a pipe to explode was permitted to be told by a machinist,<sup>34</sup> and, in the same vein, steam fitters were permitted to state their opinion as to the breaking of a steam pipe.<sup>35</sup>

On another front, a university professor who had never seen or participated in the manufacture of wire rope and was not completely familiar with the manufacturing process, on the basis of his education as a doctor of mechanical engineering, expressed an opinion that a wire cable had broken because of improper manufacture.<sup>36</sup> Indeed, even the cause of a cargo falling while a whip was being unloaded was permitted to be stated by an experienced marine surveyor and superintendent.<sup>37</sup>

In the field of railroading, expert testimony has probably been employed almost as long as various other fields of human endeavor. Witness a railroad man giving his opinion as to the custom of well regulated railroads to place telltales on each side of low overhead bridges,<sup>38</sup> or a railroad man expressing his opinion as to the degree of curve requiring a guard rail,<sup>39</sup> or an engineer testifying whether a grade siding should have been equipped with a derailling switch.<sup>40</sup> In the same field is evidence of what other railroads usually and customarily do, with reference to safer methods<sup>41</sup> and safe place to work,<sup>42</sup> or warning employees about the dangers of creosote.<sup>43</sup>

Expert testimony can be of aid on the measure of damages. There is the banker who can testify as to the highest rate at which money can safely be invested. His testimony can be of importance at such a time as the present high interest rates. He will be the first to agree that in computing interest over a life span, a more conservative figure than that being paid by the banks as

<sup>33</sup> *Moss v. Williams*, 143 Ill. App. 140 (1908), *aff'd* 237 Ill. 254 (1909).

<sup>34</sup> *McCabe v. Swift & Co.*, 143 Ill. App. 404 (1908).

<sup>35</sup> *Webster Mfg. Co. v. Mulvanny*, 168 Ill. 311, 48 N.E. 168 (1897).

<sup>36</sup> *Sitta v. American Steel & Wire Division of U. S. S.*, 254 F. 2d 12 (6th Cir. 1958).

<sup>37</sup> *Curtis v. Garcia y Cia*, 272 F. 2d 235 (3rd Cir. 1959).

<sup>38</sup> *Pittsburgh, S. & N. R. Co. v. Lamphere*, 137 F. 20 (3rd Cir. 1905).

<sup>39</sup> *Norfolk & W. R. Co. v. Gillespie*, 224 F. 316 (4th Cir. 1915).

<sup>40</sup> *Troxell v. Del., L. & W. R. Co.*, 180 F. 871 (E. D. Pa., 1910).

<sup>41</sup> *Margevich v. Chicago & N. W. Ry. Co.*, *supra* note 26.

<sup>42</sup> *Gila Valley Ry. v. Lyon*, 203 U. S. 465 (1906).

<sup>43</sup> *Dowler v. N. Y. C. & St. L. R.R.*, 5 Ill. 2d 125, 125 N.E. 2d 41 (1955).

interest on deposits should be used. The reason is simply that interest rates fluctuate and in a year hence we might be in a low interest rate period.

All of us have met the actuary, usually called by the defendant, who, employing the highest interest rate at which money can be safely invested, reduces to its present value a given sum over a period of years. We are constrained to note that there is no authority for a position frequently taken by defendants in death cases that in computing present value, work expectancy tables, as distinguished from life tables, should be employed. The only proper evidence is a recognized life table. It then becomes a matter for the jury to determine, under the instructions, how long a person of the age of the plaintiff, having his habits, might have worked.<sup>44</sup> This is true even though there might be a compulsory retirement age, since persons who are forced to retire from a given occupation subsequently obtain other employment. Thus we say this is for the jury to decide, depending upon the habits of industry of the person involved.

Inflation, courts of review tell us, in considering whether a verdict is excessive, is a matter of judicial notice. Why not make proof of the actual facts of inflation? It will not only enlighten the court of review, but, more important, the jury. Whenever a person is permanently injured or wherever there is a death, such testimony can be of untold aid. Remember, the persons who suffer from inflation most are those who have to depend upon fixed incomes. Wages are raised with the cost of living. Not so in the case of the fixed income.

Thus, consider a death action under the Federal Employers' Liability Act. The measure of damages, for the most part, is a loss of contributions. Usually the value of such intangibles as the loss of guidance to children,<sup>45</sup> the services which the deceased may have performed about the home,<sup>46</sup> and the loss of the right to inheritance<sup>46a</sup> are overlooked. On the contrary, each life is thought to have a mathematical value, omitting the human equations. Evidence of a continuous inflationary spiral during the last

<sup>44</sup> *Allendorf v. Elgin, J. & E. Ry.*, 8 Ill. 2d 164, 133 N.E. 2d 288 (1956) cert. den'd. 352 U. S. 833 (1956); *contra*: *Wetherbee v. Elgin, J. & E. Ry.*, 191 F. 2d 302 (7th Cir. 1951).

<sup>45</sup> *Norfolk & Western Ry. v. Holbrook*, 235 U. S. 625 (1915); *Giles v. Great Western Ry.*, 72 F. Supp. 493 (D. C. Minn. 1947).

<sup>46</sup> *Michigan Central Ry. Co. v. Veerland*, 227 U. S. 59 (1913).

<sup>46a</sup> *Martin v. Atlantic Coast Line R.R.*, 268 F. 2d 397 (5th Cir. 1959).

twenty-five years and one which, in the consensus of economists, is expected to continue, can do much to knock out these mathematical values and at the same time make possible a true consideration of all the elements of damages<sup>47</sup> in an action of this character.

The hypothetical question is a great weapon in the use of expert testimony. It takes all the legs, so to speak, by which a case is proved, throws them into one pot, and calls upon the expert witness for his opinion.

At times it can be the only vehicle of examining the expert, particularly one who had never had any contact with the particular subject matter. In one case<sup>48</sup> the facts as to the plaintiff's condition of ill being were developed by the testimony of non-expert witnesses and then medical witnesses were called and in response to a hypothetical question gave their opinion as to a causal connection between the injury and the condition of ill being—a method which was approved.

The effectiveness of this vehicle of proof cannot be overestimated when we remember that in giving his reasons the witness can in effect make an argument.

But there is more. Many cases would fail and justice would frequently be denied without this vehicle. In many instances the expert has no direct knowledge of the particular subject of the question. Consider a structure which has been destroyed by fire, leaving no drawings of any kind. However, there is proof as to how the fire proceeded, such as roaring through a stair well. Without the expert and the hypothetical question, it would have been indeed difficult to establish ordinance violations proximately contributing to the occurrence.<sup>49</sup>

So also, your problem may be the proof of unseaworthiness of a vessel made at a given time but later refurbished. Its entire crew has been drowned and it has never been brought up from the depths of the waters. Expert testimony is of untold aid here.<sup>50</sup>

The hypothetical question, to be free from error, should be carefully prepared. It should include the necessary facts and at the same time be as concise as possible. It is a question which

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<sup>47</sup> See tables and cases on various types of personal injury and death, and damages, in, Oleck, *Cases on Damages*, ch. 21, 22 (1962).

<sup>48</sup> *Lauth v. Chicago Union Traction Co.*, *supra* note 14.

<sup>49</sup> *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E. 2d 881 (1960).

<sup>50</sup> *Midwest Towing Co. v. Anderson*, 317 F. 2d 270 (7th Cir. 1963).

requires out-of-court preparation. If you intend to use it, be certain that you are properly prepared to do so.

Indeed, modern methods should be used whenever they can aid the truth-seeking process. If they can communicate or demonstrate certain facts to the jury, such is sufficient reason for their use.

All oral or written description fades into insignificance when compared with a photograph. A picture is the greatest of all descriptive vehicles. A motion picture portrays that which the still picture cannot, namely, movement.

What reason can there be as to why we should not avail ourselves of this vital medium of communication? When we go to court, we do not turn the clock back to 1900. Indeed, if such were the case, then all photography, and such scientific evidence as resulting from ballistics, fingerprints and microscopic studies would never have played any part in a trial. Yet today almost no case is tried without a visual aid of some character. Remember, as the courts have said many times, the general rule is that whatever tends to prove any material fact is relevant and competent.

Thus courts are well aware of the advantages of a motion picture. For illustrative purposes, in an *F. E. L. A.* case, a railroad carpenter lost his fingers on a shaper machine in a planing mill. A motion picture was admitted to show the operation of the machine.<sup>51</sup> So also in a contract action by a rider of a trained horse against a circus, the defendant's contention that the plaintiff obtained the contract by fraud was allowed to be refused by motion pictures demonstrating the plaintiff's ability.<sup>52</sup> And, with regard to damages, motion pictures have been employed to show the rapid pulsation of a plaintiff's throat when he was unable to come to court.<sup>53</sup>

As if that were not enough, a Circuit Court of Appeals has held proper the projection of a screen of films showing the plaintiff being treated for his injuries.<sup>54</sup>

Consider a person with some terrible injury, such as paraplegia. The jury, of course, has the right to see the effects of the injury, either on the person of the individual, or, if that cannot

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<sup>51</sup> *Richardson v. Missouri, K. T. R. Co. of Texas*, 205 S.W. 2d 819 (Tex. 1947).

<sup>52</sup> *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R. I. 162, 192 A. 158 (1937).

<sup>53</sup> *Rogers v. City of Detroit*, 289 Mich. 86, 286 N.W. 167 (1939).

<sup>54</sup> *Luther v. Maple*, 250 F. 2d 916 (8th Cir. 1958).



be done discreetly, with photographs. So also can the injured demonstrate before the jury the effect of the injury upon him. The rationale of allowing the jury to see the injury and permitting a demonstration by the plaintiff is that these triers of the facts will have communicated to them the effects of the particular wrong.

Why, then, should the jury not know the thousand and one difficulties this paraplegic is subjected to each twenty-four hours as he goes through the processes of living?

The only possible objection is that the motion pictures might have been posed. Nonetheless, if the fact of the injury is established, the reason for any such objection disappears. Motion pictures have been used in such cases. We ourselves have never had an objection sustained after the court had viewed the picture and there had been undisputed prior proof as to the nature of the injury.

Some students of the law—and all of us are forever students—have the false concept that the forces that engulf the lives of men turn away and pass the courts by in their normal course. Obviously, that is not true.

Let us say that whenever possible, employ modern aids which can not only demonstrate but, more important, make understandable the propositions for which you stand. Surprisingly enough, some research will usually find authority for the use of these aids.

How do jurors keep track of special damages? Doctors come in and testify as to the fair value of their bills. Other paid bills are admitted in evidence. When there are a number of bills, the jurors cannot keep track of them. Sometimes they confuse testimony concerning the fair value of services rendered with that of a paid bill and believe that they cannot include the former in their award. When bills are stipulated to, as is usually the case, or when there is no conflict as to the fair value of services rendered, why not list on a sheet of paper which goes to the jury room these various items?

Certainly, the defendant, if he has stipulated to a bill, could not complain of this practice, and it makes it possible for the jury to know exactly what is in the record.

No remarks about the presentation of a case would be meaningful without touching upon that very important phase—the summation.

There has been a tendency in recent years to regard the summation of counsel as unimportant. This concept is, of course, consonant with the theory that a trial is no longer an adversary proceeding, and that litigation more or less determines its own outcome. With these thoughts, we are in complete disagreement.

A lawsuit, as we have often said, is a drama, cut as it is out of the cloth of some human passion. Throughout the usual trial, there is conflict. It may be in the testimony itself. Or, perhaps, it may be only in inferences to be drawn from facts about which there is no disagreement. The climax of that conflict is the summation. What is said and the manner of saying it oftentimes determines the outcome of the case. If that be true, enough emphasis cannot be attached to this phase of the proceeding.

Summation is the vehicle through which the advocate demonstrates his powers of persuasion. All that makes a man a lawyer—his memory, his ability to reason, his capacity of expression, his subtlety and tact in delicate situations are but part of the persuasive process.

Thus, are not trial lawyers justly irked at any court who seeks to unduly circumscribe summation, particularly by time limitations? Frequently we go through trials with protracted delays, many unwarranted and unnecessary. Yet when the time comes for arguments of counsel, the court is "in a hurry." This is wrong.

A litigant has an absolute right to argue his cause through his counsel. And such a right is broad and deep. Indeed, one may arraign the conduct of the parties, impugn or condemn motives, and comment upon the demeanor and appearance of witnesses and their credibility. Indeed, the right of argument within proper bounds is as profound and broad as the learning of counsel allows.

The injustice wrought by limitation of time for argument usually affects that litigant having the affirmative of the issue. Why? It is he who must fuse twelve minds to the same conclusions on all issues. That time is required to accomplish this is obvious from a few considerations.

First, the jurors come to the trial without previous knowledge. They are laymen. They have but a passing encounter with the evidence. Witnesses cannot repeat their testimony. Thus jurors frequently do not realize its importance until all the evidence is in.

Again, it is the prime function of the advocate to relate facts to issues. He must, in his argument, define the issues and not only delineate what facts are material to those issues, but he must do more. His is the burden of convincing the jurors that the delineated facts are controlling. In a word, he must, in his argument, take the issues, and fit the material facts together so that there emerges an understandable portrait of the particular lawsuit. This is often a test of real legal craftsmanship.

The advocate's obligation may mean overcoming the personal prejudices of the twelve citizens. Every man, it must be remembered—no matter how just is his heart and how strong his desire to do justice—has certain preconceived ideas about given propositions. This is what we mean when we use the phrase: "personal prejudice."

Remember, jurors want to do that which is right. The prime object of the advocate is to have them believe that the verdict sought is a just one.

What is the object of any summation? It is, of course, persuasion. What is persuasion? This means obtaining the mind of the juror and making it that of the advocate. If you will accomplish this, remember there must first be a well-defined idea in your mind, and that idea must have shape and form in your own mind.

Then, too, there must be an adequate communication of thoughts. The juror does not see the advocate's mind. The advocate does not see the juror's mind. We rely upon words. Thus the advocate must not only make noise, but he must learn the art—and I use the word advisedly—of transmitting those thoughts through words. Today, more than at any time, is the public word-conscious. Because of the radio and television, the vocabulary of the public is perhaps at its apex. Today the man on the street is familiar with the shades of meaning conveyed by certain words. Do not misunderstand us to suggest the use of only simple words. But, as you know, a different meaning can be conveyed by a simple synonym or colloquialism.

When does one prepare for summation? Does he wait until all the evidence is in and then determine that which is important? Of course not. All cases, we have stated, regardless of how involved they may appear to be, have but one or two kingpins upon which they will turn. If, long before the trial starts, you have determined what those kingpins are, your preparation of the summation is but a by-product of that determination.

Thus your summation will be directed to these kingpins, to the issues for which you have conditioned them throughout the trial. You will not be confronted with the problem of attempting to have the jury forget, so to speak, much evidence which had no importance.

Personally, we like to list the two or three important facts in the case and try to introduce evidence material to those facts. The more facts you have as kingpins, the more difficult your problem becomes.

With reference to physical preparation of your summation, what is to be done? Shall you write it out in advance and read it to the jury? Of course not. It would be meaningless. You would lose that individual contact which comes from eye to eye contact with the jury. Absent would be the feeling of sincerity which cannot be conveyed through reading. Remember, unless you believe that which you say, how can you expect another to do so?

Should you make an outline of your thoughts and keep that within reach? Some lawyers do this effectively, and throughout their argument keep in touch with the jury; or should you make an outline of your thoughts on a small sheet, and, with your thoughts thus organized, make no reference to the sheet or to any document? This, we believe, is the optimum method. Why? You can look at each juror, eye to eye, and, without interruption, demonstrate your own belief in what you say. Then, too, you can at times feel the reaction of the jury to what you are saying. If a particular approach seems obviously unimpressive, you can abandon it. Above all, you will be able to better feel the pulse of the jury and keep it throbbing with your own.

What is the form of your argument? All lawyers have certain methods of arguing. But, regardless of whom you represent, we believe that there are two phases which must be discussed.

The role of the jury should be described. The jury must be made conscious of the delicate ground it occupies, the power it possesses and our reason for juries. It should know that trial by jury has as its predominant characteristic the resolution of all problems we call lawsuits in an almost sacrosanct climate.

The techniques counsel employ for this purpose vary. They are immaterial so long as they serve the purpose. Some do so at the outset of the summation—others at the close. Again, many remind the jury of its part in the trial both at the beginning and at the end of their summations.

Secondly, the law governing the rights and liabilities of the parties must be dilated upon. An adequate discussion of the law gives meaning to your dissertation of the facts. In addition to that, it conditions the jury for the court's charge. It is our opinion that a jury argument is not comprehensible unless it is preceded by some discussion of the law pertinent to the case. Thus consider an action under the Federal Safety Appliance Statute, wherein the only issues are whether there was a violation and whether that violation proximately contributed to the alleged injury. There is no question of negligence; there is no issue of misconduct on the part of the employee. Unless the jury knows something about that law, how could they understand your discussion of the facts? Again, let us suppose a defendant is defending a case solely on the basis of contributory negligence. The jury must know that if the plaintiff was guilty of any negligence which proximately caused the injury, he cannot recover, regardless of how negligent the defendant might have been.

We cannot overstress these two thoughts: First, never be an imitator, but insist upon being yourself, and secondly, approach your discussion of the case in a realistic manner so that you can expect others to adopt the reasons for the proposition for which you contend.