THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA
CLE BC

DIRECT EXAMINATION 2018
PAPER 5.2

Direct Examination: It's all about the Story

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DIRECT EXAMINATION: IT'S ALL ABOUT THE STORY

> The universe is made of stories, not of atoms. – Muriel Rukeyser
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> "Make the court want to decide in your favour"; then, "Show it how to do so."
> – Mr. Justice Laskin[1]

I. It's about the Story

The most accomplished advocates are the ones that are best able to arrange the facts within the framework of a story. Trial consultants, judges and neuroscience confirms this. In *Lawyers, Liars, and the Art of Storytelling*, Jonathan Shapiro writes, "first year law school is designed to bleach away the stories."[2] This is contrary to ancient wisdom and an evolutionary process tracing back over 100,000 years. To ensure our survival, the primitive part of our brain became programmed to make decisions at an emotional, subconscious, or unconscious level, based on the stories we had learned. When the tiger chases you, run! When the spear is thrown at you, duck!

1 Laskin J., *What Persuades (or, What's Going on Inside the Judge's Mind)*, The Advocate's Society Journal, June 2004, citing Horace Krever and John Morden.

2 Jonathan Shapiro, *Lawyers, Liars, and the Art of Storytelling: Using Stories to Advocate, Influence, and Persuade,* Chicago, IL: ABA Publishing (2015).

Neuroscience tells us that emotion trumps logic, and that storytelling is the best way to emotionalize your listeners to make them act in your favor. You must first touch the heart of your listeners before you can reach their minds and the path to the heart runs through the brain.[3] Your audience must be shown and involved in order to fully understand you. This is what storytelling does and why *Mr. Justice Laskin of the Ontario Court of Appeal says, "The best advocates … are the best storytellers. … [s]o think of yourself first as an expert storyteller rather than an expert litigator."*[4]

II. Who is your Audience?

Welcome to the death of the age of reason. In our brave new world of fake news, alternative facts are trump. Thankfully, real facts still matter in the courtroom. However, before proceeding with a discussion on demonstrative aids at trial it is important to first know your audience. A study by Steve Herzberg, a distinguished trial consultant from the United States, found the following issues, in order of priority, were important to jurors:

The juror's personal opinion on facts	29%
Other juror's comments during deliberations	26%
The juror's personal experiences	22%
References to testimony	15%
References to instructions	8%
	100%

According to Phillip H. Miller, jurors learn by:

(1) Using their own life experiences (and biases) to understand a case;

(2) Rejecting conclusions that contradict their life experiences (or fail to address a bias to their satisfaction);

(3) Creating stories to make sense of the case (and to fill in gaps in the evidence); and

(4) Comparing one thing to another.[5]

We as lawyers assume far too much and believe our own value and belief system reflects that of our audience. We are too often wrong on this. To be persuasive, we have to understand that it is the jury's collection of values and beliefs that operates to decide cases. We must understand our audience in order to make them understand and remember the stories we tell. We must not assume that the jury thinks as we do.

We tend to think differently towards judges and we assume that their rational brain trumps their emotional inclinations. *However, according to Mr. Justice Laskin, even judges are influenced by an appeal that engages the emotional side of the brain, "Ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections. … Emotion has the power to move hearts and minds, even the hearts and minds of judges."*[6] This is why Mr.

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3 Gallo, Carmine, *The Storyteller's Secret,* New York, NY: St. Martin's Press (2016).

4 Laskin J., *supra* note 1.

5 Phillip H. Miller, "Using Visuals to Persuade," 2009 ATLA's Ultimate Trial Advocacy Course: Art of Persuasion, pg. L-4

6 Laskin, J., *supra* note 1.

Justice Laskin tells us to make the judge or jury *want* to decide in our favor. Then, he says, show them how.

III. Useful Technology

When I speak of technology in trial, I am using the term broadly to encompass any creative means to involve my audience. The Chinese philosopher Confucius said "Tell me and I will forget. Show me and I might remember. Involve me and I will understand." That is why technology is important; because it can help you involve your audience.

Within the context of trial, what generally comes to mind is the use of PowerPoint and other computer- driven exhibits. Technology also includes photographs, drawings, human anatomy models, medical illustrations, charts, and timelines. However, my favourite courtroom technology is the TrialPad app. TrialPad links wirelessly to a TV screen, so your natural mobility is maintained while allowing everyone to follow along. It also has the added benefit of reducing the amount of paper needed to show your case. The app's power lies in allowing you to capture your audience's focus and hold it as you present your evidence. As a result, you help your audience understand and remember the evidence as much as possible.

IV. The Benefits of Technology in Direct Examination

Legal warriors like Gerry Spence are instinctive persuaders who know how to reach the emotional core of the listener. Not all of us can be a Gerry Spence. But the persuasion techniques that come naturally to Spence are now being revealed by the emerging new field of neuropersuasion which applies principles of neuroscience to study the decision making process of the brain.[7],[8]

Technology and demonstrative aids grab your audience's attention, but to be most effective, they must help deliver the story. The words you use, the visuals you show, must first engage, then activate the emotional mind of the listener. Only then can you persuade. Only then can you teach. The technology you are using should never become the focus of your presentation.

Simplicity is persuasive. Clear language reduces ambiguity. Active language engages the listener and heightens the listening experience. Sensorial language engages the five senses (sight, sound, touch, smell and taste) and is most important, however, as that is how people learn and experience life.[9]

The keys of clear, active, and sensorial language in the telling of your client's story are potentiated by technological aids because they:

(1) Allow you to emphasize selected facts important to your case;

(2) Increases your communication efficiency;

(3) Simplify complex relationships and ideas;

(4) Makes the abstract more concrete; and

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7 Jim Fortin, *NeuoPersuasion: The Ten Biggest Persuasion Mistakes That Most People Make!* (2009), online:<www.mindauthority.com>).

8 Gary Small & Gigi Vorgan, *iBrain: Surviving the Technological Alteration of the Modern Mind*, New York, NY: HarperCollins (2009).

9 Alan Blumenfeld, *Workbook for What Lawyers Learn from Actors?*, 2009 ATLA's Ultimate Trial Advocacy Course: Art of Persuasion, pg. A-7.

(5) Reinforce oral testimony.[10]

Technology facilitates telling the story in another way – it helps the listener remember. Generally, people learn through three different means: visual, auditory or kinesthetic. Although most people will use more than one way to learn, each person will have a preferred method. There are more visual learners than any of the other types. Using a combination of learning methods ensures a higher retention rate.

Retention Rates	After 3 Hours	After 3 Days
Auditory	70%	10%
Visual	72%	20%
Auditory and Visual	85%	65%

Technology aids in the telling of the story by helping you maintain the listener's attention. The average continuous attention span of an adult is seven seconds, after which the listener starts to have stray thoughts in his or her head but then is able to come back to the topic at hand. After the first seven seconds, the average attention span for an adult is 20 minutes. However, most direct examinations are generally longer than 20 minutes.

How then do you maintain the listener's attention past the 20-minute mark? If you observe people at the movies, you will notice that they do not have problems paying attention to a two hour movie. Why? It's because they are hearing and seeing a story unfold before them. Using technology to allow the listener to visually see what you are saying ensures a better chance that you will retain the listener's attention past the 20-minute window.

Without the visual, the imagination is not engaged. And without imagination, the emotional side of the brain is not activated. And as we know the emotional side of the brain is the side that is active 90 percent of the time and is responsible for making decisions. The purpose of the left logical side of the brain is to rationalize the decisions already made by the right emotional side of the brain. It is an evolutionary truth.

A great presentation, according to Nancy Duarte, author of *Resonate: Present Visual Stories that Transform Audiences*, will elicit empathy.[12] A great presentation will cause an audience to respond willingly with support. This means that you must craft your message to the audience rather than convincing the audience to conform to you.

Standing out is also important for a great presentation. According to Duarte, the enemy of persuasion is obscurity. In order to be persuasive, a presentation requires contrast with its environment. Duarte says the best way to stand out is to be real, "You can have piles of facts and still fail to resonate. It is not the information itself that is important but the emotional impact of that information". So, in order for facts to resonate, they must come with an emotional component.[13] The emotional connection is obtained via the story. Duarte affirms that stories are the most powerful delivery tool for information. They are more powerful and enduring that any other art form.[14] One difficulty is that telling a story can make the storyteller vulnerable. Another is that

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10 Miller, *supra* note 2, pg. L-3.

11 Ibid, L-3.

12 Nancy Duarte, *Resonate: Present Visual Stories that Transform Audiences*, Hoboken, NJ: John Wiley & Sons (2010).

13 *Ibid*, pg. 14.

14 *Ibid*, pg. 16.

telling a convincing story is hard work. Making lists and presenting logical rhetoric is easy. The deep insight required to tell a great story will take time. An immense amount of energy is necessary to distill the story into its purest form. This is the lawyer's challenge.

Good visuals are less complicated than the equivalent expressed in words. When describing the scene of an accident or a medical condition, it might take a dozen or more paragraphs to establish what could be shown in a single image and understood with a single glance. When done well, visual communication can have a dramatic impact on how your case is perceived by improving the clarity and persuasiveness of your message.

The Hollywood storyboard technique effectively employs visuals to tell the story. The setting can be shown by photos of the crash scene. The main character of the story can be developed through visuals. A significant advantage of employing visuals is that they are marked as exhibits and are taken into the judge's chambers or the jury room, unlike the oral evidence of witness. Otherwise, all the judge or jury takes from the courtroom themselves is what they can remember.

A copious amount of text on a slide or board distracts your audience. Do not use up any more than about a fifth of the image with words. The words should be simple and to the point, such as "cell phones distract drivers" and no more.

When presenting a textual document, present the document with the important part highlighted and blown up so the audience can focus their attention on what you want them to see. Graphics make problems easier for people to solve. When presenting a complex part of your case, demonstrate it by graphical representation.

For example the routes taken by parties involved in a car crash should be represented on a map to visualize the scene. And rather than using dots, use memorable graphical symbols, such as a house, a car, or notable landmark to represent the locations of important information on the map.

V. Problems with Using Technology at Trial

The first problem you may encounter with using technology at trial is your friend's opposition. If possible, the issue should be canvassed at the trail management conference. Ideally, in order to avoid delay, and reduce the risk that the judge may agree with the objector, obtain your friend's consent prior to the trial.

Recently, in *Luckett v. Chahal*, 2017 B.C.S.C. 1031, Mr. Justice Abrioux drew from *Sovani v. Jin*, 2005 B.C.S.C. 1852, in his decision to exclude medical illustrations. *Sovani*, concerned a mid-trial ruling in a quantum of damages assessment, which was proceeding before a jury. The issue was whether certain medical illustrations and videos depicting the plaintiff's surgery could be adopted by the plaintiff's neuroradiologist. Finding in the negative, Madam Justice Neilson noted the video was not narrated, and showed a mechanism for injury while the expert's report did not. This is a reminder to carefully consider the admissibility of your demonstrative aids, regardless of the technology used to deliver them.

Secondly, be careful of using too many exhibits. Keep in mind that your purpose in using technology is to aid your story telling by simplifying the case's complexities and highlighting selected facts that are important. Using too many exhibits detracts from that function and from the effectiveness of your presentation. According to Jerome Planov, the author of *Sponsorship Theory*, a jury believes that:

(a) Lawyers are advocates for their clients;

(b) Lawyers will portray their client in the best possible light; and

(c) Lawyers will introduce evidence needed for their client to win.

According to Planov, the assumption that is reached by the jury is that where you present more than one piece of evidence to prove a point, each piece of evidence was necessary. This then has the effect of threatening the effect of the stronger evidence by your use of weaker evidence.[15]

Thirdly, be mindful of the costs of preparing the technology you will be using relative to its purpose at trial. Be aware that the cost of preparing some aids will not be recoverable after the trial. Take the case of *Kay v. Pettigrew*, 2006 B.C.S.C. 232 in which Master Keighley disallowed the disbursement relating to the preparation of the PowerPoint presentation on the basis that the lawyer had not indicated why the presentation, essentially an advocacy tool, could not have been prepared by counsel or her staff. The costs of other aids, however, may be recoverable. In the same case, the lawyer sought to recover the disbursement incurred for the creation of colourized, enhanced diagnostic images in poster and reduced form. Master Keighley allowed the disbursement on the basis that it was reasonable to conclude that the work product was essential to the presentation of the case, and particularly, assisting the jury's understanding.

Finally, as with the use of technology in any situation, make sure the technology works and you know how to use it beforehand to ensure the effectiveness of your presentation is not hampered by technical glitches.

VI. Additional Discussion on Technology at Trial

Consider the following: a University of Chicago study found that 80 percent of jurors polled made their determination on liability after hearing the opening alone.[16] Consider also the fact that what jurors hear first and last are what jurors remember best.[17] The psychological principles of primacy and recency explain this. Primacy is an advantage for the person who presents familiar issues first. Recency is an advantage for the person who presents unfamiliar issues last.[18] Make the subject matter of your entire opening familiar to the jury to take full advantage of these principles. You should not overlook this phenomenon. Otherwise, you will be fighting an uphill battle in your direct examinations.

After the opening statement, continue to use technology during the trial and through different witnesses to reinforce your client's story. For example:

(1) Police officers can be used to get in blow up photographs of a street map of the area, aerial photographs of the area, photographs of the damage to the car, and photographs of the scene of the crime. While the police officer may not remember much about the actual accident, the officer can become an important foundation witness.

(2) A lay witness is usually nervous and uncomfortable on the stand and may have trouble explaining the evidence without the use of maps and charts. To help the

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15 *Ibid*, pg. L-8.

16 Gary D. Fox, *Getting Off on the Right Foot: Winning the Professional Negligence Case in Opening Statement*, 2003 ATLA Convention Reference Materials, Volume II at pg. 2395.

17 *Ibid*.

18 Thomas J. Vesper, *Breathing Life into a Case with Theme In Opening: Storytelling and Damages in Opening Statements*, 2003 ATLA Convention Reference Materials, Volume II at pg. 1458.

listener visualize the witness's evidence, have the witness refer to photographs he or she may have, or create other visuals.

(3) Have experts use medical diagrams or models to enable the listener to visualize and comprehend what the expert is speaking about. For example, an economist should use charts and graphs to maintain the listener's interest in what is usually a boring subject. This will also enable the economist to teach economic principles, as opposed to dictating to the listener.

Regardless of which technology you intend to use at trial, keep in mind Rule 12-5(10) of the Rules of Court which provides:

> Unless the court otherwise orders or the parties of record otherwise agree, no plan, photograph or object may be received in evidence at the trial of an action unless, at least 7 days before the start of the trial, the parties of record have been given an opportunity to inspect it.

In *Pedersen v. Degelder* (1985), 62 B.C.L.R. 253 (B.C.S.C.), defence counsel had objected to the use of a spinal column by the plaintiff's expert to demonstrate the plaintiff's injuries on the basis that the 7-day notice requirement had not been complied with. With no good reason advanced by the plaintiff's counsel as to why the notice requirement was not complied with, Mr. Justice Bouck declined to overrule the objection.

VII. Conclusion

Demonstrative aids, when used properly, can be an invaluable way to enhance your presentation of your case. In this day and age, there is an expectation that some form of technology will be used at trial. Failure to incorporate it is not only a failure to take advantage of the opportunity to enhance your persuasive abilities, but it may also detract from the listener's perception of your competence, which according to Aristotle, has a direct impact on your credibility. The use of which technology, and how much, are strategic decisions that have to be carefully thought out. Your use of demonstrative aids and technology must not overshadow the story or yourself. In short, the demonstrative aids you decide to use must be simple, helpful, and purposeful.