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HEADLINE: Trial Advocacy, The Use of Photographs in Personal Injury Cases

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BODY:

Quite often photographs serve as the most compelling evidence at trial. Not only can they be persuasive in proving liability and damages but they can also graphically corroborate your client's position. Photographic evidence can take all forms, and can be used to illuminate a variety of situations and objects. Whether the photo depicts the general scene of an accident, a specific defect causing injury, a type of instrumentality causing injury, or simply an injury itself, photography provides the trial attorney with an important tool. To effectively offer this persuasive evidence, however, the trial lawyer must know how to lay the proper evidentiary foundation.

Laying a foundation is simple, and consists merely of authenticating a piece of evidence to show the court the exhibit is what the lawyer says it is. Of course, the exhibit must fairly and accurately depict something relevant on a date, time and place that is meaningful to the case.

Photographs of the Scene

In all cases involving personal injury, photographs of the scene and instrumentality are critical. Photographs enable the jury to better determine how an incident happened by providing it with a visual understanding of the accident scene. Let us take the example of a fall in a hole located in the parking lot of a shopping center. Before jumping right to the photographs, make sure your witness properly describes the scene and the defect first. This serves the dual purpose of enhancing your witness' credibility by having him effectively describe the scene and defect, while also repetitively reinforcing the scene in the jurors' minds.

Q: What I would like you to do now, Mr. Witness, is describe the scene for us. First, describe the parking lot if you will from your perspective of leaving the store?

Q: Where was the hole you told us about located?

Q: What did it look like?

Q: How large was it?

Q: How deep was it?

Q: Describe its shape.

After getting a thorough description of the scene, the defect's location, shape and depth, lay the foundation for its admission.

Q: Your honor, may we have this photograph marked as plaintiff's exhibit 1 for identification? (Then ask the court for permission to approach the witness.)

Q: Mr. Witness, I show you what has been marked as plaintiff's exhibit 1 for identification, and I ask you if you recognize this?

Q: What do you recognize it to be?

Q: Is this a fair and accurate representation of the accident scene at the time of the incident?

Assuming the answer is yes, offer the exhibit as evidence. Once the attorney gets the photograph properly admitted into evidence, he must publish it to the jury. Evidence is useless until the jury sees it and evaluates it; however, the trial lawyer cannot stop simply after showing the evidence to the jury. Rather, the lawyer must use the photograph as persuasive proof of an important point.

Q: Using the photograph, marked plaintiff's exhibit 2 in evidence, please show us your view from the entrance to the store.

Q: Show us the hole you ultimately fell in, by marking it with an "H" for hole.

Q: Using the photograph, point out the path you walked from the rear door of the store to the point where you had your accident, by marking the exhibit with an arrow.

Obviously, the foregoing direct examination would be useless if the jury could not readily see the photograph. Therefore, you must use photographic enlargements. This way the jury can easily see the exhibit without it having to be passed around the jury box. More importantly, the jury can see the witness as he marks the relevant areas of the exhibit. In offering photographic enlargements (which we recommend to be at least 30 by 40 inches) the trial lawyer should simply offer the enlargements themselves, and not the original photographs, into evidence. Offering the smaller original photographs first, allows your adversary to argue that the enlargements are simply cumulative.

To avoid having the continuity of the direct examination broken up by multiple voir dices, when offering similar photographs of a single scene, the trial lawyer should lay a foundation for all the photos before offering them into evidence.

Limited Purpose Photos

Often times an accident scene has changed or a defect has been corrected by the time a lawyer or investigator has the opportunity to take photographs. For example, in cases of improper accumulations of snow or ice, the weather may have changed drastically by the time plaintiff retains a lawyer. All is not lost in this type of situation. The trial lawyer can still demonstrate the scene to the jury and have his client indicate where the defect was located at the time of the accident. He should first have the witness describe the scene in narrative form before offering pictures of the scene without the snow or ice. Then offer the photographs for the "limited purpose" of showing the jury the general layout of the scene.

Q: Where specifically in the parking lot did the accident occur?

Q: Describe the condition of the parking lot in the specific area that you fell.

Q: What did the ice you just described look like at the time of the accident?

Q: Describe the dimensions of that ice patch.

At this point offer photographs which show the scene of the incident without the defective condition, and have the witness superimpose the condition on the normal photographs:

Q: Aside from the weather conditions and the absence of snow and ice on the ground, is this a fair and accurate representation of the scene of the accident on Dec. 23, 2002 at 2 o'clock in the afternoon?

Q: Your honor I offer plaintiff's exhibit 2 into evidence for the limited purpose of showing the general scene of where the accident occurred without regard to weather conditions or the existence of snow and ice at the time of the incident.

Q: Now Mr. Witness, what is different about this photograph from how the scene looked on the day of the

incident?

Q: Please point out to the jury where, if any place, the ice was located at the time of the incident.

Q: With this red marker, please indicate where the ice was by marking the photo with red lines.

Q: Show us how wide the area containing the ice was by drawing a border on the photo.

Photos of Exemplars

There are times when the trial lawyer does not have photographs of the actual instrumentality that injured the plaintiff. Take, for example, a situation where a plaintiff was rear ended by a city bus, and the bus has been taken out of service and destroyed before the lawyer could obtain a photograph. In this instance, the lawyer must still accurately relate the size and weight of the bus to prove causation of the plaintiff's injuries. In cases where the actual bus is unavailable, a photograph of the same type and size, procured through discovery or investigation, should serve well enough to demonstrate your theory of causation to the jury.

Q: Could you please describe the bus that struck you?

Q: What if any special markings did it have?

Q: What color was the bus?

Q: Describe the approximate height and width of the bus.

Q: Your honor, may we have this photograph marked as plaintiff's exhibit 3 for identification?

Q: Mr. Plaintiff, I show you what has just been marked for identification as plaintiff's 3, do you recognize this?

Q: What is it?

A: It is an example of the type of city bus that hit me.

Q: Is that a fair and accurate representation of the very type of city bus that hit you?

Q: Your honor, I offer plaintiff's exhibit 3 for identification into evidence.

Photographs of Injuries

Photographs detailing the nature and extent of injuries are always relevant in personal injury cases. They are always probative and rarely so prejudicial as to be excluded from evidence because the jury is entitled to more than just testimony when deciding issues of disability, pain and suffering. Obviously, photos of the injuries can be put into evidence through lay witnesses or treating physicians; however, there are advantages to offering them through a physician as is made clear below:

Q: Dr. Haber, I show you what has been marked as plaintiff's exhibit 4 for identification. Do you recognize this?

Q: What is it?

Q: Is that a fair and accurate depiction of Mr. Plaintiff's injuries as they appeared while he was in the hospital after the incident of June 4, 1999?

Do not stop there. Publish the photograph to the jury and have the doctor demonstrate in detail what is depicted in the photograph. Then ask if what is depicted in the photograph is a cause of pain and suffering to the plaintiff.

Q: Dr. Haber, can you show us where the open compound fracture was on Mr. Plaintiff?

Q: Please draw a red arrow to where the bone was sticking up through the skin.

Q: Do you have an opinion, to a reasonable degree of medical probability as to whether or not the injury shown in the photograph was a competent producing cause of pain in Mr. Plaintiff?

Q: What is your opinion?

Q: What is the basis for your opinion?

Direct to Deliberation

The photographs you place in evidence have a long-lasting effect on the trial. Once they are in evidence, they can serve to strengthen your position during the rest of your case. For example, the exemplar of the bus can form the basis for a hypothetical question on cross of the opposing medical expert:

Q: Doctor, I show you plaintiff's 3 in evidence, an exemplar of the very bus that struck my client while he was crossing the street. You would agree with me that anyone being struck by this bus could suffer a fracture of his leg?

Q: Let me be more specific doctor. I want you to assume that Mr. Plaintiff was struck on the right side of his hip by this very type of city bus. That he was taken to the hospital where his treating physician diagnosed a compound, comminuted fracture of the head of his right femur. Do you have an opinion to a reasonable degree of medical probability as to whether being struck by a bus like that depicted in this photo, could be a competent producing cause of the fracture to (my client's) femur?

Photographs resonate throughout the entirety of a trial, and can be used whenever the trial lawyer wishes to reinforce or emphasize a point. They should be used freely during summation to reinforce and bolster your argument. Most importantly, they serve to persuade the jury long after the evidence has been closed, summations have concluded and the law has been charged. They serve as your surrogate in the jury room, persuading the jury of the rightness of your cause long after you cannot.