THE ART AND SCIENCE OF ADVOCACY

by

JOHN A. OLAH

B.A., LL.B.

of the Ontario Bar

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Normally, the X-ray technician, physician, or dentist who took the X-ray is called to supply the foundational elements. Foundational testimony may also be supplied by a physician or technician who was present at the time the X-ray was taken. Although a layman is capable of verifying the X-ray picture, the foundation witness must have knowledge of the procedure involved.[115] An expert witness should be called to explain the X-ray to the trier of fact. This witness must have sufficient qualifications by training or experience to interpret the X-ray picture.

Remember that you will need an illumination box or a positive to view the X-ray properly. Like most other types of demonstrative evidence, X-rays can be enlarged to add impact. Alternatively, an overhead projector can be used to display the X-ray. An X-ray has an aura of authority; coupled with a medical illustration of the relevant anatomy, the X-ray can be a highly persuasive piece of demonstrative evidence. Remember that the X-ray is a limited diagnostic tool; for example, it does not reveal soft tissue injuries such as whiplash.

Other medical diagnostic results, such as the results of electrocardiograms, ECG or CAT scans, require similar foundation evidence. The results from new diagnostic techniques, such as thermography, will be admitted if the proper foundation evidence can be established.[116]

§11.8 USING THE BLACKBOARD OR A SKETCHPAD

Trial by blackboard is a well-accepted practice in the United States.[117] This tactic involves the use of the blackboard in all phases of the trial, from the opening, to the closing address. Information presented in this format is effective for several reasons. We are all conditioned to read a blackboard; it symbolizes our school years, and conveys a sense of authority. It is simple and credible. It explains and teaches.[118]

Nevertheless, the use of the blackboard and the sketchpad is rare in Canada.[119] This is unfortunate, since they can be very effective tools of persuasion, particularly before a jury. Both can be used to draw diagrams and sketches; both can list information and convey calculations.

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[115] Scott, *Photographic Evidence*, §1264 at 104-106.

[116] *Laprise and Bourque v. Lepera* (October 17, 1983), (Ont. H.C.) [unreported]. In British Columbia, the courts have been reluctant to admit such evidence: see, for example, *Meuser v. Sall* (1987), 5 A.C.W.S. (3d) 298 (B.C. S.C.).

[117] See Belli, *Modern Trials*, §55.14 at 768ff.

[118] For an interesting insight into why the blackboard works, see McElhaney, *Trial Notebook*, c. 40 at 437ff.

[119] One Canadian critic of the use of the blackboard at trial advances the following reasoning for not employing the blackboard: "smacks of the American system and can be confusing." See D.J. Walker, "Addressing the Jury for the Plaintiff" (1959) *Special Lectures of the Law Society of Upper Canada: Jury Trials* (Toronto: Richard De Boo, 1959) 301 at 304.

The sketchpad has several advantages over the blackboard. Its most important advantage is that information on the sketchpad can be entered as an exhibit. It overcomes the classic objection that this type of evidence cannot be preserved. In the case of the blackboard, the only way to preserve the information on the board is to photograph the blackboard and then to enter the photograph as an exhibit. This is a cumbersome procedure. The sketchpad is portable and it can be positioned near the jury. Different colours can be used to emphasize key points. Charts, drawings, and calculations can be prepared in advance. Overlays can also be used in conjunction with the sketchpad: overlays permit you to illustrate the progression of events, for example, the construction of a manufacturing plant.

(a) Opening Address

The sketchpad or the blackboard can be effective at all stages of the trial.[120] In the opening address, you can list on the sketchpad the names of the witnesses you intend to call. It permits you to list key facts in support of your theory of liability. It can be used to explain the damages you are seeking, to outline for the jury the various heads of damages, to break down the various components, and to explain them. This demonstrative tool can act as a roadmap for the jury; it permits the jury to understand the evidence that is about to unfold relating to liability and damages.

If you intend to refer to demonstrative evidence in your opening address, be sure you obtain the trial judge's consent in advance. You do not want your opponent or the trial judge interrupting your opening address and objecting to the use of the demonstrative aid in the midst of your opening. Since the opening address does not constitute evidence, you should be able to use the blackboard or the sketchpad in this phase of the trial, provided that you are prepared to prove later what you write and say. Your failure to do so will be the subject of comment by your opponent and the trial judge.

(b) Examination-in-Chief

The blackboard and the sketchpad can be helpful during the examination-in-chief. Your witness can illustrate his evidence by means of a sketch. An expert witness can simplify complicated concepts by portraying them on the board. Important facts can be written on the blackboard; this process underscores their importance to the trier of fact. For example, in a personal injury action, such matters as the number and nature of the operations undergone by the plaintiff, medication prescribed, and other treatment can be listed on the board. This technique will bring home to the jury the serious na-

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[120] The American case law permits the use of blackboards and charts in the opening address: *Arnold v. Ellis*, 97 So.2d 744 (1957); *Campbell v. Menze Construction Co.*, 166 N.W.2d 624 (1969); and Belli, *Modern Trials*, §553.