

Practical Strategies for Experts: The Shifting Landscape

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DEMONSTRATIVE EVIDENCE AND THE USE OF TECHNOLOGY IN THE COURTROOM

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MCLEISH ORLANDO

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PERSONAL INJURY LAWYERS

OVERVIEW

1. Why Experts Should Use Demonstrative Evidence
2. Demonstrative Evidence:
 - What is it?
 - The available tools: from an **expert's perspective**
3. Using Demonstrative Evidence in the Courtroom

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Why Experts Should Use Demonstrative Evidence

The Role of an Expert

- to assist the trier of fact (often a jury in personal injury claims) on matters beyond common knowledge
- to EDUCATE
- to provide impartial opinions relevant to matters in issue

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Why Experts Should Use Demonstrative Evidence

The Expert's Goals

- to be qualified and accepted as an expert by the Court
- to be easily understood (often by a jury)
- to be considered impartial
- to withstand cross-examination
- to have their opinions respected/accepted

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Why Experts Should Use Demonstrative Evidence

How Experts Can Best Educate

- we *learn* much more by seeing than hearing
- we *retain* more by seeing than hearing
- we retain much more if we both see AND hear
- **colour** visuals better than black & white for retention
- using demonstrative evidence to supplement expert testimony helps the trier of fact learn and retain info

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Demonstrative Evidence:

What is it?

- basically anything visual that assists the trier of fact
- can be real/substantive evidence
- or can just be an illustrative aid

see visual example that follows

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Demonstrative Evidence:

The Tools – From an Expert’s Perspective:

- tools that help bring the assessment/treatment to life
- tools that highlight the key supporting facts
- tools that simplify and explain the expert’s opinions

Demonstrative Evidence:

Tools to Help Bring the Assessment/Treatment to Life:

- equipment/hardware
- models
- old school flip charts/drawings
- doing a demonstration using visual aids
- using photos/videos where available
- medical illustrations (including generic ones)

see visual examples that follow

Nathan Resch — 2
2h. Postoperative appearance: conceptual and based on CT scan below

"An 6-hole ... craniofacial plate was ... secured across the bony fragments ..."¹

"... a 6-hole curved ... plate was ... secured across the fractured segments [of the zygomaticomaxillary process] ..."⁵

"Arch bars were ... secured [for the maxilla and mandible] ... intermaxillary fixation was obtained ... wiring the upper and lower arch bars together"⁵

Nathan Resch — 2
2g. Anuseth teeth, tongue and lip laceration: conceptual and based on X-ray below

"... he avulsed teeth 3.1, 3.2, most of 3.3, 3.4, 4.1, and 4.2"³

"... there was a through and through dehiscence [of the left lower lip] ..."⁴

"... intra- and extra lip and cheek laceration, large complex tongue laceration, a complex left LeFort II ..."⁷

10 Operative report by Dr. W. Baker in reference to surgery performed at the Erie County Medical Center on May 26, 1998, on Nathan Resch.
John Harvey, MD/EMC for Thomson Roges
10/15/02

11 From a letter dated September 26, 2000 by Dr. W. Baker of the Small Center of EMC, in reference to the surgery and post-operative care he performed on Nathan Resch.
12 From a letter dated November 15, 1998 to Dr. C. Gember at the Hospital for Sick Children, following notification of Nathan Resch.
13 From the operative report of Dr. C. Gember in reference to surgery performed at the Hospital for Sick Children on March 05, 1999, on Nathan Resch.
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JOHN DOE

RIGHT KNEE ARTHROSCOPY & SYNOVECTOMY ON 5/9/2008

Instruments are inserted into the knee joint to see and repair damaged tissue.

An anteromedial synovectomy is performed on the anteromedial knee and intercondylar notch.

Synovial capsule

Inflamed synovial tissue

Viewing scope

Irrigating instrument

Trimming instrument

Motorized arthroscopic shaver

Demonstrative Evidence:

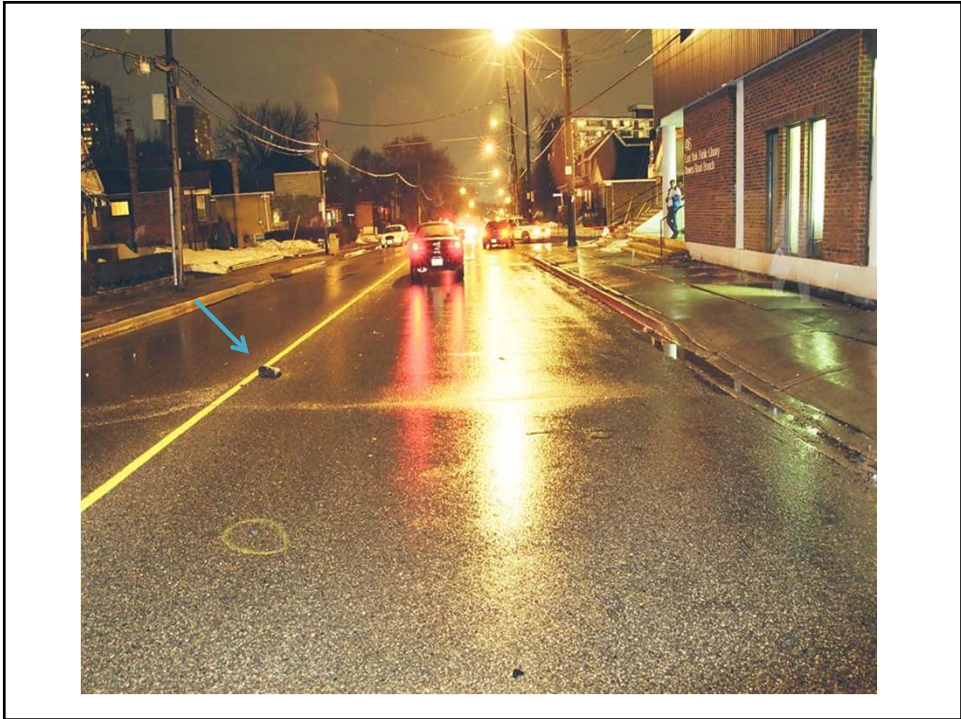
Tools that Highlight the Key Supporting Facts

- use an ELMO to show and highlight key references in:
 - supporting documents/photos/diagrams
 - supporting admissible reports
 - excerpts from discovery transcripts
 - excerpts from real time trial transcripts (if available)
 - test results or data

see visual examples that follow

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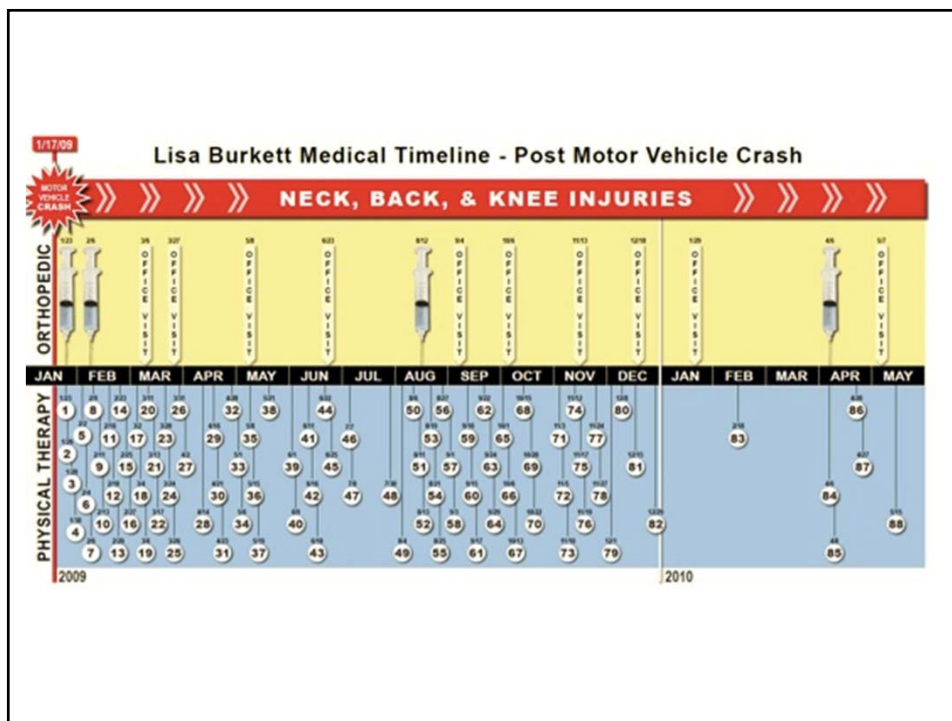
Demonstrative Evidence:

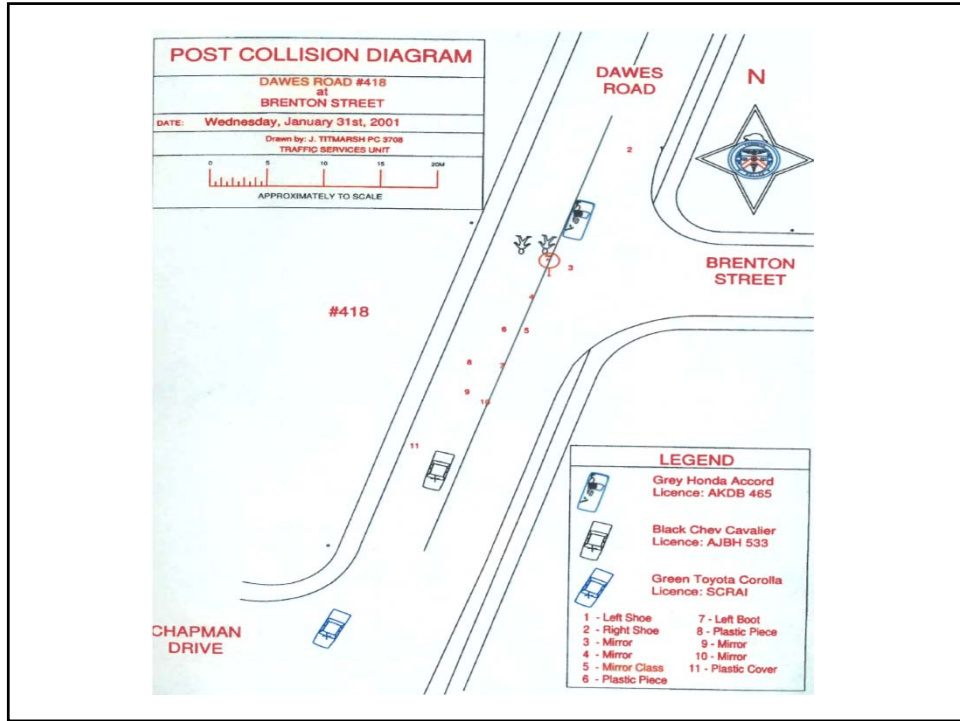
Tools that Simplify And Explain the Expert's Opinions

- prepare easy to understand charts/graphs/diagrams:
 - must be fully supported by information in expert reports
 - can be used to highlight extensive treatment/medication
 - can be used to itemize future care needs and costings
 - can be used to explain income loss claims
 - very useful in identifying points of contention
 - can thereafter be used to simplify evidence of others

see visual examples that follow

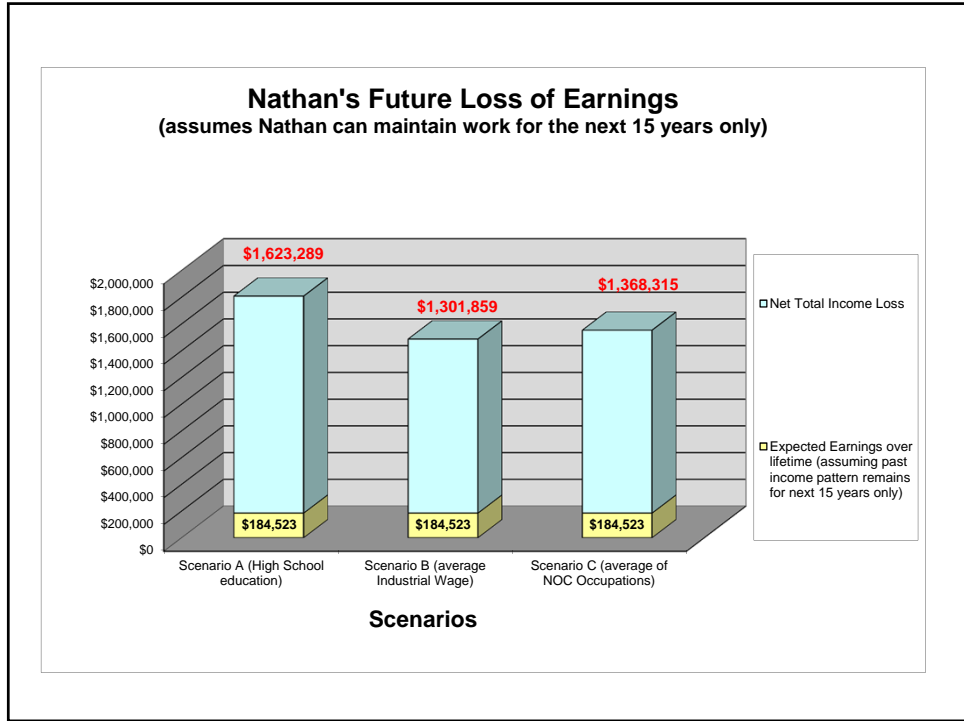
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FUTURE CARE COST ANALYSIS (EXAMPLE FROM RESCH V. CANADIAN TIRE)

Needs	Plaintiffs' Position (based on Martha Binstock's evidence)			Defendants' Position (based on Luana Troiani's evidence)			Jury's Findings Insert Present Value Totals
	One Time Cost	Annual Cost	Professor Carr's Present Values (as of Jan 31, 2006)	One Time Cost	Annual Cost	Calculated Present Values (as of Jan 31, 2006)	
Surgical Procedures							
Rhinoplasty	\$8,000.00			\$8,000.00			
Scar Revisions	\$20,300.00	Estimated 7 surgeries		\$29,000.00	Estimated 10 surgeries		
Orthodontic Treatment	\$2,740.00			\$2,740.00			
Prosthetic Treatment		\$200.00			\$200.00		
Bridge Replacement	\$10,500.00	\$1,050.00		\$10,500.00	\$1,050.00		
Contingency for Failed Implants	\$15,500.00	Believes future more likely		\$7,750.00	Believes future less likely		
Tissue Filler Procedure-Surgical	\$11,000.00	\$2,200.00		\$11,000.00	\$2,200.00		
Tissue Filler Procedure-Injections		\$3,919.50			\$3,919.50		
Totals	\$66,040.00	\$7,369.50	\$314,933.87	\$66,990.00	\$7,369.50	\$315,833.15	
Transitional Living Program							
Case Manager	\$7,200.00	Based on 2 Years Residential Living		\$7,200.00	Based on 1 Year Residential Living		
One month assessment in residential facility	\$24,000.00			\$24,000.00			
One month treatment at residential facility	\$16,500.00			\$16,500.00			
Months of high supervision	\$105,000.00	Based on 10 months		\$52,500.00	Based on 5 months		
Months of low supervision	\$91,250.00	Based on 12 months		\$45,625.00	Based on 6 months		
Psychology	\$8,580.00	1 time/ak for 1/2 year then monthly for 1 yr		\$5,136.00	1 time/ak for 1/4 yr then 1 time for 1/2 yr		
Family Counseling	\$7,410.00	1 every 2 wks for 1 yr then monthly for 1 yr		\$3,852.00	1/2 wks for 1/2 yr then 1 time for 1/2 yr		
Occupational Therapy	\$9,120.00	Believes cost is additional		\$0.00	Believes cost included in living cost		
Tutor	\$27,445.50	3 times/ak for 90 wks		\$8,132.00	1 time/ak for 80 wks		
Psychoeducational/Vocational Assessment	\$3,000.00	One assessment		\$4,250.00	Two separate assessments		
Totals	\$299,505.50		\$294,474.90	\$167,195.00		\$164,430.42	



Demonstrative Evidence:

Tools that Simplify And Explain the Expert's Opinions

- rely on demonstrative evidence to support opinions:
 - refer to segments from a day in the life video to showcase and explain needs (see example that follows)
 - consider accident reconstruction animations (scientific visualization)
 - refer to charts/diagrams/graphs used in evidence with other experts (like a chart re treatment/medication)



Using Demonstrative Evidence in the Courtroom

Planning to Use it When Testifying:

- discuss demonstrative evidence *options* in first expert briefing with the lawyer
- review and consider all available tools (like the day in the life video, medical illustrations, etc.)
- make suggestions about any additional demonstrative evidence that you encourage the lawyer to obtain (like medical illustrations, day in the life video, etc.)

Using Demonstrative Evidence in the Courtroom

Lawyers Role Re Admissibility:

- Lawyer to lay foundation:
 - the visual aid must relate to the expert's evidence and they must be familiar with the aid
 - the visual aid must fairly and accurately reflect the expert's evidence (and be based on info in their report)
 - the visual aid must be of assistance to the trier of fact in understanding the expert's evidence

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Using Demonstrative Evidence in the Courtroom

Lawyers Role Re Admissibility:

- Admissibility of Demonstrative Evidence:
 - varies depending on its purpose and what kind of aid it is
 - in short though the demonstrative evidence must be: relevant, accurate, fair and more probative than prejudicial
 - to comply with expert report rules, the information in the visual aid must be able to be footnoted to info in the report
- the judge determines if it can be used
- *Admissibility solution – develop the chart on the go....*

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Using Demonstrative Evidence in the Courtroom

Cautions:

- over-exposure to a visual aid lessens its impact
- use professional looking aids only
- using too many aids may make case look concocted
- don't use them just to look modern
- jury will be online validating what they see
- have a backup plan (in case held not admissible)

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CONCLUSION

1. Discuss demonstrative evidence options with the lawyer at the first expert briefing
2. Use an ELMO to substantiate accurate reliance on key documents (...to add credibility to opinions)
3. Prepare simple summary charts/graphs from information within your report

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THANK YOU

Please feel free to call or email me with questions

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