LENGTH: 1854 words

HEADLINE: Proving Your Case Through Adverse Witnesses

BYLINE: Ben Rubinowitz and Evan Torgan,web-editor@nylj.com, Special to the new york law journal

BODY:

The best way to prove your case to a jury is often through the mouths of the enemy. Most jurors will expect your witnesses to testify favorably to your case. They will not, on the other hand, expect an adverse witness to testify favorably for you. Therefore, any opposition witness that gives positive testimony for you will help underscore the strength of your case. Of course, proving your case through witnesses who would prefer to hurt you does seem a little dangerous. However, with the proper command of the facts and effective trial skills, utilizing adverse direct examination can make the evidence much more compelling.

The most important thing to do when calling an adverse witness--either the defendant himself or an employee of the defendant--is to exercise total control. There is no better way to do this than by the use of leading questions which are defined as:

1) those which suggest the answer or limit the universe of potential answers;

2) those which contain within them the answer; or

3) those which call for a yes or no answer.

Clearly, the more leading or suggestive the question, the more control the examiner can exert.

Although it is horn book law that when calling an opposing party on direct, the examiner can lead, it is best to have case law on the subject or a memorandum of law prepared prior to the start of the trial. There would be nothing more dangerous than calling an adverse party to the stand and then being limited to asking open-ended, non-leading questions that call for a narrative response. The landmark Court of Appeals case on the issue is Becker v. Koch, followed by many cases that stand for the proposition that when calling adverse parties, they are hostile by definition, and one can put leading questions to them as if on cross-examination.[1]

The best way to begin virtually all personal injury cases is to call the defendants first. This way, you can control the pace of the testimony, provide drama for the jury and prevent the defense from tailoring its testimony responsively to yours. Take, for example, the garden-variety motor vehicle case where you represent a pedestrian: you can prove the liability through the mouth of the driver who injured her:

Q: Sir, you are, in fact, the actual defendant in this case, true?

Q: And there is no question that you were involved in an accident with my client, true?

Q: That accident occurred on Aug. 13, 2008, correct?

Q: At 4:00 in the afternoon, yes?

Q: In broad daylight?

Q: At that time, you were driving a truck for ABC pharmacy, right?

Q: As an employee of ABC, true?

Q: And you, at some point, made a right turn from Third Avenue onto 52nd Street, correct?

Q: And to make that right turn, you obviously had a green light, true?

Q: But so did any pedestrian crossing 52nd Street, right?

Q: And it was during that right turn, you felt your front right wheel go over something, true?

Q: Something you soon learned was a young woman, right?

Q: A young woman that you actually went over with your ABC truck as you were making that turn, correct?

Q: A young woman you later found lying in the crosswalk, true?

Not only is it effective to prove the liability aspect of the case through the defendant himself, but proving some of the damages through the defense can be devastating to the defense as well:

Q: After you felt your truck roll over the woman, you stopped it, true?

Q: You got out of the truck, right?

Q: And you went to look for the person that your vehicle came into contact with?

Q: You found her between your front right wheels and your rear right wheels, true?

Q: She was bleeding, wasn't she?

Q: From the head?

Q: From her legs?

Q: And from her left arm?

Q: Not only was she bleeding, but she was rolling back and forth in the street, wasn't she?

Q: Screaming out in pain?

Labor Law Cases

The strategy of calling the defendant on one's direct case should not be limited to simple automobile cases. Labor law cases should begin with defense witnesses as well. Take the situation where a worker falls from a baker's scaffold missing a side rail while working in a high rise building. In a case like this, it is effective to call as an adverse witness the site safety foreman, getting to the dramatic heart of the case immediately:

Q: Sir, you were the safety foreman for K Construction on Aug. 1, 2007, true?

Q: And you were aware that my client, Victor Smith, had a terrible accident that day?

Q: He fell off the side of a baker's scaffold, didn't he?

Q: Now sir, you were called to the scene of this accident shortly after it occurred, true?

Q: You found Victor lying on the ground, true?

Q: And you realized at that time, Mr. Foreman, that one side of that scaffold was missing a guard rail, correct?

Q: And you later learned that Mr. Smith died at the hospital from his injuries, didn't you?

You can actually paint the scene through this witness as well, leading him through a description of the construction site and then the type of scaffold itself:

Q: A baker's scaffold is a platform on wheels, isn't it?

Q: This one was eight feet long?

Q: And four feet wide?

Q: A baker's scaffold, when erected properly, is safer than a ladder, true?

Q: That's especially true when a worker is performing work above his head, right?

Q: Because it's longer?

Q: Wider?

Q: And has guard rails or side rails that prevent the worker from falling off, true?

Q: And that is especially true when working from a height, correct?

Q: Those rails can prevent a fall, isn't that so?

Q: And they can prevent serious injury? Or death?

Q: Sir, you'd agree with me that not just one, but two of those side rails were missing here, true?

An important line of attack on your adverse direct is getting the foreman to admit that there is nothing more important on the job site than the safety of the workers he is overseeing: not speed, not efficiency, not profit:

Q: Mr. Foreman, not only were you the site safety foreman on this job, but you have been a site safety foreman for the past 30 years, haven't you?

Q: And specifically on the job where Mr. Smith died, you actually worked for the General Contractor on this particular work site, didn't you?

Q: And you would agree that you had an exclusive role as the safety foreman, true?

Q: With one critical priority, true?

Q: And that critical priority was to promote safety, correct?

Q: And one way to define safety is the condition of being safe, true?

Q: Or freedom from danger?

Q: Freedom from hazard?

Q: Freedom from risk of injury, true?

Q: And you would agree with me sir, that the health, safety and welfare of your workers is your most important consideration?

Q: More important than the speed of the work, right?

Q: More important than finishing the job on schedule, true?

Q: And certainly more important than any financial profit earned by your employer, the

General Contractor, correct?

It is also a good idea to examine this type of witness on the applicable sections of the Labor Law or the Industrial Code that applies. This is a very compelling way to secure admissions from the defendant as well as educate the jury regarding the law itself on which they will be instructed at the end of the case.

Q: Sir, you'd agree with me that after 30 years as a safety foreman you are familiar with the Labor Law of this state, aren't you?

Q: And as a result sir, you would have to agree that you were obligated to furnish scaffolding which was so constructed to give proper protection to the workers on the job?

Q: And not only were you obligated to be in compliance with the Labor Law of this state, sir, in your thirty years you are also familiar with the Industrial Code of the New York State Department of Labor, right?

Q: You'd agree with me that the industrial code requires that the platform of every mobile scaffold shall be provided with a safety railing, correct?

Q: And when you got to the scene of my client's death, Mr. Foreman, there were two safety rails that were missing, true?

Q: And therefore, you saw that this platform was missing its safety railing, right?

Q: And sir, this very scaffold did not provide Mr. Smith with the adequate protection he so deserved, true?

Q: And it was that lack of adequate protection that caused his fall, true?

Q: And ultimately his death?

Medical Malpractice Cases

Medical malpractice is another area where the trial attorney should call the adverse party as the first witness. It is not only a very dramatic way to begin, but a good way to educate the jury on the anatomy and injury involved with the case through the use of leading questions. Moreover, it gives you the opportunity to have your experts comment on the quality of care provided by the defendant.

Q: Dr. Roberts, you performed surgery on my client to repair his scoliosis, didn't you?

Q: And while you were operating, his motor evoked potentials were constantly being monitored, weren't they?

Q: And this was done to ensure that no damage was done to his spinal cord during the

surgery, correct?

Q: Because motor evoked potentials monitor the sparking of the muscles from the brain to the spinal cord to the specific muscle group in question, true?

Q: And at some point you put a screw in my client's vertebral body at T11, or the 11th level of the thoracic spine, correct?

Q: And it was at this very time that you lost the Evoked Potentials bilaterally, or on both sides of his body, correct?

Q: Meaning that my client was paralyzed at the moment you placed that screw, true?

Q: And you continued the surgery anyway, didn't you?

Q: Meaning you left the screw where you placed it, right?

Q: You never reversed the surgery did you?

Q: To give that young boy a chance to walk again?

Q: In fact, four days went by before you even so much as ordered an MRI for him, true?

Q: An MRI that ultimately showed bleeding or hemorrhage in the spinal cord, true?

Q: Blood that was caused by the trauma of that screw, right?

Q: And to this day, sir, my client is unable to walk, true?

Q: Unable to control his bladder or bowel, right?

Q: And unable to take care of his activities of daily life?

Q: By the way, doctor, after the surgery was complete and the boy was paralyzed, you never once told this child's parents about that screw, did you?

Q: Or the hemorrhage in the cord, right?

Q: Instead you told them it was an ischemic event that was from the risk of surgery, that couldn't be prevented, correct?

Q: But what you failed to tell them was that this ischemic event was caused by the trauma to the cord and the resultant bleeding, all from that screw you placed as the Evoked Potentials were lost, true?

Beginning your case by calling the defendants is an effective way to present the evidence.

By controlling the witnesses with the use of leading questions, the examiner can prove the case through testimony that the jury would ordinarily expect to support the other side. Calling friendly but credible witnesses on your direct case can win it for you; but calling unfriendly, hostile and adverse witnesses can win it big.**Ben Rubinowitz**

Evan TorganRichard Steigman,

Endnotes:

1. 104 N.Y. 394 (1887); Gonzalez v. Medina, 69 A.D.2d 14 (1st Dept. 1979); Cornwell v. Cleveland, 44 A.D.2d 891 (4th Dept. 1974); Matter of Arlene W. v. Robert D., 36 A.D.2d 455 (4th Dept. 1971).

LOAD-DATE: September 21, 2011