TIME IS WHAT YOU MAKE OF IT: RETHINKING CHRONOLOGICAL PRESENTATION OF EVIDENCE

By: Ben Rubinowitz and Evan Torgan

Picture this scene: you sit down in a movie theater just in time to catch the beginning of your film. As you dig into your popcorn, you see the star of the movie on the screen– he stands breathlessly on a crowded street, holding a gun, blood trickling down his arm. A wounded man lies on the ground next to him, writhing in pain. Immediately you think: did I miss something? Who are these characters and why is this happening?

Of course, this technique has become common in television shows and movies: grabbing the audience's attention immediately by beginning the story at a critical point in the plot, only then to return the narrative to the beginning, taking the story up to the point which the audience has already seen, before concluding with the resolution of the conflict.

As our society grows ever more used to receiving information quickly, in short bursts, or in what is commonly referred to as sound bytes, thanks to the internet and truncated television news programs and newspaper articles, capturing the attention of your audience from the start becomes ever more important. This common technique, seen so often in film, is easily portable to your opening statements and examination of witnesses. If delivered correctly, it can have the desired effect of maintaining and stimulating your jury's interest in the case, while also focusing it on the moments in time which are critical to your case's narrative.

For example, often times we think of presenting the proof in a unified trial with liability first followed by damages. Chronology might, at times, be a good way to present the story. Many times, though, damages are the strongest part of the case. The concern for any trial lawyer with the burden of proof is that by offering a rote chronological presentation, the lawyer runs the risk of having the jury make up its mind on liability against your cause and then simply ignoring

the later proof offered in support of your client's damages.

A more powerful way to engage the jury and to elicit emotional impact is to begin the presentation with a better starting point - - a point that immediately captures the attention of the jury. Once again, the psychological concepts of primacy and recency come into play. By offering something powerful at the outset and again at the conclusion, the jury will more likely focus its attention to the presentation, become engaged in the client's plight, and, more importantly, remember it clearly during deliberations.

Aside from jury selection (which has been severely restricted due to time constraints) the first real opportunity to discuss the case in detail is the opening statement. While chronology might set forth the facts and meet the requirement of making out a primae facie case, it also might work to undermine your cause by serving to dissuade the jurors. A well prepared opening starting with a powerful punch at the outset, however, might draw the jurors in and help to hurdle the bad facts.

Consider, for example, a typical garden - variety pedestrian knockdown case in which the plaintiff pedestrian, while crossing the street mid-block, is struck by the defendant motorist who was speeding. The pedestrian suffered life altering leg injuries. A chronological presentation designed to first set the scene, unfortunately, might reinforce the fact that there were traffic signals and crosswalks at either end of the block:

> "To understand the manner in which this accident occurred
> you must first understand where the accident took place.
> Sea Cliff Avenue is a typical street, two lanes in each direction,
> separated by double yellow lines. At either end of the block is
> a traffic signal and a crosswalk. At the time of the accident the

(plaintiff) was crossing the street. True, the (plaintiff) did not cross at the crosswalk, but the defendant motorist should have seen her. She was three quarters of the way across the street when she was struck."

Here, the plaintiff's attorney has done nothing but stress the comparative fault that should be placed on the plaintiff herself. Indeed, this type of presentation more nearly resembles a defendant's opening statement in the same case. By offering supportive facts first and then bringing out the less helpful ones, a skilled trial lawyer may help the jurors be more willing to accept your client's position:

"Ladies and Gentlemen, the impact was severe. Her legs were crushed. Crushed by a speeding car. Crushed by a driver who was not paying attention. Crushed by a driver who was not keeping a reasonable and proper lookout. Her legs were crushed so badly that she will never walk again. This is not the kind of case where someone darted out into the middle of the street without warning. It is not the kind of case where there was no time for the driver to react. The (plaintiff) had almost crossed the street when she was struck. Had the defendant been paying attention he would have seen her, he would have reacted and he would have avoided hitting her. The severity of the injuries to her legs is proof of the unreasonable speed at which the car was driven. The fact that there were no skid marks is proof that the defendant never slowed down. The fact that the driver did not turn to the left or right and did nothing to avoid impact is proof that the driver did not see that which was there to be seen. She had already walked three quarters of the way across the street. While we fully anticipate that much will be made of the crosswalks and traffic signals at

either end of the block, the proof will show that the reason that this accident occurred was because of the careless manner in which the defendant drove."

Consider the same approach in a medical malpractice case. Imagine the scenario in which a man in his mid 60's went to the defendant hospital for a procedure known as a carotid endarterectomy - - the removal of plaque from a major artery leading to the brain. The man suffered a stroke which caused his death, a few days after the procedure. He had in the past suffered from coronary artery disease and arteriosclerosis. The plaintiff's claim was that the defendant failed to conduct certain diagnostic tests that would have revealed a blockage in the artery following surgery, and that if this had been timely diagnosed the plaintiff would still be alive today.

A chronological approach to this case might serve to undermine the entire claim. First, it would suggest how difficult the surgery was due to the plaintiff's underlying medical condition. Second, it would serve to point out that plaintiff's life expectancy was severely limited due to that same condition. No matter how the attorney tries to spin the facts, the chronological approach does not help:

"If we look at the chronology of the events that unfolded here, you must first take a look at Mr. Smith. For the last 10 years he has seen a cardiologist. He suffered from coronary artery disease. Eight years ago he had stents placed in his coronary arteries. The procedure went well. Four years ago he had coronary by-pass surgery due to arteriosclerotic disease. The procedure went well. He then saw the defendant doctor in this case for removal of plaque in his carotid arteries two years ago."

Clearly, chronology has done nothing but reinforce in the minds of the jurors that the

plaintiff was a very sick man. By shifting the focus of the opening away from the chronology of the disease to the medical failures and omissions, the bad chronology can be turned into a strength rather than a weakness:

> "Ladies and Gentlemen, the doctor caring for Mr. Smith had an obligation to look, to listen and to check. By his own admission there was a standard - - a gold standard - - a test which could be used to determine whether the blood flow in an artery was appropriate. That test is angiography. That test has been around for decades. In fact, that test is routinely used in procedures such as the one Mr. Smith underwent. The defendant doctor was fully aware of Mr. Smith's underlying medical condition. He knew that he had undergone coronary artery bypass surgery and stent placement years earlier. But he also knew that the coronary artery disease was not so bad that he would not perform surgery. Indeed, the reason he performed the surgery was to give Mr. Smith many, many more years of life. That surgeon made a decision - - a decision in which he decided not to do that test. That decision cost Mr. Smith his life."

The same technique holds true on direct examination as well. In the pedestrian knockdown example, a chronological approach might serve to reinforce the bad facts and place the testimony regarding the accident itself (and the defendant's negligent conduct) directly in the middle of the examination, during which time the jury's attention is likely to wane:

Q. How are old are you?

Q. Where do you live?

Q. Describe your educational background.

Q. Before we focus on the accident itself, let's focus on the scene of the accident: Where did the accident take place?

Q. Describe the roadway.

Q. Describe the traffic control devices.

Here, the attorney's efforts clearly undermine his ultimate purpose- to secure a verdict reflecting the negligence of the defendant and the grave injuries sustained by his client. In contrast, an impact direct might serve to engage the jury immediately in the important facts in the case:

Q. Before the day of the accident, did you ever have difficulty walking?

Q. Did you ever have difficulty standing?

Q. When had you last felt pain in your legs prior to the accident?

Q. When was the last time you didn't feel pain in your legs?

Q. What caused the pain in your legs?

Q. Describe the impact.

Obviously, you will need to back up at some point and establish all of the pedigree information, and other facts necessary to bring out during your direct exam. Just as in the movie example, you can then bring your examination forward, returning to the critical point (in this case this specific accident) as you near the end of the examination.

This technique works equally well in the context of an adverse direct examination of a party-opponent. Consider the medical malpractice case discussed above: while the attorney might work his way up to the critical area by establishing background information through the use of leading questions (which are permissible during the direct examination of an adverse party), this method again will undermine the strengths of your case:

Q. Doctor, you attended medical school in Mexico?

Q. Then you came back to the U.S. and received a degree from the University of Maryland?

Q. You did an internship and residency in general surgery?

Q. Then you received extra training in vascular surgery in the form of a fellowship?

Q. You even did a second fellowship specifically in cerebrovascular reconstruction?

Q. You knew all about carotid angiography?

A. Yes, and in my vast experience, the risks of that procedure did not justify performing it in this case.

By starting with a punch that captures the jury's attention, not only do you reinforce the point made on opening, but you will be well on the way to winning your case:

Q. We can agree, can't we, that stroke is a life-altering event?

Q. It can cause a catastrophic injury?

Q. It can cause death?

Q. In fact, your biggest concern as a surgeon performing a procedure such as this is the patient having a stroke?

Q. There is a test known as angiography, true?

Q. It's been around for decades?

Q. In fact, it's considered the gold standard for determining patency of a blood vessel?

Q. In other words, it's a method to make sure there's good blood flow in an

artery?

Q. It can show defects in a surgical repair of an artery?

Q. The kind that could cause a stroke if left untreated?

Q. One person chose not to perform angiography in this case?

Q. That person was you?

CONCLUSION

The astute trial lawyer not only picks the issues on which he wants the jury to focus, but also chooses the manner and timing of the presentation of these issues. Going right to the heart of the case before establishing all of the facts necessary to complete the presentation can, at times, pave the way for a more successful outcome.

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