



Positioning the Win:

From Intake to the Courthouse Steps

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Lay Witnesses: *Jewels in the Rough*

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LAY WITNESSES- JEWELS IN THE ROUGH

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Introduction

The purpose of this paper is to address the effective use of the lay witness as part of a personal injury trial. The first part of this paper is directed to what might be called the “usual” way in which lay witnesses can be effectively used--- to support, bolster and collaborate a plaintiff’s case. The second part of this paper addresses those circumstances where a lay witness may be able to do something “extra” and provide admissible opinion evidence which can be used by the trier of fact to support damage claims for loss of capacity.

Part 1: The Lay Witness as a Witness to Facts

I am of the firm belief that in all cases, particularly in cases heard by juries, one of the most critical bodies of evidence will be that of the lay witnesses. Before doing a few trials, I was a little blinded by the lure of the "expert" witness. I did what one famous American trial lawyer describes as “gorging on experts and starving for lay witnesses”. As time passed and I gathered more experience I began to realize that obsessing over the expert evidence and relegating the lay witnesses to an afterthought was a big mistake. At trial I found that the expert “hired guns” sometimes cancelled each other out and what was left was (1) the plaintiff and (2) hopefully some very strong lay witnesses such as friends, family, coworkers, supervisors etc...

I find that, for the most part, people are afraid of being a witness. They often need to be carefully approached and then encouraged and prepared for the task. Many people have misconceptions (which often flow from television and movies) about their role and what the process will be like. I try to do what I can to make their job easier and make the experience less daunting so that they can relax and hopefully even enjoy the process a little.

Finding the Lay Witness

These are some steps that I like to employ in finding and preparing lay witnesses:

- Work first with the client. Ask him or her to help you develop a “cast of characters” comprised of the names and emails and phone numbers of all the people who might be able to speak to the key issues such as changes after the accident, opportunities missed at work after the accident etc...
- Have the client let his or her witnesses know that they will be contacted by a lawyer or the lawyer’s investigator in the near future to ask some questions about what they know. This usually avoids any problems or difficulties when the witness is later called upon for an interview.
- Review all of the statements you have obtained and determine which of the lay witnesses you feel will best assist in your case. In the appropriate cases, the witness statements can often be modified into Will Say statements or Minutes of Evidence and can be used as powerful leverage for settlement at mediation or before trial.
- If the case is not going to settle and it is likely going to go to trial then it is time to meet with the lay witnesses in person and prepare them to testify. The usual response is always something like:

You mean a real trial? In an actual Courtroom!?!?! ...can't I just write a letter?

Calming the Lay Witness

- Do not be alarmed if the witness initially is angry about the prospect of testifying... maybe even angry at you. You should remember that for most people the concept of testifying in court, or even of public speaking is deeply frightening. It is much easier for those people to lash out in anger than admit that they are feeling very afraid. I find that accepting their anger without biting back and acknowledging how much of an inconvenience the process is helps calm the initial storm. After that I let them know how much their friend (*aka the Plaintiff*) really needs their help and thanks them. I also promise to try to make the process as stress-free as possible and assure them that it is nothing like TV and they will be well prepared.

- I try, if possible, to go to them or meet them where they want to and where they feel comfortable. It could be their home, a local coffee shop or the place of work. I find it gives the witness a signal of respect for their time and shows them that you value their help.

Preparing the Lay Witness to Testify

- It is helpful to let the witness know the basic overview of what the case is about and where they fit into the picture. This helps alleviate a lot of the anxiety that the witness feels about being part of something they have probably never done before and something where they don't know exactly what their "job" is. Also, a witness who knows something about the "big picture" and what the real issues are in a case is much more likely to volunteer helpful information and deal well with cross-examination.
- I often will prepare an outline of the areas I will cover in the direct exam or a list of questions for the witness. I make sure that they know this is not meant as a "script" but rather an overview so they feel that they have a roadmap for what they will be talking about.
- I make sure the witness knows that the case is not "hinging" on them. They are just one little piece (but an important piece) in the puzzle. This will make their job immediately seem less daunting.
- Let the witness know that while the doctors are the "experts" of medicine, they are the "expert" of the bowling league that they were in with the plaintiff or the "expert" of how the plaintiff loved to go hiking before the accident etc... And no one knows more than they do on those subjects. Their job is to simply help the court compare and contrast who the plaintiff was before the accident and after the accident in matters such as physical activities, relationships, job performance, hobbies, mood etc. The lay witness likely knows more about that than anyone else in the case other than the Plaintiff.
- If you believe the defense will suggest malingering or faking tell the lay witness about that. Ask the lay witness if that may be true. This will often trigger a lay witness to recall all sorts of great examples and stories of how honest the plaintiff is and how it's so obvious that the accident changed the Plaintiff so much.

Lay Witness at Trial

- Let the lay witness know that they don't have to argue the case, that is your job. That takes away a lot of their fears of being in an argument with a lawyer in the courtroom.
- Describe some of the basics about court that we as lawyers know well, but are very foreign to the first-time witness. Most nervousness comes from people being afraid to look foolish- not knowing what to say or where to stand or when to speak. Much of this can be alleviated by a brief introduction to the court layout, the method of being sworn in, standing when the Judge enters or leaves, how to address the Judge, the fact that the Courts are open to the public and a group of school children may wander in, etc..
- Make sure that the witness knows that they can ask for questions to be clarified or repeated. Make sure that the witness knows that they can disagree with suggestions made to them by the defence lawyer and that is appropriate. (Some witnesses are so polite they are literally afraid to say “no” to the lawyers).
- Tell the lay witness that if the defense lawyer asks a question that seems unfair or critical of the plaintiff, not to get angry or confrontational. I encourage lay witnesses to treat (i.e.: kill) the defence lawyer with kindness and to remember that the defense lawyer has a job to do and has probably seen too many scammers. It's just a shame that he or she doesn't know how nice a person this plaintiff is.
- Encourage the lay witness to dress as they would for a business meeting or interview.
- Make sure they know there is nothing wrong or inappropriate about having met with you before the trial as the purpose was to make sure the lawyer knew what the witness saw and had to say.
- Ask the lay witness to try and remember to direct their answers as much as possible to the Judge or Jury----and definitely not to look over at you (for help) when the defence is asking them questions.

Part 2: Lay Witness Opinion Evidence

I have encountered a handful of cases in my practice which left me feeling very unsure of how I was going to prove or quantify a loss of capacity for my client. These cases involved people who had great talent (artists, musicians, athletes) and had been injured and had their abilities compromised.

The first problem was that at the time of their injury these same talented people had not “made it big” or even “made it medium” yet...but they had potential. The second problem was that I had no idea what type of “expert” opinion I could use to prove that they had talent or that they had “a shot” or they “coulda been a contenda”...

At the end of the day I decided that I would advance the cases without expert opinion at all and try to rely on the opinions of very knowledgeable lay persons to support my contention of the Plaintiff’s talent, opportunities and the loss of those opportunities. Not surprisingly, the admissibility of such evidence has been hotly contested in each case.

The first case involved a boxer (Mr. Albert) who had his career cut short after injury to his hands in a violent car crash. His matter proceeded to trial by judge and jury. One of the first preliminary issues was the admissibility of lay opinions in relation to the boxer’s potential as well as the potential earnings if he excelled in his sport. The defence objected to any such evidence being tendered and asserted it would have needed to be done as expert evidence pursuant to the *Supreme Court Civil Rules*.

Clearly this was a “make or break” evidentiary ruling for the Plaintiff’s case.

The lay witness opinion evidence was ruled admissible. This is a segment from the Reasons (*Albert v Politano* (26 June 2012), Vancouver M104190 BCSC Greyell J. (unreported):

[7] The plaintiff seeks to admit evidence from several witnesses who were former coaches of the plaintiff or persons involved with the plaintiff in a professional capacity. These witnesses will testify as to the plaintiff’s accomplishments, his abilities and his pre-accident potential to advance as a professional in the boxing world.

[8] The defendants...do object to these witnesses offering opinions as to the plaintiff's potential for advancement in the boxing world...

[9] The general exclusionary rule for opinion evidence is often not applied for lay witness opinion...Lay witness opinion evidence is received in some circumstances because the opinion is considered helpful to the Court...

[10] The Law of Evidence in Canada sets out four criteria upon which lay witness opinion evidence may be received in evidence at paragraph 12.14...

(1) the witnesses were in a better position than the trier of fact to form their opinion;

(2) the conclusion reached was one that persons of ordinary experience are able to make;

(3) the witness, though not an expert, had the requisite experience to reach the conclusion;
and

(4) the opinions being expressed were only "a compendious way of giving evidence as to certain facts," where those facts are too subtle or complicated to be narrated as effectively without resort to conclusions.

[11] I find the lay witness opinion tendered by the plaintiff meets these criteria. Each witness worked with or at least closely observed the plaintiff's development as a boxer. Each witness is in a better position than the trier of fact to draw an inference as to the plaintiff's future career as a boxer. The witnesses all have experiential capacity, which I find is different from the ordinary circumstances of life (to which the jury is accustomed). Finally, the witness' opinion is a "compendious mode of speaking". In other words, the facts are too subtle

and too complicated to be narrated separately and distinctly (as explained in Graat at 841).

[12] I further note that paragraph 12.12 of The Law of Evidence in Canada states “couched in these terms, the modern opinion rule for lay witnesses should pose few exclusionary difficulties when based on the witness’ perceptions. The real issue will be the assessment and weight to be given to such evidence after it is admitted.” This latter comment, in my view, is one which can be adequately addressed by proper instruction to the jury following examination and cross-examination.

...

[14] For the reasons stated, I will permit these witnesses referred to above to give opinion evidence as to the potential for the plaintiff’s advancement as a professional boxer.

The crucial lay evidence came from John O’Shea, the former president of Boxing BC and Boxing Canada. Mr. O’Shea who was 70 years of age at trial, had a lifetime of experience in boxing, beginning in England as an amateur boxer and later as an international referee and vice-president of the England Amateur Boxing Association. In Canada, in addition to serving Boxing BC and Boxing Canada in various roles, Mr. O’Shea continued to serve as an international referee, coached the Canadian National team, act as Canada’s boxing representative for the Commonwealth Games team and serve on the Canadian Olympic Committee.

He was familiar with all of the contending international boxers around the world. At the 2000 Olympics he testified that he watched as Mr. Albert defeated Canada’s medal hopeful, Troy Amos-Ross. At the 2002 Commonwealth Games he saw Mr. Albert “destroy” the gold medal favourite and reigning European Champion, Courtney Fry. He later saw Mr. Albert win the Canadian championship. Having observed and coached over 1000 boxers, Mr. O’Shea testified that Mr. Albert was the best amateur boxer he had ever seen and predicted that as a professional boxer the respondent would become a world champion.

The jury in *Albert* awarded the Plaintiff over \$800,000 in lost earning capacity even though he had not fought for more \$5,000 before his injuries and had earned very little money at all in boxing before his injury.

Albert was appealed to the Court of Appeal. The Court of Appeal in *Albert v Politano* 2013 BCCA 194 upheld the verdict in its entirety. There was no appeal

taken of the lay witness ruling. The Court of Appeal noted the helpful evidence of the lay witnesses as to the Plaintiff's potential:

[52] I deal with the loss of earning capacity first. I conclude, from the fact the jury awarded a significant sum, that the jury rejected the appellants' submission that Mr. Albert would have withdrawn from a boxing career, soon after the accident, in any event. Clearly Mr. Albert had boxing ability. The jury must have considered that his boxing ability was diminished as the result of the injuries from the accident. It is true that Mr. Albert did not earn very much money from boxing prior to the accident. It is also true that there was not a great deal of evidence about the size of the purses available in professional boxing. Nonetheless there was some evidence. Witnesses from the world of boxing did testify to some extent as to the purses won in certain matches, particularly in Canada. There was evidence, therefore, before the jury from which they could conclude that Mr. Albert had the skills to fight for, and win, purses in the time between the accident and the trial, amounting to \$60,000. The period of past loss is close to four years. The sum awarded is well within the range of the purses that were discussed in the evidence as available, in Canada, over that period of time. Given the positive evidence as to Mr. Albert's abilities, one cannot say the award of \$60,000 for past income loss is unsupported by the evidence, disproportionate, or wholly erroneous.

[53] I have come to the same conclusion in respect to the award for future loss. That sum may be a small portion of what Mr. Albert otherwise would have earned, or it may be more than he would have earned. We do not know. There was, however, evidence of his considerable abilities and evidence of the purses available in the boxing world, even in Canada, that would support an award of \$838,000. I would not interfere with the award for future loss of earnings.

The next case in which lay witness opinion evidence played a key role was *Giczi v Kandola* 2014 BCSC 508. That case involved a talented singer and

tribute artist who lost her ability to sing and perform after a motor vehicle accident. She had a great deal of support from various people in the entertainment world in relation to her potential but did not have a good, proven, earnings history. The admissibility of lay opinion evidence from performers, booking agents and producers in relation to her talents and lost capacity was again a crucial contested evidentiary issue.

The trial proceeded with a standing objection to all of the evidence on the part of the defendant and the Court reserving on the issue and delivering its ruling with the balance of the judgment.

The eventual decision allowed many key parts of the important lay evidence in but it also indentified some areas of lay opinion as going too far and requiring a qualified expert and notice.

Some key passages appear below:

Lay Witness Opinion Evidence

[138] At the commencement of the trial, counsel for the plaintiff indicated he wished to tender as witnesses a number of knowledgeable individuals from the entertainment world, who would describe the skill, ability and potential of the plaintiff, as well as her opportunities in the entertainment field. The plaintiff asserted that much of this evidence was simply factual observation as to her charisma, singing skill, stage presence, as well as factual evidence about job offers or opportunities. However, the plaintiff acknowledged there was an element of opinion, regarding the plaintiff's chances of achieving certain levels of financial success.

...

[146] I observe that the evidence objected to is sought to be introduced for different purposes and so I will deal with those aspects in turn.

[147] I find where the witness in question has sufficient personal experience, the witness is able to give his or her lay opinion as to the quality of the plaintiff's performance and singing, because that opinion is relevant and is a compendious way of giving evidence of certain facts that are too subtle or complicated to be narrated as effectively without resort to conclusions. Testimony which falls within this category is

evidence of witnesses as to the quality of the plaintiff's singing, performance and energy, as well as to the quality of her performances as Bette Midler.

[148] I also find that these witnesses, as they have the requisite experience, are capable of giving admissible lay opinion evidence comparing the plaintiff to other tribute performers generally, Bette Midler tribute singers, or Bette Midler.

[149] This conclusion are supported by the authorities.

...

[157] I find the witnesses who gave evidence about the tribute band or tribute artist industry, and incomes generally available to artists in that industry, were giving factual evidence of which they had firsthand knowledge and to which they could testify.

[158] Similarly, I find the witnesses who gave evidence about specific opportunities personally known to them to which the plaintiff had access were giving factual evidence, and accordingly that evidence is admissible.

[159] However, I pause here to highlight the bounds of admissibility regarding such evidence. The opinion or statement by a witness that the plaintiff would have "made it", as was given, for example, by Jodi Lee Smith, Edie Perala, and other witnesses, is not admissible for the purpose of supporting the plaintiff's probability of achieving financial success in the entertainment field. This is because it goes beyond the proper bounds of lay opinion evidence: it is a speculative opinion that depends significantly on how she would have acted or how others would have acted or received her if she pursued this career and perhaps more importantly, to the extent it is not speculative, it is opinion evidence that involves extensive expert knowledge of the entertainment world. To the extent that such an opinion on the marketability of the plaintiff's act could be admissible, I find that it must be accompanied by a properly qualified expert in the entertainment field with proper written notice to the opposing party. That expertise of course can arise in numerous ways but it has to be established with evidence.

At the end of the day the Court found that the evidence did establish the Plaintiff's pre-existing talents and the loss to her of opportunity, in particular, the opportunity to perform as a Bette Midler tribute artist.

[174] Overall, I find it is a real and substantial possibility but for the injuries the plaintiff suffered in the 2008 accident that she would earn significant income in the future by performing the Bette Midler show. The evidence is clear that there is a market in the entertainment world for good tribute acts for performers who have been and remain popular. I also find that she had a real and substantial possibility to earn income as a gilder, a painter, or a seller of cosmetics and that has been impaired by the accident

The two most recent decisions on lay opinion evidence, *Albert* and *Giczi* are very helpful on the use of lay opinion to support capacity claims involving loss of talents and related loss of opportunities. However, some questions still remain. In *Albert*, the retired head of Boxing Canada gave lay opinion evidence based on his “requisite experience” in the world of boxing as to the Plaintiff’s chances of being a champion boxer and that lay opinion was admitted. Lay evidence as to the sizes of purses available was also admitted and the two combined to form the basis of a capacity award absent any expert evidence.

On the other hand, the Court in *Giczi* found that evidence as to potential financial success of her tribute show would need to come from a qualified expert from the entertainment world who knew the financial side of the business with an accompanying expert report and notice.

As a result, I recommend a two-pronged approach for the cases of talented clients with lost opportunities. First, amass as good a cast of talented and knowledgeable lay witnesses as you can to establish the talent of your client, and who can rank and compare that client’s talent to others in his or her field. Next, identify a person or persons from the relevant industry who can be qualified as an expert in the “business side” of your client’s skill set. Hopefully that person can help add some meaningful (and admissible) parameters to the possible financial opportunities lost.