

## Hidden Pitfalls in Auto Trials - Boardwalk Seminar 2017

# Lay Witness Testimony: How it can Win or Lose Your Case

### **NJRE 701. Opinion Testimony of Lay Witnesses**

If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.

The rule merely requires that the witness have actual knowledge that he/she acquired through the use of his or her senses. [State v. Wishnatsky, 258 N.J. Super. 67, 89, 91 \(Law Div. 1990\)](#). "Pivotal to the admissibility of *N.J.R.E.* 701 evidence is perception acquired through the senses." [\*\*\*28] [In re Trust Created by Agreement Dated Dec. 20, 1961, 194 N.J. 276, 283, 944 A.2d 588 \(2008\)](#).

### **Federal Rule of Evidence 701**

See [State v. Maddox, 2013 N.J. Super. Unpub. LEXIS 1679](#):

[Fed. R. Evid. 701](#) is similar to [N.J.R.E. 701](#) in requiring that a lay opinion be rationally based upon the perception of the witness and helpful to the trier of fact. Addressing the first requirement that the opinion be rationally based upon perception, the Second Circuit stated, "a lay opinion must be the product of reasoning processes familiar to the average person in everyday life." [United States v. Garcia, 413 F.3d 201, 215 \(2d Cir. 2005\)](#). The Fifth Circuit described that reasoning process as follows:

[T]here must be sufficient evidence to support a finding that the witness has personal knowledge of the facts from which the inference or opinion is said to

derive. Next, there must be a rational connection between the opinion or inference and the observed factual basis from which it derives -- that is, the opinion or inference must be one that a normal person would form from those perceptions.

[\[\*Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.\*, 630 F.2d 250, 263 \(5th Cir. 1980\) \(internal citations omitted\).\]](#)

## **Examples**

### **Scene Witnesses (police or other eye witnesses)**

#### **Co-Workers:**

[Vitale v. Schering-Plough Corp.](#), 447 N.J. Super. 98, 123-24 (App. Div. 2016)

Plaintiff (a security guard) took the basement keys from the guardhouse (one of the building he guarded), told his coworker he had to go downstairs for something, and subsequently fell down the basement stairs. Plaintiff had no recollection of the accident, or of the moments immediately before and after his fall. Plaintiff's coworker, Alec Schaffer, went looking for plaintiff approximately twenty minutes after plaintiff left with the basement keys. When Schaffer opened the basement door he noticed the light was off. After he turned on the light, he saw plaintiff at the bottom of the stairs, having landed on a brown paper "cement type" bag. At the top of the stairs, near the door, Schaffer saw a ladder, crates, an industrial-type extension cord, and a fifty-pound bag of ice melt that had been knocked down a few stairs. Based upon the positioning of the bag of ice melt, Schaffer believed plaintiff had tripped over the bag, causing him to fall.

Schaffer's testimony that plaintiff had tripped and fallen over a bag of ice melt was rationally based on his perception of the scene. When Schaffer discovered plaintiff at the bottom of the stairwell, he saw a bag of ice melt knocked down a few steps and observed other items stored at the top of the stairwell. His testimony was not speculative nor did his testimony negate the possibility that plaintiff stumbled and fell for some other reason, as argued by defendant. Schaffer's impressions were significant because he was first on the scene and obligated to complete a report regarding the incident. Significantly, the testimony did not produce an unjust result because Schaffer's testimony was a repetition of the information contained in his investigative report.

## **Police Officer:**

[Neno v. Clinton](#), 167 N.J. 573 (2001)

This case involved a couple construction workers that were struck by a truck while crossing the street at their construction site. The Trial Court permitted a police officer to testify as to his lay opinion regarding the cause of the accident based on the hearsay statements of two eyewitnesses. The Supreme Court held that lay opinion based solely on hearsay is inadmissible.

See also, [Aiges v. Fuccillo](#), 2014 N.J. Super. Unpub. LEXIS 2434 (Nurses testimony classifying the dog's bite as "provoked" was not admissible as lay opinion because it was based on plaintiff's statement rather than perceptions by the nurse of the bite itself).

Other issues that courts have permitted Officer's to testify about (without being an expert witness) are speed of a vehicle, measurements taken by the Officer as well as other items, not necessarily connected to auto cases.

## **Other witnesses/examples:**

See [State v. McLean](#), 205 N.J. 438 (2011):

Traditional examples of permissible lay opinions include the speed at which a vehicle was traveling, [State v. Locurto](#), 157 N.J. 463, 471-72, 724 A.2d 234 (1999) (permitting lay opinion about speed of vehicle based upon observation);

[Pierson v. Frederickson](#), 102 N.J. Super. 156, 161-63, 245 A.2d 524 (App.Div.1968) (permitting lay opinion about speed of vehicle based upon auditory perception);

The distance of a vehicle from the intersection where an accident occurred, [State v. Haskins](#), 131 N.J. 643, 649, 622 A.2d 867 (1993) (listing traditionally permitted subjects of lay opinion testimony);

Signs and behaviors indicative of an individual's intoxication, [State v. Guerrero](#), [\*\*344] 60 N.J. Super. 505, 509-11, 159 A.2d 448 (App.Div.1960) (holding that lay witness opinion was sufficient evidence of intoxication);

[Searles v. Public Serv. Ry. Co.](#), 100 N.J.L. 222, 223, 126 A. 465 (Sup.Ct.1924) ("[T]he rule is settled that the average witness of ordinary [\*\*\*36] intelligence may testify whether a certain person was sober or otherwise, without making it appear that the witness was an expert in judging of intoxication.");

See also [State v. Bealor, 187 N.J. 574, 588-89, 902 A.2d 226 \(2006\)](#) (permitting police officer to testify about observations of defendant's behavior indicative of narcotics intoxication, but noting preference for expert chemical proofs), and,

With an appropriate foundation, the value of personal property owned by the witness, see [Penbara v. Straczynski, 347 N.J. Super. 155, 162, 789 A.2d 134 \(App.Div.2002\)](#) (permitting landlord to testify about value of carpet damaged by tenant seeking return of security deposit);

[Lane v. Oil Delivery, Inc., 216 N.J. Super. 413, 420, 524 A.2d 405 \[\\*458\]](#) (App.Div.1987) (requiring that estimate not be speculative); [State v. Romero, 95 N.J. Super. 482, 487, 231 A.2d 830 \(App.Div.1967\)](#) (permitting owner to testify about value of personal property as part of criminal prosecution for larceny).

### **Property Damage: (Mechanics):**

Auto mechanics may be very helpful regarding the issues of property damage. Bringing in the mechanic to describe the damage to a vehicle, both externally and internally to a vehicle can assist to explain why damage may look minor on the outside of a vehicle (which defense attorneys and insurance companies love to harp on) but may reveal more damage than meets the eye underneath.

### **Damages: (family members, friends, co-workers)**

One of the most helpful areas that lay witnesses can really bolster your case is in the area of damages (relating the injuries that your client has sustained to the impact those injuries have on your client in everyday life). Allowing the jury to connect to real life impacts. This can come from your client, but it can be very impactful to have family members, friends or co-workers to testify to their observations of how the injuries have impacted your client. Video clips forwarded to the adjuster before suit, as a way to personalize your clients to the insurance company may also be useful.