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The Use of Real Evidence

Donald P. Lay*

I. INTRODUCTION

The modern and sometimes evil connotation of "real evidence" is the more descriptive phrase "demonstrative evidence." "Real evidence" means a fact, the existence of which is perceptible to the senses.¹

The purpose of "real evidence" is to better explain to a court or jury so that a complete understanding of the facts is the end result. Visual aid advanced rapidly with the new and more effective techniques developed during World War II in our Armed Forces Programs. However, visual aid for better learning has long been a part of our educational system. The author can recall his first grade classroom, almost 25 years ago. The teacher was describing the various birds that make their homes in North America. The design, shape, and beauty of the birds was described by the teacher. A hazy picture of the birds' proportion and coloring came to our imaginative minds. We drew pictures. At the end of the week, a taxidermist brought his collection of stuffed birds to our classroom. When we saw the actual model of the bird, our understanding of his color, design, and habitat crystalized for the first time. We then drew pictures which finally resembled birds. This was the art, use, and technique of the uses of "real evidence" at work.

Modern use of real evidence has taken on what some call "epidemic" proportions. Lawyers, particularly in the field of trial practice, are taking their post graduate legal education more seriously. The various Bar Associations, Insurance Counsel Associations, and the National Association of Claimants' Compensation Attorneys are including in their programs more and more concerning the use and technique of visual aids to better enable the jury and court to understand a particular fact. The techniques of demonstrative evidence are also being taught in an increasing number of law schools.

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¹ 20 Am. Jur., Evidence, § 716, p. 600 (1938). *Riggie v. Grand Trunk R.R. Co.*, 93 Vt. 282, 107 Atl. 126, 127 (1919).

II. OBJECTIONS TO USE

The use of "demonstrative evidence" as such has drawn unfair and undeserved critical abuse.² Trials can be recalled where opposing counsel has made the following objection: "Objection to the offer because this is demonstrative evidence." Other lawyers when faced with an offer or use of real evidence in the court room have denounced its use as "an attempt to make a Hollywood production," "an attempt to confuse the jury," "a technique invented by Melvin Belli in his book *Modern Trials*,"³ and other bizarre terminology.

The fact is that "real evidence" is the oldest form of evidence in our trial system of Anglo-Saxon jurisprudence.⁴ Today, the Uniform Model Code of Evidence provides for the use of models and other understandable means of communications to demonstrate evidence given in the trial.⁵

Nevertheless, the use of "demonstrative evidence" draws a great deal of abuse. One judge in a midwestern courtroom is re-

² Bunge, *Demonstrative Evidence—A Grandstand Play?*, 42 Ill.B.J. 72 (1953); Hinshaw, *Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion*, 40 A.B.A.J. 479 (1954).

Dean Mason Ladd, well-known professor of evidence, has recently written: "People are pictorial-minded today. With television in almost every home, color pictures covering the pages of almost every magazine as a part of advertising or as illustration for articles, with the use of diagrams and graphs to explain the news and economic trends, and with a blackboard in every classroom of our schools, it is not surprising that similar devices have become commonly employed to make the triers of fact better understand the meaning of testimony and thus to aid in the determination of the controverted issues of a lawsuit. The use of charts and other visual aids as a teaching procedure by the armed forces has added its part to the new look in the presentation of evidence and testimony. With everyone else making use of pictorial and other visual aids in the development of ideas, why shouldn't lawyers make greater use of demonstrative evidence in the preparation and presentation of proof so that jurors drawn from a visual-minded public will be able to understand the problems they are to decide and to evaluate more accurately the testimony of witnesses who are sometimes not too articulate in relating the facts which they have perceived or in expressing opinions which they have formed and are authorized to make." Ladd, *Demonstrative Evidence and Expert Opinion*, 1956 Wash. U.L.Q. 1.

³ Belli, *Modern Trials* (1954).

⁴ Wigmore, *Evidence* § 1150-1169; 1 Bentham, *Rational of Judicial Evidence*, 401-05 (1827).

⁵ Model Code of Evidence, Rule 105 (j) (1942).

puted to have said that the doctor could not demonstrate to the jury with any model spine unless the spine were that of the plaintiff.

Objections to the offer of "real evidence" in the trial are generally made on the ground that it will prejudice and inflame the jury. If the evidence is at all germane to the case and serves to better illustrate oral testimony, then there can exist no real objection to the evidence. If it will tend to improve the jury's understanding of scientific testimony or of any fact in the case, then it should be admitted. Lawyers and judges alike often fail to appreciate that the jury in a personal injury case must interpolate and understand the teachings of law and medicine, as well as occurrences which take place over several years. This evidence is sometimes literally "crammed" down the jury's throat in as short a time as possible. If they do not understand certain evidence, for example the medical testimony, then assuredly they are not at fault for reaching an unfair result.

III. USE BY DEFENDANT

Many lawyers say that "demonstrative evidence" is just a plaintiff's device. How far this can be from the truth! "Real evidence" in defending cases is equally as important and available to the defendant. It is submitted the failure of the defendant to use real evidence may be attributed to fear of educating his adversary.⁶

In defending a malpractice case, the author once used an enlarged picture from a medical book to show internal organs of a female. It was thus demonstrated to the jury that the area where a sponge was discovered on a subsequent operation was not related to the area in which the defendant doctor had previously performed a hysterectomy. This evidence, along with "demonstrative proof" of the fact that the defendant doctor did not use the type of sponge found, was extremely helpful in obtaining the defend-

⁶ The writer has practiced under the guidance of experienced defense counsel. One of the earliest experiences with a doctor in preparation for a defense in a personal injury case is well remembered. A doctor brought forth a skull from part of a skeleton he had in his office to demonstrate to us the particular bones, function, and location that were involved in the injury. After the demonstration he stated to us that he would be happy to bring the skeleton to trial so that the jury could see in the same manner demonstrated to us. The doctor was cautioned by the older defense counsel, "Heaven's sakes, don't bring that to court. The other side (plaintiff's lawyer) can use it to his advantage too."

ant's verdict.⁷ In another malpractice case recently tried, the defendant's attorney produced giant blown-up pictures of X-rays to demonstrate to the jury that the defendant doctor had not committed malpractice. The author has used giant blown-up pictures of automobiles to illustrate to the jury that the physical damage done was such that it proved the defendant was not at fault. Of course, this technique has been used many times on the plaintiff's side. "Real evidence" is not a tool of the defense or the plaintiff lawyer alone. It is the tool of the trial lawyer. All trial lawyers, as well as trial judges, should readily accept descriptive or explanatory techniques for use in the courtroom.

Such a technique should not be resorted to only in a jury trial. A recently tried equity case involving the transfer of several hundred thousand dollars worth of stock was greatly aided by a giant chart of the genealogy of the members of the family among whom the stock had been distributed. This chart was of equal value to both lawyers and of great significance to the trial judge in understanding the complex evidence as it proceeded over the many days of trial.

The author recently tried a case involving a defective installation of a motor. The terminology and the understanding of the workings of said motor as related to the cause of the accident were complex. In order to better understand the situation, we purchased a similar motor, had it cleaned up, and asked our expert to explain to us the defective installation. The use of the motor made the problem so clear that it was decided to use the motor as an illustrative exhibit in court. Members of the jury mentioned after the trial that the use of the motor in demonstrating the defective installation in relationship to the cause of the accident was a great aid to them in reaching their verdict.

The use of "real evidence" has long been approved by courts throughout the land.⁸ Examples of "real evidence" to prove a

⁷ The facts of the case showed that the plaintiff had been operated on by another doctor two years previous to the operation performed by the defendant. The sponge found in the plaintiff was identified by the pathologist as being a two by two or four by four sponge. The defendant doctor proved he had used long pieces of roll gauze in place of a sponge ever since medical school. The type of sponges, as well as their technique in the use during the course of an operation, were effectively demonstrated to the jury.

⁸ See Ladd, note 2, *supra*.

sale,⁹ to prove handwriting,¹⁰ or to prove paternity¹¹ have all been recognized as proper means of proof.

The Nebraska Court has held that exhibiting evidence of injury to the jury is within the trial court's discretion.¹² It is submitted, however, that in most instances it would be an abuse of discretion not to allow the actual showing of the cause of disability. Certainly the demonstration of an injured portion of the body is material. For example, in a recent amputation case the defense objected to the showing to the jury the stump of the man's arm. The objection was made, of course, on the ground that it would prejudice the jury. The objection was overruled. The purpose in showing the stump was to demonstrate the great amount of difficulty this man had in putting on his prothesis due to the shortness of his stump and demonstrate what he could and could not do with his stump with and without his prothesis. Moreover, the jury was certainly entitled to see the hideous sight that this man must live with the rest of his natural life. How else can one vividly *prove* the embarrassment and humiliation that he has in front of his own wife, family and friends; to *prove* why he does not take his shirt off at work in front of other men, to shower or take part in activities at the Y.M.C.A., etc. All these things defendant readily claimed would prejudice the jury. The wrongdoer is literally saying, "I caused this terrible thing, but it would be unfair to me for a jury to see and understand what I did." Unless such evidence is demon-

⁹ *St. Louis Paper & Box Co. v. J. C. Hubinger Bros. Co.*, 100 Fed. 595 (8th Cir. 1900) (Exhibition sampled to show whether or not the merchandise furnished corresponded with the sample); *Gormley v. United States*, 167 F.2d 454 (4th Cir. 1948); *E. K. Hardison Seed Co. v. Jones*, 149 F.2d 252 (6th Cir. 1945).

¹⁰ *State v. Jacobson*, 348 Mo. 258, 152 S.W.2d 1061, 138 A.L.R. 1154 (1941) (Demonstration of similarities between disputed and a genuine handwriting). Nebraska provides comparison of handwriting in its statute. Nebraska Revised Statutes, § 25-1220 (Reissue 1956) states as follows: "Evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writing of the same person which is proved to be genuine."

¹¹ *State ex rel Feagins v. Connecticut*, 160 Kan. 370, 162 P.2d 76 (1945) (Exhibition of the child to compare with the appearance of the father); *Green v. Commonwealth ex rel Hilms*, 297 Ky. 675, 180 S.W.2d 865 (1944); *Nimmo v. Sims*, 178 Ark. 1052, 13 S.W.2d 304 (1929). *Contra*: *Flores v. State*, 72 Fla. 302, 73 So. 234, L.R.A. 1917b, 1143 (1916); *State v. Harvey*, 112 Iowa 416, 84 N.W. 535 (1900) (Holding that the child may be exhibited only to show race characteristics).

¹² *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579, 213 N.W. 966 (1927) (Exhibition of injury of small child).

strated, the plaintiff is extremely prejudiced since the jury will never be able to clearly crystalize in their own mind the real damage that was done.

IV. ILLUSTRATIVE PROOF

Perhaps the greatest misunderstanding in the use of "real evidence" arises when the evidence is used for illustration only. This is true in the use of maps, models, diagrams, photographs, casts, charts of the human body, skeletons, dummies, scientific reconstructions, illustrative slides, and blackboard illustrations. The use and admissibility of use of such techniques as testimonial aids to the jury should be encouraged.

A. PHOTOGRAPHS

The view of the scene of an accident or of the premises or view of the subject matter provides, in most instances, a better means of comprehension for triers of fact.¹³ Our statutes provide a method by which the jurors may view the same.¹⁴ Many times, however, it is impracticable or impossible to view the scene. Many times at the time of trial the subject matter or the scene has been changed, and it would be an error to allow a jury to view the scene. Sometimes it is difficult to preserve the subject matter.¹⁵ A photographic

¹³ Most recent illustration of the view of the scene was in the internationally publicized trial of the *Girard* case in Japan. Girard, an American soldier, was accused of shooting a Japanese citizen on a firing range. Testimony was actually taken for several days at the scene of the alleged crime, with the various witnesses acting out and re-enacting the incident.

Another trial which received a great deal of publicity was the recent criminal libel trial in Los Angeles against Confidential magazine. Here the jury was allowed to view the famous Chinese theater in Hollywood to determine whether or not it was possible to actually see the off stage "performance" of a certain Hollywood starlet from the balcony of said theater while the said starlet was allegedly "entertaining" in the back row on the main floor.

¹⁴ Neb. Rev. Stat. § 25-1108 (Reissue 1956). "View of Property or Place. Whenever in opinion of the court, it is proper for the jury to have a view of property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial." See also, *Rundall v. Grace*, 132 Neb. 490, 272 N.W. 398 (1937) where it was held that the jury may take into account the result of their observations in connection with the other evidence in reaching their verdict.

¹⁵ See Lay, *A Trial Lawyer Speaks to the Investigator*, *The Practical Lawyer*, Vol. 2 p. 78 (Jan. 1956).

view of the scene or subject matter has long been recognized as a proper means of presenting this evidence to the jury.¹⁶ It is of utmost importance in the investigation of accident cases to obtain pictures of the scene or subject matter within a short time after the occurrence. This is also true in obtaining photographic evidence of injuries. Many times persons will be severely injured and disabled by bruising alone, or in the extreme case by a burn. A jury can readily understand the extreme disability if they see the extensive discoloration over the person's body. Several years after a severe burn only scar tissue is available from which to infer the severe pain which the plaintiff has suffered. Colored photographs of the burned area will illustrate to the jury the severity of the burn and, to some extent, the pain and disabilities which the person had at that time. Such colored photographs are admissible in evidence.¹⁷

Motion pictures have been received in evidence in many cases.¹⁸

¹⁶ *Bedford v. Herman*, 158 Neb. 400, 63 N.W.2d 772 (1954); *Omaha Southern R. Co. v. Beeson*, 36 Neb. 361, 54 N.W. 557 (1893); *Zancanella v. Omaha & C.B. St. Ry. Co.*, 93 Neb. 774, 142 N.W. 190 (1913) (Holding that photographs are not to be excluded because the situation is capable of verbal description). Compare *Tankersley v. Lincoln Traction Co.*, 101 Neb. 578, 163 N.W. 850 (1917) (Holding where the surroundings and place of the accident had materially changed at the time the photographs were taken, same are not admissible in evidence).

¹⁷ See *Anderson v. Evans*, 83 N.W.2d 59, 68, 164 Neb. 599 (1957). The court stated: "By the fifth assignment of error the defendants contend that the court erred in admitting into evidence photographs showing the physical appearance of the plaintiff after the accident. These photographs were in color. The substantial theory of the assignment is not that the photographs did not reflect the appearance of the plaintiff at the time, but that there was other descriptive evidence of his condition and appearance which rendered unnecessary this evidence, and in this light the evidence should not have been admitted because it was calculated only to prejudice against the defendants.

"In light of the decisions the assignment of error may not be sustained. In *City of Geneva v. Burnett*, 65 Neb. 464, 91 N.W. 275, 58 L.R.A. 287, 101 Am.St.Rep. 628, it was said: 'Under the proper precautions, and with necessary explanations, what are known as "x-ray pictures" are admissible in evidence for the purpose of showing the condition of the internal tissues of the body.' This pronouncement was referred to with approval in *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171.

"If this is true as to internal tissues, it would reasonably appear that photographs showing the condition of the external tissues should likewise be admissible. *The possibility that the photographs might have a tendency to create sympathy in favor of one party should not render them inadmissible as proof of an issue on the trial.*" (Emphasis added.)

¹⁸ See *Dennison v. Omaha & C.B. Street Railway Co.*, 135 Neb. 307, 280 N.W. 905 (1938).

Actually, motion pictures are nothing more than a series of photographs. A photograph is admissible in evidence if it is shown to be a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry.¹⁹

Many times clients come to your office months, and sometimes years, after an accident with small photographic pictures of the accident scene, automobiles, or their injuries as of the time of the accident. These pictures are usually 2 by 2 or 3 by 5 photographs. It is a futile effort to hold such a picture in front of the jury in argument or to present testimony concerning the picture from a witness while a jury views it. It is recommended, therefore, to have enlargements made of said photographs. If the negative is available, then enlargement is generally possible to a size large enough to be viewed by all members of the jury panel at the same time. This method does not require the constant handling and passing back and forth of the small picture. Frequently the reproduction of the picture cannot be made large enough without loss of detail unless a proper camera is used at the time of the taking of the picture. In such a case it has been suggested that sufficient copies be made so that the judge and each of the jurors might have a copy of the photograph to examine during the testimony and argument of counsel.²⁰ Such procedure is also recommended and used in appellate courts.

Medical photography has been developed in our new medical centers for the use of doctors in their work. In many hospitals a medical photographer works almost exclusively for the benefit of the various doctors in reproducing slides of X-rays and pictures of injuries to aid the doctors in their treatment and history of the case. Such photography and slides are also used by instructors in the medical schools. There is no valid reason why such photographic methods cannot be used by doctors in court rooms to better illustrate injuries and damage to individuals.

Nevertheless, when enlargements of pictures are used in the court room, objections are often made on the ground that it is an attempt to impassion and prejudice the jury.²¹ Again, it is submitted, the motive for the objection is generally based upon the fear that the jury will better understand the evidence in question. In order to avoid pitfalls of having such an objection sustained, if

¹⁹ *Bedford v. Herman*, 158 Neb. 400, 63 N.W.2d 772 (1954) (Error in excluding pictures held not prejudicial).

²⁰ *Hinshaw, Use and Abuse of Demonstrative Evidence; The Art of Jury Persuasion*, 40 A.B.A.J. 479, 542 (1954).

²¹ See note 17, *supra*.

you anticipate objection to enlarged pictures, use the original negative, the original print, and any enlargements made therefrom, marking them as separate parts of one exhibit. In this manner the jury and the court may see that there has been no change or trick photography in the development of the enlargement. It is generally held that enlargements which are not misleading are generally admitted into evidence.²²

In order to avoid any surprise at the time of the trial and to expedite the trial, an enlargement should be submitted to opposing counsel before trial for stipulation. The pre-trial conference should dispose of any question of foundation regarding the use of the enlargements.²³ The author has found that enlarged photographs, in every case that he has tried, have been stipulated to by counsel prior to trial and that foundation as to the development of enlargements need not be shown.

B. X-RAYS

X-ray pictures have always been deemed admissible where it is shown by competent testimony that they were taken in a professional manner by a competent technician.²⁴ The foundational proof should show the position of the body at the time the X-ray was taken and that the usual X-ray techniques were employed.²⁵ Some courts allow the admissibility of X-rays without expert interpretation,²⁶ but this is not the generally accepted rule. It is generally held that where the physician identifies the X-ray pictures as being taken in his presence and under his direction that it is not necessary to call the technician who took the X-ray pictures.²⁷ Here again

²² See *Sin v. Weeks*, 7 Cal.App.2d 28, 45 P.2d 350 (1935); *Western and A.R.R. v. Reed*, 35 Ga.App. 538, 134 S.E. 134 (1926); *Carver v. Missouri-Kansas-Texas Ry.*, 362 Mo. 897, 245 S.W.2d 96 (1952); *People v. McDonald*, 365 Ill. 233, 6 N.E.2d 182 (1936).

²³ See rule promulgated by the Nebraska Supreme Court on pre-trial procedure, *Revised Rules of the Nebraska Supreme Court* (1957) p. 35, which states: "In any civil action in the district court after issues have been joined, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider. . . (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof. . . ."

²⁴ *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956); *City of Geneva v. Burnett*, 65 Neb. 464, 91 N.W. 275 (1902).

²⁵ *Call v. City of Burley*, 57 Idaho 58, 62 P.2d 101 (1936); *Texas Indemnity Insurance Co. v. Desherlia*, 237 S.W.2d 715 (Tex. Civ. App. 1951).

²⁶ *American National Insurance Co. v. Points*, 81 S.W.2d 762 (Tex. Civ. App. 1935).

²⁷ *Arkansas Amusement Corporation v. Ward*, 204 Ark. 130, 161 S.W.2d 178 (1942).

is where pre-trial conferences greatly aid the trial of a lawsuit.²⁸ It should never be necessary to take the time of the jurors and the court in the trial of a lawsuit to lay the foundation to an X-ray photograph unless there is some unusual circumstance or objection involved.

The difficulty in the use of X-ray film is that too often the lawyer and doctor become involved in technicalities in using the X-ray and such evidence has little meaning to twelve lay people and a judge who are not as familiar with the medical evidence of the case. Both the lawyer and the doctor involved in the case undoubtedly have been over the medical testimony on many occasions. It is the duty of the lawyer to break down the doctor's technical language into lay terminology so that the jury can readily understand it. If the X-ray picture is helpful and diagnostic to the physician in defining the injury, these pictures should be equally helpful to the jury through proper questions and answers to the attending physician. This is not to say that the jurors can interpret the X-ray films themselves. Even many competent doctors cannot interpret X-ray film (which sometimes comes as a great shock and surprise to the trial lawyer).²⁹ Unless the jury has an opportunity to see the X-ray film as the doctor testifies, the jurors feel they have only the statement of one doctor which is many times contradicted by the adverse doctor. Then, there exists complete confusion. Therefore, the use of the X-ray film for gross appreciation by the jury is imperative.

In instances where there is no obvious defect whatsoever in the X-ray picture and the interpretation rests upon the expert knowledge of the particular doctor as to the significance of certain shadows, etc., use of the small film in a viewbox is sufficient. Any attempt to reproduce the X-ray will be of little aid since there is nothing that can be seen by the lay person in any event.

However, where there is an obvious fracture in the bone, obvious deformity, or other obvious injury to be seen, it is submitted that

²⁸ See note 23, *supra*.

²⁹ This comment is not to accuse any doctor that he is not properly qualified. It is directed to the trial lawyer who carelessly waits until the doctor is on the witness stand to find out that the doctor has not had specialized training in the field of radiology. Many general practitioners and medical specialists today rely almost exclusively upon the specialized readings of a doctor trained in roentgenography. For the lawyer to wait until the doctor is on the stand before ascertaining this fact is a grave error since, to the jury, it detracts from the qualification of an otherwise very competent expert witness.

a photographic reproduction of the X-ray film³⁰ or a slide of the X-ray film be made for projection of the film on a screen.³¹ This is so the jury can readily appreciate the gross changes showing the damage as the doctor testifies. This is the same technique used in medical schools and at medical conventions for the demonstration of medical facts to audiences. The trial lawyer should keep in mind that the X-ray film itself is ordinarily better for interpretative purposes since detail is often lost in reproduction. Particularly in the projection of a slide on a screen if a doctor stands right next to the screen, he will not be able to see the detail in the projected picture in the same manner as the jury sitting several feet distant from the screen. Therefore it is suggested and recommended, where slides are used to project the film on a screen, that the slide be marked as a part of the original X-ray film exhibit and both offered into evidence. The doctor should testify from the projection on the screen so that all of the jury may see and understand the gross abnormalities involved and also refer to the actual X-ray film in the view-box to point out any details not apparent in the reproduction on the screen. This procedure enables the jury to fully appreciate the doctor's testimony as he interprets the X-ray film. The question of foundation should not be a difficult one for the trial lawyer. The foundation may be laid by the person who photographed the X-ray film and made the 35 mm slide, stating that the slide is an actual reproduction of the original X-ray film and that it is true and accurate in all respects with no distortion in the reproduction.³² Here again the author has always used the

³⁰ There are two ways in which a reproduction of an x-ray film may be made. One way is to have a negative print of the x-ray made in such a manner that one gets a reproduction of black on white, similar to a print of an ordinary picture from any ordinary negative of a film. The other way is to make a positive reproduction of the negative itself by taking a picture of the x-ray and then reproducing the negative on film or paper. These x-ray reproductions are usually enlarged so that all members of the jury may see them. See *Texas Employers Insurance Assoc. v. Crow*, 148 Tex. 113, 221 S.W.2d 235 (1949) (positive x-rays admissible).

³¹ It is a simple procedure for a professional photographic laboratory to take the x-ray film and take a picture of the same so as to recreate a 35 mm. slide of the x-ray film. No distortion or loss of detail occurs in the reproduction.

³² Many times the expert witness, standing in the immediate proximity of the screen where the slide is reproduced showing the x-ray, will lose some of the detail due to the fact that he is so close to the screen itself. It is suggested that if this technique is to be used in the courtroom, that the expert keep the witness stand and use a small flashlight to point on the screen the particular areas of the x-ray he is discussing. It is always wise to have the original x-ray films available for comparison if necessary.

pre-trial conference to obtain a stipulation as to foundation being waived.

Many times the X-ray film itself is self-explanatory without too great a technical explanation. For example, with the comminuted fracture of the femur one may generally see the fragmentation of bone in the original X-ray film. In such a case it is suggested that an actual positive print of the X-ray film be taken and be attached to the original X-ray film.³³

Here again there should not be any objection to the enlargement of such positive pictures. As long as it is a true and accurate representation of the original X-ray film, the enlarged picture allows all members of the jury and the court and the counsel to view it as evidence is being given toward its interpretation. Every lawyer and trial judge should be concerned toward the use and adoption of such practice.

It is recommended that when slides are made of the original X-rays and are used in the trial, that the lawyer, through his medical experts, use slides of the anatomy of the human body relating to the injured portions. These slides are available from the Ciba Collection³⁴ or any medical photographer may make them from recognized medical text books. In showing the slides of the X-rays it is then suggested that the doctor supplement his testimony through the use of the slides of the anatomy so that he may better illustrate the injured portion of the body involved. Here again this technique may be used both by the plaintiff or by the defendant, either to prove or disprove a point in question.

It is always well to go over this portion of the testimony of the doctor with the expert himself prior to the actual testimony being given in court. He should view such slides with you and verify that they are anatomically correct.³⁵ The author in interviewing

³³ The original film should always be marked as an exhibit along with the particular slide in the event there is any question as to identification in actual reproduction.

³⁴ See Netter, Ciba Collection of Medical Illustration, Vol. 1, Nervous System (1957). The slides may be purchased through Ciba Pharmaceutical Products, Inc., Summit, New Jersey, for a minimum cost. The slides are merely 35 mm. reproductions of the actual plates found in the Ciba books. These books contain large colored plates of the anatomy, particularly useful in illustrating cervical and lumbar injuries.

³⁵ See Chicago R.R. Co. v. Walker, 217 Ill. 605, 75 N.E. 520 (1905), wherein it was held that any scientific witness may use any object, drawing, plat or diagram which is not exact for the purpose of illustrating or explaining his testimony.

physicians, usually several weeks prior to the trial, asks the physician whether or not he has any known aids or pictures which would enable the author to better understand the injury and the described disability of the patient. Usually the doctor will produce a series of pictures, a model skeleton, or slides to illustrate his point. Once this has been accomplished, it is a simple procedure to reproduce these pictures or to use the slides in trial to better enable the doctor to present his testimony.

The Ciba Collection³⁶ on the cervical and lumbar spine, which most doctors will readily accept to illustrate their testimony, is very informative and helpful.

It is suggested a proper technique in adapting either illustrative charts or slides to court room use through the physician is as follows:

Question: Doctor, I hand to you what the court reporter has marked as Exhibit "A" for purposes of identification, the same being a slide (or a photograph, model, or chart) and I ask you if you have examined it and viewed the same before this trial?

Answer: I have.

Question: Doctor, will you tell us what this Exhibit represents?

Answer: It is the skeleton of the human body.

Question: Doctor, have you examined this Exhibit to determine whether it is anatomically correct?

Answer: I have.

Question: Doctor, will you tell us whether or not it is anatomically correct and truly portrays the anatomical structure of the human body?

Answer: It does.

Question: Doctor, are these slides used in the ordinary course of teaching students in recognized medical schools?

Answer: They are.

Question: Doctor, through the use of Exhibit "A" can you state whether or not you can better illustrate your testimony concerning the injury to the plaintiff in the present case?

Answer: I feel that I can better illustrate and demonstrate my testimony concerning this person and the injuries involved through the use of this Exhibit.

Lawyer: (To the Court) I now offer into evidence Exhibit "A" for illustrative purposes only.

³⁶ See note 34, *supra*.

C. MODELS, CHARTS, DIAGRAMS, AND MAPS

Many times it may be more illustrative to use models and wall charts than photographic means of illustration. In medical testimony sometimes charts and actual skeletons may be used to explain the anatomy, the nervous and muscular system and their function. It is sometimes better to use such method of illustration rather than using some photographic slide since they are available and visual at all times throughout the trial for the use of all witnesses and counsel in their argument. The previous example of questioning a doctor may be used to lay a foundation for their admissibility. It has been stated by Dean Ladd of the Iowa Law School:

Demonstrative medical evidence is the best devised answer to provide this information and to make sense out of the too often learned, technical dissertations given by doctors on the witness stand.³⁷

As an Illinois court recently held, use of medical charts for illustration is admissible where it serves a relevant, legitimate, and helpful purpose and is not used primarily for dramatic effect or emotional appeal.³⁸

Illustrative diagrams, medical charts, and the like should be offered into evidence for purposes of illustration only. This would mean that the jury should not take such charts and illustrative exhibits to the jury room. Some trial lawyers may disagree, but it is submitted that the charts have served their purpose when they allow the jury to better understand the oral testimony of the witnesses. They themselves do not offer any evidential purpose relevant to the case beyond that of understanding technical evidence as it is presented.

Plats or maps of a location are generally used in the trial of accident cases.³⁹ If the map truly and accurately represents the

³⁷ Ladd, *Demonstrative Evidence and Expert Opinion*, 1956 Wash. U.L.Q. 1, 17.

³⁸ *Smith v. Ohio Oil Co.*, 10 Ill.App.2d 67 (1956); *Lackey v. State*, 215 Miss. 57, 60 So.2d 503 (1952) (anatomical charts used to illustrate medical testimony); *Segee v. Cowan*, 66 R.I. 445, 20 A.2d 270 (1941) (medical expert's use of drawing of fractured tibia for illustration proper in negligence case). See also *C. & A. Ry. v. Walker*, 217 Ill. 605, N.E. 250 (1905).

³⁹ See *Kroeger v. Safranek*, 161 Neb. 182, 72 N.W.2d 831 (1955) (Pneumatic drawings of tractor-trailers showing their location on the highway in the position as testified to by witnesses for both sides. Drawings were made to scale). The court quoted from 20 Am.Jur., *Evidence*, § 739, p. 616 and stated . . . "The use of such things as testimony of the objects represented rests fundamentally upon the theory that they represent a method of pictorial communication of a qualified witness which he may use instead of, or in addition to, some other method. Evidence of this charac-

measurements involved, then there is no reason why it should not be received into evidence. Sometimes objections are raised to maps, plats, etc., on the grounds that they are not drawn to scale. If the offer of the map or plat is merely for descriptive purposes alone and is not intended to be drawn to scale it should be admissible as long as the jury understands that it is not drawn to scale.⁴⁰

Many times lawyers hire an engineer and present a very technical survey map of an area involved. This type of drawing is very meaningless to the jury. Such a detailed drawing by an engineer with the various sightings and measurements, such as you might find in a county highway department, is so complex and involved that it really does not visually illustrate the area involved. It is suggested that it is advisable to avoid the use of such exhibits. When a large area is involved, aerial photographs⁴¹ should be used in the place of a detailed drawing. The aerial photograph can be supplemented with pictures on the ground to show the lay of the land. The author has supplemented such pictures, by using a large drawing with basic measurements which can be readily seen and understood by the jury as testimony is given.

ter is helpful in aiding the jury to visualize the objects and scenes in the action." See *O'Neil v. Union National Life Insurance Co.*, 162 Neb. 284, 75 N.W.2d 739 (1956), an action on a life insurance policy which limited recovery or repayment of premiums if insured's death was caused by war. A map was made by the insured's commanding officer to illustrate his testimony wherein he described the area in which his command and enemy forces were operating when the insured came to his death. The court held that this was properly admitted in view of the fact that the description was complete and the map added nothing but picturization. The map and drawing were not made to scale.

⁴⁰ *Barnes v. Scott*, 35 Tenn.App. 135, 243 S.W.2d 133 (1951); *Anderson v. Elliot*, 244 Iowa 67, 57 N.W.2d 792 (1953). See *Egenberger v. National Alfalfa Dehydrating & M. Co.*, 164 Neb. 704, 83 N.W.2d 523 (1957), wherein the court stated: "Further, generally, a trial court may in its discretion permit counsel, in addressing the jury, to display and use schematic drawings, diagrams, and maps, not put in evidence, by way of illustration or elucidation of evidence actually adduced, provided the jury understands that they are employed merely for such purposes and are not of themselves evidence in any sense. 53 Am.Jur., Trial, § 490, p. 395; 88 C.J.S., Trial, § 177, p. 348; Annotations, 9 A.L.R.2d 1046, 37 A.L.R.2d 662, 44 A.L.R.2d 1205, L.R.A. 1918b, 80." (Trial court excluded a schematic drawing from evidence illustrating plaintiff's theory about how and where a collision occurred on the ground that it constituted an argument by counsel for the plaintiff, but stated that such "ruling does not go to the extent of preventing the plaintiff from using the drawing in arguing to the jury about the relationship of the various details disclosed in the testimony." The Supreme Court held that such use was not error.)

⁴¹ As to other suggested techniques, see *Stichter, A Practitioner's Guide to the use of Exhibits and Expert Testimony*, 8 Ohio St.L.J. 295 (1942).

Many times plats and maps are put into evidence and then witnesses are required to draw on said maps and plats the various locations of persons or automobiles. Many times after such a plat or map is used by several witnesses, the map becomes such a "hodge-podge" of drawings, figures, and numbers that no one can readily understand it. It is recommended, rather than using the map for several witnesses, that the map, if considered necessary at all, should be used only for one witness to mark on, that witness being the key witness in the case.⁴² However, the author generally prefers that no markings be made on the plat or map by any witnesses. It is suggested, particularly where there are several witnesses involved, that a large pointer be used. As the witness is testifying, he should point generally where he was or where the automobiles were and define for the record where he is pointing on the map. In this way the map is preserved in its original status and a confused diagram or marking is not presented to the jury at the end of the case.

Mortality tables in death cases are useful to show on a chart or placard the actuarial testimony concerning the present worth of money invested over the life expectancy of the decedent.⁴³ Again these tables should be used merely for illustrative purposes and should not be taken to the jury room.⁴⁴ It is suggested in the use of mortality tables that up-to-date tables be obtained. The tables now contained in the statutes⁴⁵ of the State of Nebraska are dated as of 1941. They are completely outdated and are hardly competent evidence in any trial.⁴⁶ If objection is raised as to the life expect-

⁴² Another technique is to use duplicate maps allowing each witness or each side to use a map for whatever use necessary. See Ladd, *Demonstrative Evidence and Expert Opinion*, 1956 Wash. U.L.Q. 1 at n. 50.

⁴³ See *Litwiller v. Graff*, 124 Neb. 460, 246 N.W. 922 (1933). Mortality tables are likewise admissible to show life expectancy in cases where personal injuries are of a permanent character and result in the impairment of earning power. *Henry v. City of Lincoln*, 97 Neb. 865, 151 N.W. 933 (1915).

⁴⁴ As to what a jury should take to the jury room, see Note, 48 Mich.L.Rev. 721 (1920).

⁴⁵ Neb. Rev. Stat., Vol. 2A, App., Schedules, p. 681 (Reissue 1956).

⁴⁶ For comparison, see United States Life Tables, published by the United States government November 23, 1954. For the admissibility of such tables see *Bennett v. Denver and RGWR Co.*, 117 Utah 57, 65, 213 P.2d 325, 329 (1950). This case deals with a previous United States Life Table; the latest up-to-date one is in November 23, 1954. These tables may be obtained through the Public Health Service of the National Office of Vital Statistics in Washington, D. C. For excellent discussion concerning use of mortality tables, see Duparq & Wright, *Damages Under the Federal Employers Liability Act*, 17 Ohio St.L.J., p. 430, 457 et seq. (1956).

ancy charts, it is submitted that an actuary should be used to testify as to the veracity of later tables.

A graphic diagram of profit and loss may be used in contract cases, illustrative of the trend of testimony. The author recently used such graphic tables on large wall charts to show the correlation between sale and expense and the correlation of profit and loss during a three-year period of time in a breach of contract case. It helped illustrate the month-by-month figures and the significance of the trend shown by all of the figures. Both counsel were able to use such charts in their arguments and again they were used for illustration only.

Here again such charts should be stipulated to by counsel at the pre-trial, and there should be no necessity for taking the time to show the foundation for such a chart.

In a recent malpractice case the parties stipulated as to a large chart showing the definition of technical terms used by doctors concerning the injuries involved in the case. Over a dozen words were printed in large block letters on these charts and hung in the court room during the trial. These were useful to the jury in understanding the repetition of the technical terms as the various doctors testified. Here again it is the idea of trying to help the jury to understand what is going on in the trial. This is the advantage of the use of "real evidence," and when we change its name to "demonstrative evidence" it should not be objectionable for court room use.

D. BLACKBOARDS

The use of a blackboard in the trial of a case has drawn comments from many sources.⁴⁷

Many trial lawyers utilize a large paper pad on some type of easel on which they use assorted colored crayons. This technique is used by those who feel the blackboard is not a useful aid in that it lacks permanency and cannot be made part of the record. The author has found it helpful to use a large paper pad or at least to have one available in the court room where witnesses may make a drawing⁴⁸ or some schematic diagram to better illustrate their point, such as an engineer showing the angulation of a grade or a lay witness showing the position of individuals or vehicles in relationship to fixed objects. These illustrations and diagrams can be made large enough, easily marked as exhibits, and made part

⁴⁷ See note 2, *supra*.

⁴⁸ Excellent pads and aluminum easel boards can be obtained from many dealers throughout the country.

of the record. Here is the distinct advantage of the use of such a drawing pad over a blackboard.

Many court rooms throughout the country have a blackboard or drawing facility for individuals to use for illustrative purposes. Many Bar Associations throughout the country have furnished court rooms with such visual aids for utilization of attorneys and their witnesses in a case.

Actually the use of the blackboard or paper pad by an attorney has grown in an area related to but certainly never considered a part of the presentation of "real evidence." By the use of illustrative means in his opening statement and argument to prove facts and damages involved in the case, the lawyer has belatedly adopted an educational technique of the doctor and the teacher. Such uses and techniques have been approved by many courts throughout the country⁴⁹ and certainly should be encouraged by all lawyers.

Actually there exists no appellate decision disapproving the use of the blackboard. It is largely something that rests in the discretion of the court,⁵⁰ but here again if it is something that will better illustrate and explain the case to the jury there should be no real objection for the use of such. For example, in the trial of a case involving a fire loss to several items of personal property and real property, when it came time to argue the case to the jury, the plaintiff's attorney had prepared on the blackboard the various items of loss and their respective values, showing the total loss sustained. The trial judge held that the use of the blackboard was improper in argument and the lawyer had to do without it. The jury was totally confused as to the values and amounts. It is submitted that such use of a blackboard should be permitted. If the items of damage involved were incorrect, counsel for the defendant could have shown on the blackboard that such figures were incorrect as to the damaged item. To deny the use of such means to better inform a jury tends toward verdicts of confusion rather than fact.

In argument both counsel should use some type of blackboard or pad to show the various items of damage or to present his analy-

⁴⁹ See Annotations, 44 A.L.R.2d 1205 and cited case, *Four-County Electric Power Assoc. v. Clardy*, 221 Miss. 403, 73 S.2d 144 (1954); *Kindler v. Edwards*, 126 Ind. 261, 130 N.E.2d 491 (1956); *Young Mines Co. v. Blackburn*, 22 Ariz. 199, 196 Pac. 167 (1921); *Birks v. East Side Transfer*, 194 Ore. 7, 241 P.2d 120 (1952).

⁵⁰ See cases cited in note 49, *supra*.

sis of the evidence.⁵¹ There have been known instances where the attorney for the defendant has erased the blackboard or torn up the sheets on the pad which were made by the plaintiff's lawyer. Where this act appears to be discourtesy, it will often irritate the jury and hamper the attorney's effective presentation of his case. It is submitted that if opposing counsel wants to also use a pad or blackboard that he illustrate on a fresh page or turn the blackboard over and start on the back side.⁵²

⁵¹ See *Egenberger v. National Alfalfa Dehydrating & M. Co.*, supra, note 40. As illustrative of the extended use of such illustrative methods an attorney used the courtroom floor to draw a diagram of the scene of the accident. In the case of *Alabama Power Co. v. Jones*, 212 Ala. 206, 101 So. 898 (1924), the court held that it was not error to allow plaintiff's attorney to draw a diagram of the scene of the accident from which a witness indicated the location of objects about which he testified. This diagram was not evidence and it was proper to allow the witness to use it as a graphic demonstration of his testimony.

Dean Ladd, in his article on demonstrative evidence, 1956 Wash. U.L.Q. 1, 19, cites the cases of *Haley v. Hockey*, 199 Misc. 512, 103 N.Y.S. 2d 717 (1950) and compares *Murray v. State*, 19 Ariz. 49, 165 Pac. 315 (1917) dealing with the blackboard. Dean Ladd writes in approving the blackboard in the courtroom, "There is a place, however, for the blackboard in the courtroom for those who care to use it. In argument by counsel there would appear to be no real objection to the attorney using a blackboard, and it might be very effective in presenting his analysis of the evidence. If he can describe by words there is no reason why he should not illustrate by drawings. If a drawing is an effective medium of communicating ideas in argument, there is no justifiable reason to preclude its use. Arguments are not ordinarily reported so that writing on a blackboard made by counsel during argument would not need to be preserved any more than the spoken word. If there was an objection that the drawing was unfair or inflammatory for some reason, the writing on the board could be preserved by a similar writing on a paper which could be made a part of the trial record. In much the same way that the record of a matter objected to in oral argument is preserved, an objection to writings or drawings used by counsel in argument could be included in the record through use of the court reporter when objection was made. In opening statements it is possible that a blackboard may assist counsel in showing the jury what he proposes to establish by proof in the case, but ordinarily it would seem that this type of communication could be more effectively used at the conclusion of the case when all the evidence has been presented and when final arguments are given. Many courts have approved the use of a blackboard in the ways mentioned."

⁵² In the event there is only one side to a blackboard and the plaintiff's counsel uses the board in his opening argument and would like to have the information on the board be retained until his closing argument, it is suggested that he draw a line down the middle of the blackboard and write on one half of it, and offer the other half of the board for the use of the defendant's attorney.

Prepared charts of damages are recommended and used by several trial lawyers throughout the country.⁵³

Blackboards may also be used in the opening statement in order to illustrate or inform the jury as to what the proof will be. A rough sketch of a drawing may be made to demonstrate in the opening statement the directional movement of the vehicles, the positions of individuals, and items of damage indicating what special damages have been incurred.

Here again in the use of drawings or illustrations by the lawyer in the court room it would seem that this aid would be beneficial to both the plaintiff and the defendant. At least, the author has found it so.

V. CONCLUSION

A great deal of objection to the terminology of both "demonstrative evidence" and "real evidence" has arisen due to the fact that too many lawyers are attempting to use "demonstrative evidence" when it is not needed. In other words, an over-accumulation of proof beyond the point where it is easily and readily understood is not necessary. The fact is that the average juror is intelligent enough that if the lawyer overdoes the use of "real evidence" in the court room it will work to his disadvantage although neither the adverse party objects nor the court interferes.

As previously discussed, the cardinal rule to follow, particularly in personal injury cases, is to use only such exhibits as you or your expert witness feel are necessary to demonstrate or illustrate the facts of the case. If this rule is followed, the court and counsel should encourage the proper use of such evidence.

⁵³ Leading trial attorneys in the United States recommend this method over the blackboard, since defendant cannot erase the prepared chart. Belli, *Trial and Tort Trends*, 885 (1955).