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Demonstrative Evidence

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DEMONSTRATIVE EVIDENCE

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DEMONSTRATIVE EVIDENCE USED BY DEFENDANT AND PLAINTIFF

The trial of a law suit is the portrayal of facts in the search of a just award. Demonstrative evidence, the procedures that, in all humility, I give to you are as available to the defendant as they are to the plaintiff. If the plaintiff has no case, it is the duty of able defense counsel to show this to a jury as dramatically and as capably as possible. Plaintiff should not win his case if he is not entitled to an award.

If, however, facts cry out for compensation, then it is incumbent upon plaintiff's counsel, by the use of demonstrative evidence, to convince a jury first, that the case is one of liability, and secondly, that the size of the award should be adequate. Consequently, I hope the procedures I outline will at least be considered, if not tried, by both the defendant's and the plaintiff's bar of your state.

We are a trial law office. While we participate in domestic relations cases, will contests and do general trial work, both civil and criminal, I am particularly interested when I am privileged to go into a courtroom representing the plaintiff in a personal injury case.

NEW METHODS OF TRIAL PROCEDURE

Let me preface here preliminarily before giving you the workable tools of demonstrative evidence, two of the greatest attributes of the trial lawyer: (1) *sincerity,* (2) *humility.* Of course, a trial lawyer can't go into court unless he has a good case or a thoroughly prepared one. Your case must be prepared to the utmost so that when you go into court, trial procedure becomes a *race of disclosure* to get the facts to the jury. The old idea of surprise witnesses, the dramatic pulling the rabbit out of the hat, just isn't done any more before an American judge and an American jury.

No doubt most or all of you have read the stories of Fallon and Rogers and other great criminal lawyers of days gone by, when you were in law school. You won't get by with the procedures they used any more. Our juries, which means our citizenry, have become learned in separating fact from fancy. While it is true they demand demonstrative evidence in order to be persuaded, nevertheless your demonstrative evidence must be based upon facts and logic.

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STARTING THE CASE—THE BROCHURE—DEPOSITIONS

I speak of preparation. I want particularly the defendant's men here today to hear this. I tell you of a procedure we have been advocating in NACCA for some time. I have used it personally with considerable success on the coast and with a sense of accomplishment—the use of the brochure. I have my investigator marshall all of the facts of a case, but before he does it, I make my own investigation and I make it personally. If pictures are to be taken, I go out and set up the camera angles; if witnesses are to be seen I want to see that witness and determine his personality before he gets on the stand.

When the complaint is drawn, we have all the facts available in our file. Our complaints are very short, not over a page and a half. If it is a case for exemplary damages, we have those facts available.[1]

We like to file our complaint as soon after the case comes into our office as possible. This moves us up to the trial date as rapidly as we can. With the filing of the complaint, we file deposition papers. We take the deposition papers. We take the deposition of every available witness, both adverse and friendly, as well as the actual parties. We want the actual facts. We want them in writing. We don't depend on surprise witnesses.

Once we have all of the facts in our file, all of the depositions, statements from all witnesses, all pictures of the client, his injuries, the scene of the accident, etc., we make up a brochure. Into this brochure we put our trial brief on the law. We then go over to the defendant or the insurance company or the claims man and we set this brochure down on his desk and tell him, "Look, here's our case, here are all the facts, here's our special damages, and we have every one itemized, here's our future damages, here's our doctor's reports, here's our demand on this case, and you can make notes from this brochure and tell your home office what we have."

Defendant doesn't want to go out and take a beating in a case that he knows he is going to lose. He'll became your advocate in trying to sell your case to his principal, the insurance company. This brochure method is a recommended procedure. Compensation then is based upon facts of liability and damage, not speculation.

More cases should be settled. However, if the defendant will not pay you what you in your mind think is an adequate award, then you, yourself, must determine to try that case, and you must convince your client that the case should be tried.

1. I suggest for your consideration the plea of punitive or exemplary damages. It is not necessary to show willfulness; mere wantonness is sufficient. Exemplary damages entitle you to: (1) examine the defendant on his wealth; (2) contributory negligence is no defense; (3) defendant cannot admit his liability and thereby foreclose you from showing the facts of the accident; and (4) a discharge in bankruptcy is unavailable where there is a wanton or willful tort. See *Donnelly v. Southern Pacific Co.*, 18 Cal. 2d 863, 118 P.2d 465 (1941), where plaintiff pleads wantonness instead of willfulness, the policy is then not concealed but exemplary damages lie. See also *Ross v. Clark*, 35 Ariz. 60, 274 Pac. 639 (1929), where mere drunken driving warranted exemplary damages.

If we have a case involving plastic surgery, we take colored pictures because colored pictures only will show the burns, keloid formations, and the results of the surgery. Colored pictures only will give the facts; black and white will not. You can't tell on a black and white picture whether it is dirt, grease, or a burn. In our plastic surgery cases, we take pictures at the various stages of the operation, from the time of the original injury up until the time of trial. These sequential pictures appear in our brochure. They indicate to the defendant and the jury if necessary, the number of operations, the amount of the surgery, the pain and suffering and they indicate the end result too. You can't hide the end result. It is a factual thing. Better have it in your file than have defendant bring it out against you by showing the end result, a perfect job of plastic surgery, without your showing the pain and suffering the plaintiff went through to get that "perfect result." My friend, Perry Nichols, down in Miami, Florida used this procedure the other day to settle an electric burn case for $200,000.00 This was settlement, gentlemen, not trial.

DEALING WITH THE ADJUSTER

I have found insurance companies reasonable when they are confronted with facts. We are not concerned whether it is an altruistic reasonableness or a forced reasonableness. Of course you do have the problem of "reasonableness" or "adequacy" of award, depending upon the standard of your state. I say your plaintiff's lawyers, your defendant's lawyers and your judges must be educated, and I say this with all due respect and not presumptively, as to what an adequate award is. To educate, you must appreciate the awards that are given in other states. There is nothing in your industry, your commerce, your labor or your social relations that should make your state any more backward than any other state. You would take issue with me if I called you a backward state. However, I say one of the tests of a backward state is the adequacy of award to your injured people and until you give the injured adequate compensation as compared with other states, you are backward.

Some of you plaintiff's men may say, "Well, suppose we have given all of this information in the brochure to the defendant and then he won't settle the case—he knows everything we've got and we are at a disadvantage when we come to trial." I say to you that the defendant generally knows what you have anyhow, you are going to have to put your case on first, facts cannot change, and once you have marshalled your facts by thorough preparation and prepared them so that they are in a brochure, then you're going to get all that information over to the jury with a ring of sincerity. Again I use the expression, a jury trial today is a *race of disclosure.*

That which you have in your briefcase, if undisclosed to the trier of the facts, isn't going to be reflected in your award. A jury can become impatient. You may be able to keep them interested for several hours or for half a day, but if you haven't anything to tell them they're going to lose

interest in your presentation and your client is going to lose not only interest but the principal as well. I can only tell you in my own practice that I have never been afraid to open my file by way of the use of the brochure in any case in which the facts demand a plaintiff's verdict and an adequate award.

THE INADEQUATE AWARD

The most personal, miserable thing that can happen to a human being is the personal injury. The wrongful death case is the supreme personal injury.

The successful advocate must have sincerity. Not only in the specific case that he tries but in his entire makeup. To achieve a "big" verdict you must sincerely believe in your cause yourself. I don't like the term "big verdicts." They should be called verdicts "approaching adequacy." Even some of the verdicts that I have achieved in California only approach adequacy measured in the now purchasing power of the dollar.

We have not yet achieved even a meagre appreciation of the dignity of man's mind, his members, his life, as reflected in our jury awards and appellate decisions.

In a 1902 Canadian case[2] $4,000 was held to be excessive for the loss of a right leg; $2,000 was ordered to be remitted! In 1870 a verdict of $18,000 was held to be excessive for the loss of a brakeman's two legs in Illinois.[3] In Indiana in 1896 a verdict of $1,100 was held adequate for the loss of a right leg to a seven year old girl![4] In 1911, in an Arkansas case,[5] a verdict of $10,000 was ordered reduced to $5,000. Both legs were amputated! I recall in *The William Branfoot*[6] that a plaintiff stevedore, thirty years of age, suffered a comminuted fracture of his leg which necessitated an amputation below the knee. The trial judge allowed $500 for his suffering and $1,786 for his loss of future earning capacity. The judge said, "We can compensate him for his pain. Following Mr. Justice Bradley in *Miller v. The W. G. Hewes*[7] . . . I allow him $500. His disability is for life, but *for life only*."[8] (Emphasis added.)

Do you realize that in half of the states of the United States the largest verdict that has ever been returned since the beginning of the jurisprudence of that state is not as adequate as a top baseball player's salary for one year—$60,000? Man has built a complex material world. His airplanes, the racehorses he has trained, his pleasure yachts, the commodities he sells, paintings he achieves, the music he writes, the prices for them are far in

2. *Myers v. Sault Ste. Marie Co.*, 3 Ont. L. R., 600, 33 Can. Sup. Ct. 23 (1902).
3. *Chicago R. R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661 (1870).
4. *Berry v. Lake Erie Co.*, 72 Fed. 488 (C. C. D. Ind. 1876).
5. *St. Louis R. R. v. Hesterly*, 98 Ark. 240, 135 S. W. 874 (1911).
6. 48 Fed. 914 (D. S. C. S. 1892).
7. 1 Woods 363, 17 Fed. Cas. 362 (1870).
8. See Belli, *The Adequate Award*, 39 Calif L. Rev. 1 (1951), for other examples of "adequacy."

excess of the price that he has placed upon his own human life, his mind, his personality, the loss of his legs, his eyesight!

It is an incongrous thing to me that a man flying in an airplane from Chicago to San Francisco can insure his life with an insurance company for a half a million dollars. The insurance company computes an individual life as a readily ascertainable commodity. The insurance company will pay half a million dollars if this man loses his life. Yet, gentlemen, if that man lost his life in an airplane accident, the airplane falling in Colorado, the legislature of that state has placed a $10,000 limit on the value of that man's life (suit by wrongful death) regardless of his place in society, his earning capacity, the number of dependents he leaves to grieve him, or the negligence of the defendant! To me this is a brutal anomaly in our economic, I dare not affront you lawyers by saying our legal, system. If the airplane fell in Utah, Nevada, or California, the verdict would be unlimited. (We've recently gone to $100,000 in our wrongful death awards. $300,000 was awarded in New York recently.)

The highest verdict that has ever been sustained in Oregon is $32,000. Yet the price of bread, of milk, of butter, of gasoline, is the same in Oregon as in California. A geographical difference of a state boundary gives the disproportionate result of awards returned at $32,000 in one state and at $225,000 in the adjacent one! Certainly the threshold of pain is as high in Oregon, the value of human life should be as great, tears and pain as brutal and laughter as gay in Oregon as it is in California. Yet the appellate courts in Oregon, and I say this with all the respect it deserves, have flatly refused to affirm any verdict over $32,000. (This may be the fault perhaps of the Oregon lawyer in startling his appellate judges with absolute figures, rather than breaking down pain and suffering into minute amounts, dollars and cents, for minute periods of time. In California our highest and most adequate award, and I humbly apologize for the word "highest," is $225,000. This was in my *Reckenbiel* case[9].

HUMILITY A NECESSARY TOOL

Humility. I remember trying the *Reckenbiel* case. Captain Reckenbiel could not be brought into court. He was incarcerated in an insane asylum. He had one of the most complete traumatic psychoses I have ever seen. I had to be Captain Reckenbiel in the courtroom. During the entire trial I had someone from my office sit in the front row and remind me after each examination upon each recess that I was not a wise-cracking or a brilliant lawyer, I was Captain Reckenbiel. This was Captain Reckenbiel's only day in court to achieve an award for his family for the rest of their lives.

After the case was over I so transposed myself for Captain Reckenbiel that when the jury came back they paid me the highest tribute I had ever had. They ignored me completely, walked right by me—some of them were

9. Super. Ct., S. F., Cal., No. 366675.

in tears— walked over to the family sitting in the courtroom. I felt in that case I had done the most humble and sincere job I had ever done. My reward was in the adequacy of that verdict, not in any praise of the jury coming to me and shaking my hand and saying that it was the highest verdict that had ever been given. The verdict was the adequate award for the family. I made that jury feel that the award had to be adequate for *that* family, I showed them what that man had suffered, what he would suffer, I made them feel that what they gave to him would have to be for the rest of his life in his only day in court.

You have read of the great cases in our jurisprudence, the landmarks in our law. These cases didn't come into the lawyers' offices with signs on the clients' backs, saying, "I am the *Dartmouth College* case," "I am *Pennoyer v. Neff*," "I am *Marbury v. Madison*," "I am *Buick v. McPherson*." These cases will come into your office only as humble human beings, perhaps some of them in overalls, some of them stumbling, some of them incoherent, some of them available for adequate expression. These men will be great cases only as you are able to interpret their human rights to legal remedies before a jury as a plaintiff's lawyer.

DEMONSTRATIVE EVIDENCE

Now let's talk about demonstrative evidence—the surgery of the law suit. These procedures are available for both plaintiff and defendant.

When I first started giving these lectures, I was asked, "This is all on the plaintiff's side, isn't it?" It's not all on the plaintiff's side. If you have a case where the facts show no liability, then you as the defendant, have the duty of using demonstrative evidence—aerial photos, maps, colored pictures, moving pictures, diagrams, medical exhibits—to portray no liability.[10]

THE JEFFERS CASE[11]

To illustrate demonstrative evidence, I refer you to a case I tried against our Municipay Railway: Catherine Jeffers had suffered the traumatic amputation of her right limb below the knee as she was getting off a streetcar on Market Street at its regular stopping point in San Francisco.

At the first trial, the verdict was $65,000. At the first trial I employed all of my ability as a trial man, all of my attributes of sincerity and humility. I failed to use one thing. I didn't use *demonstrative evidence.* Perhaps I should say I did not use imagination. Imagination to me in the courtroom is merely another way of saying I did not think the case through clearly enough so that I could portray to others in the most dramatic fashion what was so obvious to me. I failed to realize that I was trained in the courtroom, I went to law school and had become a specialist, that jurors are chosen because they know nothing of law, know nothing of the

10. See 20 Am. Jur., Evidence § 716.
11. *Catherine Jeffers v. City and County of San Francisco,* Super. Ct., S. F., Cal., No. 343965 (1946).

procedure of the courtroom, nothing of medicines, and they are mystified as much as they are frightened at the thought of "going to law."

On motion for new trial, excessiveness of verdict, the trial judge set aside the verdict of $65,000 for a lost limb.

I reset the case for trial before another judge and another jury. On the next trial, the verdict was $100,000, and there was another motion for excessive damages. This time the verdict of $100,00 was sustained.

Why the difference? On the second trial I employed demonstrative evidence and I convinced both jury *and* judge, and gentlemen, it is important that you convince your trial judge and talk to your trial judge, because don't forget, he is the thirteenth juror, and he is the juror that singly carries as much weight as the other twelve collectively with appellate justices!

The first trial judge in my *Jeffers* case had never seen an artificial limb. When I came into court on the second trial it occurred to me, "I am asking this jury to give my client something. I must show them, if possible, just exactly what it is. I can't show them an intangible commodity: pain and suffering and tears."

As if to emphasize my thoughts, defendant's counsel had commented to me that he was going to prove that science has now progressed to the point that an amputee can be fitted with a prosthesis which is just as good as the amputated limb the Lord had given him. I could hear counsel arguing that amputees now drive cars, play bridge, dance, swim, eat, tie neckties, and do practically everything that man with a normal limb can do, provided they are fitted with a prosthesis. This is exactly the argument that the City Attorney made. I saw the jury impressed by this argument.

On the first day of trial, at the time of the opening argument, I had brought into court a large object wrapped in yellow butcher paper. I placed this down on the counsel table and left it here during the entire trial. Of course, the jury, the judge, and opposing counsel were curious. I moved it from the side of the table to the back of the table, to the front of the table, close to the jury. I picked it up and put it on one of the seats in the courtroom. But I never unwrapped it.

When it came time for me to argue the case, I took the object in the paper before the jury box. It took me about five minutes to unwrap it. When I did, I said, "This is what this young girl is going to have to wear for the rest of her life—this artificial limb, this marvelous scientific invention. You see here the metal and the harness and the strapping and the brutality of an artificial limb, no matter how adeptly made."

I asked Number One Juror to handle the artificial limb and then to pass it among the other jurors. I asked them to "feel the fine texture of

the flesh, to feel the warm blood coursing through the veins, to move the noiseless joints, to compare them with the articulating parts of their own knees." I told them this was the great piece of scientific achievement my friend had spoken of, which anyone would gladly substitute for a natural limb.

The jury passed the "member" from juror to juror. It took about a half an hour. All this time my plaintiff sat in the courtroom in plain view with only one natural leg! I could see the verdict sealed in the looks on their faces as this limb was being passed around. Gentlemen, the jury was convinced; the trial judge was convinced. The jury was out thirty minutes!

This use of demonstrative evidence was available to any lawyer who tried this case. I was derelict in not presenting it during the first trial. Gentlemen, there was nothing histrionic in using this. There was certainly dereliction of duty in not using it during the first trial—in not showing actually what I was asking damages for.[12]

This portrayal of actual demonstrative evidence before a jury, is available in any type of case. As I speak to you I can assure myself that in your own minds you are now thinking of cases which you have tried or which you are about to try in which you too may present just as vividly the elements of liability and damage to a jury.

DEMONSTRATIVE EVIDENCE ON THE QUESTION OF LIABILITY

In the *Reckenbiel* case, Captain Reckenbiel was riding on a fire truck, an emergency vehicle. I presume your law is similar to ours, that any emergency vehicle has the right of way, even through a red light, if the indicia of emergency are evidenced, the siren being blown. This was an intersection accident, there was an actual fire, the truck was blowing the siren, it went through the red light.

In my own mind I was positive the siren had been blowing. Another vehicle came into the intersection, going with the green light, and rammed the fire truck, throwing Reckenbiel therefrom, causing him severe personal injuries which put him in the asylum.

I had the burden of proof, of course, to show that the siren had been blowing. Once I showed this I had the right of way, there was a complete liability; it was only a question of damages.

One evening as I was riding home in my own automobile I happened to go across an intersection at Geary and Van Ness Avenue. I was ab-

12. I should not go so far as to cite as authority the Supreme Court of Tennessee, which in *Ferguson v. Moore,* 98 Tenn. 342, 39 S. W. 341 (1897), on an argument that the plaintiff's lawyer was guilty of inflaming the jury when he cried to them, said: "Perhaps no two counsel observe the same rules in presenting their cases to the jury. Tears have always been considered legitimate arguments before a jury. It would appear to be on the natural rights of counsel which no court or constitution could take away. Indeed, if counsel has them at command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises."

stracted, thinking of some case that I was trying. I got out into the intersection, the green light was with with me. Fortunately I slammed on my brakes just as a fire engine sped by in front of me—with its siren blowing. I hadn't heard it!

When I recovered from my fright I had a second one. If I hadn't heard the siren in my own case, how about my jurors who might feel that the siren hadn't been blowing loud enough in the Reckenbiel case I was about to try, or they might have had the same experience as I.

Don't forget that the jury is made up of all different types of people, all races, all minds, all emotions, all prejudices. Perhaps one juror may doubt on liability. His doubt is carried over when he comes to assess damages if the majority of the jury can swing him over on liability.

I had to portray to that jury that the siren was blowing, as I knew it was blowing. So I got an airplane, got above the intersection and took aerial photos of the entire area. I blew these pictures up until they were at least ten by ten feet. I put the pilot and the camerman on the stand and I had them testify as to the elevation that the picture was taken, the visibility, the type of lens used, and had them qualify the picture as a true and correct depiction of the area at which the accident happened. And, let me say this, that you may vary this procedure by taking pictures from the tops of buildings and you will get as diagramatic a picture as any diagram that any artist can draw. Furthermore, you will get a clear picture because the witnesses won't be confused. When we take smaller pictures we have fifteen copies made, one for *each of the jurors* so that they can look at the pitcure while the witness is testifying, one for the trial judge, one to offer into evidence, one to show the witness.

With a picture like this it is not necessary to explain to the witness that "one inch on the diagram equals fifty feet on the ground, etc. etc." The witness can find himself by looking at the picture. You are *dispelling* confusion, not *creating* it. If you are doing anything dramatic, it is the drama of factual portrayal.

In the *Reckenbiel* case I had thirty-five witnesses who had heard the siren blowing. Had I overlooked the value of demonstrative evidence I would have put these witnesses on one after another. I would have asked Mr. Jones, "Where do you live," he would have answered " I live at 51 B Street, I heard the siren blowing at 9:10 in the morning." Then I would have put on the next witness. He would have testified that he lived at 61 A Street, that he heard the siren blowing at the same time, and after I had put on three or four of the witnesses, the Judge would have called for the rule of cumulative proof and asked me how many more witnesses I had. I would not have impelled that jury to decision and carried my burden of proof by portraying to all of the available senses of perception, those of *seeing* as well as *hearing*.

What I did was to introduce the large diagram, then I brought my witnesses, all thirty-five of them, one after another to the stand. I asked each witness his name, I asked him to go to the picture and show me where he lived on the day of the accident. He put his finger on the picture and while he held it there I took a piece of paper with his name and pasted it on his house. He then testified that he was living at *that* house at *that* time and that he *heard the siren blowing.*

The judge allowed me to call each of the thirty-five witnesses and when I was through I had *thirty-five pieces of paper pasted upon the aerial photo.* When those thirty-five pieces of paper were pasted upon the aerial photo, they extended out from the intersection as much as a half a mile away. You could draw rings connecting the witnesses who live at the perimeter and you could draw rings connecting the witnesses who were right at the intersection.

After the thirty-five witnesses had testified, it appeared that there were concentric rings around the intersections and I argued, I doubt if argument was necessary, that here was an actual *zone of sound* through which the defendant's vehicle forced its way to make the accident. If all of these witnesses, these thirty-five witnesses who lived as they showed they lived in the picture, had heard this fire truck and had heard it so far away from the intersection, certainly the defendant, right up at the intersection should have heard it and he was negligent in pushing through the zone of sound to get to the accident.

Of course, we photographed the picture with all of the witnesses' names on it and then "unblew" the picture so that it was of minimum size that it would fit into the brief on appeal and that the justices on the appellate bench could see for themselves the zones of sound that so impressed the jury.

In demonstrative evidence we attempt to *dispel* confusion and doubt. Why? Because on the plaintiff's side, again, we have to carry the burden of proof.

Further, on demonstrative evidence. In the *Reckenbiel* case, plaintiff was in an asylum. Defendant's doctors testified that Reckenbiel would be out of the asylum as soon as the case was determined! (This case was now over a year a half old. Reckenbiel is still in the same asylum, his psychosis progressing!)

The doctors who testified for defendant that plaintiff would be released from the asylum after the trial were shown by me on cross-examination, letters Reckenbiel had written to his wife. I asked, "Doctor, do these letters show the mind and handwriting of a man who was a Boy Scout leader, who belonged to the various lodges, who was a healthy, normal individual?" I read these letters to the jury, I passed these letters to the jury to show the handwriting, I gave them the demonstrative evidence portrayed in these letters of this man's state of mind.

Gentlemen, let me read one of these letters. You must appreciate that this plaintiff was in an asylum. He is a grown man, he is forty years of age, he had all the social accomplishments and attributes that I have heretofore given you. I read you one of the letters which was given to the jury, and which letter, of course, was introduced into evidence and was photostated and incorporated in the brief on appeal so that the judges could *read the letter, not my description of it:*

> "Darling, Maxine, I love you. How was your ride home O.K.? Wonderful I know. Do you love me? I pray honey. You have faith in me I have in you. I want to be home I do. I love you and Dolores. God is a good person. I love him. I want you both to love me. I want you both. I pray I come home. dear. you both pray for me. Love Freddie."

This is the man defense doctors said would be home as soon as the trial was over. The doctors said the best therapy for him would be to take him home. It was the most brutal thing I have had to combat in a courtroom. This woman whom I represented came to me during the recess and said repeatedly, "I love this man, I want to take him home, maybe we should bring him home, maybe we are wrong. Maybe all of these defense doctors know what they are talking about. *Human beings just can't be so cruel and insincere* as to lie about this!"

Yet I knew that if Reckenbiel were allowed home there would be a further tragedy visited upon this family.

You have a tremendous task when you are trying the plaintiff's case; you are beset with the utmost tragedy that may befall the human being. There is nothing more personal to him than his body. It has been wrecked, devastated, physically bankrupt when he comes into court, through you, as a plaintiff. If you are humble and sincere when you present his cause, there can be no complaint that the plaintiff's lawyer is asking for sympathy. Defendant's only complaint can be that plaintiff's lawyer is *portraying the facts.*

AVAILABLE IN CRIMINAL CASES

I recall trying a criminal case involving a death at San Quentin Prison, California. The defense was self defense. It seemed, even to me, far fetched when I first interviewed my client in the Captain of the Guard's office. He claimed he was standing over a boy he had knocked down in a fight after an argument. Up to this point, apparently no unfair advantage had been taken by either side. It was an altercation born of mutual anger.

My defendant went on to say he kicked the deceased as he was lying on the ground because the deceased had pulled a knife out of his pocket and was ready to throw it at him; that he kicked the prostrate man in self defense.

It seemed ridiculous to me that a prisoner in such a well-regulated prison as San Quentin would have on his person a knife. If I had this thought the jurors must be susceptible to the same doubt. They must appreciate that prisoners in San Quentin are not allowed knives. However, to my astonishment, I find out that most prisoners at that time were allowed knives in San Quentin, up to a certain length. Beyond that length, the knives were confiscated. I happened to remark upon this to the Captain of the Guard. He pulled open a drawer and showed me some hundred knives in the drawer that had been confiscated!

When this case came to trial I told of the custom of allowing the prisoners certain knives, but, portraying to all the senses, those of sight as well as hearing, I then subpoened by duces tecum the drawer with all of the knives that had been confiscated in the Captain of the Guard's office. When these came to court I had the Captain of the Guard himself take this drawer of knives and dump the whole drawer in front of the jury. I dispelled by this use of demonstrative evidence the feeling that prisoners in San Quentin did not have access to knives. In doing this I laid the foundation for the plea of self defense and was able to achieve, for this boy that I represented, a verdict that was based on fact.

Demonstrative evidence is available in every case. It is limited by the scope of the imagination of the trial lawyer. There are many points of entry to the logic that compels conviction. Jurors, we sometimes forget, are human beings neither to be talked down to nor to be talked up to. You must discuss your case with them, not argue it at them. It may be necessary to prove your point by the use of various pieces of demonstrative evidence all impelling to the same factual conclusion: photos, actual physical exhibits, testimony of experts, and experiments. No trial judge will limit your portrayal of your cause claiming repetitiveness when you portray the same fact in different manner.

DEMONSTRATIVE EVIDENCE ON APPEAL

The appellate judge, too, is a human being. There is no magic in the cloistered chambers of Cloud 8—the Appellate Tribunal. That our appellate judges have not sustained adequate awards in some of our states is the fault in many instances of the trial lawyer. He has failed to protect his record and his jury award. The end of a law suit is not the report of the stewardship of the foreman of the jury in his verdict. It only ends after the long tortuous road of appeal is traversed.

Any evidence introduced that is of a physical nature we photostat or photograph at each recess after its introduction and have the photostat or photograph marked as an exhibit just as much as, and regard it just as carefully as, the words that are spoken and that are preserved in the reporter's transcript.

Demonstrative evidence in the form of physical exhibits or pictures

should be available to the senses of the jury throughout the entire trial. By this I mean you should tack up your pictures throughout the courtroom, on the blackboard, or on the walls, so that the jury can refer to them, as the witnesses refer to them, that the jury may refresh their minds as to a particular mark on a picture, depicting the scene of the accident.

Don't let your clerk stamp your photography or your physical exhibit and then put it in his desk drawer out of the sight of the jury. If he does that, take the exhibit and hand it to Number One Juror and, calling him by name, ask him to pass it among the twelve jurors. When the twelfth juror has handed it back to you then pass it up to the judge and let this thirteenth Juror examine it. If the clerk again attempts to put it in his desk drawer, put it on your counsel table in plain sight of the jury, so that the jury may refer to it. In your argument always advise your jury that any exhibits are available for their inspection in the jury room and further you might remind them, remembering that you have the burden of proof and the verdict that you want is one of fact, not of confusion, that they may have any parts of the testimony reread to them and they may come back into court and ask of the judge that he reread any instructions. If you know that you have this privilege and the jury knows they have this privilege and if you appreciate that this privilege should be employed then you have the sincerity of your cause that facts will impel an adequate factual award. Daniel Webster said: "Murder will out." If you use demonstrative evidence as it is available to you then facts must out and reflect themselves in the award.

Our appellate judges being human beings and limited by the tremendous pressure of appellate business, sometimes do not have time to read an entire brief, but again, being human beings, they will look at pictures. I do not say this facetiously, I say this impellingly. You present pictures as we did to our trial jury and then incorporate them in your appellate brief and your appellate judges will look at these pictures. They impose liability at a glance.

May I give you a further hint and I only wish I had time to go through more, since the subject of "adequate award" is my own personal charity. At the close of your case may I suggest that you take fifteen minutes and go through your notes and determine that everything that you intended to offer into evidence is in evidence rather than marked "for identification." Nothing is more tragic than to get into the appellate court and find your principal piece of evidence which you intended to offer was only put in "for identification."

May I also suggest that you keep a bound volume of your notes, not in the loose leaf system, but in bound books for each of your trials to which you may refer for the law of that particular case, or your argument that you made in that particular case, and index these books. I have mine going back to the first case I tried, and I find them of inestimable value, on law, fact, opening statements, and arguments.

USE OF THE BLACKBOARD PARAMOUNT

I think the blackboard is the most important instrument in legal surgery.

Demonstrative evidence is used for two purposes: (1) to show liability, and (2) to show the severity of injury. Its use is limited only by counsel's imagination or, a proper term, counsel's ability to portray forcefully, and the amenities of courtroom decorum.

Let us assume that you have proved a case of liability by use of demonstrative evidence. Let us assume that you have portrayed the magnitude of injury and a prognosis of permanent disability with devastating special damages. You still haven't shown your jury what an adequate award is in dollars and cents. Remember your verdict can only be written in *dollars and cents.* It is not an equity award whereby a jury furnishes a nurse, a home, doctors and comes back into court in one month, six months, six years, or sixteen years to give further awards. *It is one lump sum for all time.* It is one day in court; it is one award.

Your jury must be told that when they go home, having written their award, they must provide for all time for this plaintiff, and his dependents. They must be made to realize that what they do this day must last this man for all life and they must be proud of the award they give when they meet this man as well as the defendant, on the street, five, ten, or fifteen years from this day.

In the courts of California we have furnished us not one, but two or three blackboards in each courtroom. In the last several years I have never tried a case but what I have used at least two blackboards. Blackboards are used in grammar school and in college to teach. We must not forget that jurors are chosen because they are not lawyers, because they are not familiar with legal liability or interpreting pain and suffering in dollars and cents. Jurors in three or four short days must be educated in all phases of law pertaining to the particular case, law that has taken you some eight or ten years to learn, and then they must in their verdict reflect the judgment of medical science and resolve conflicts that doctors have been struggling with for ten or even twenty years in resolving their opinions. Jurors need all aid so that their verdict reflects facts, not confusion. I say that if a blackboard helps us learn in grammar school and in college, then there is no misconduct in using it in the courtroom where we have to teach so much in so little time.

There is no case in the United States that says a blackboard cannot be used or that it is improper to use one during the presentation of a case. It is ridiculous to report that an attorney can say, "2 x 2=4" by word of mouth, yet he can't put on the blackboard, "2 x 2=4." You learned your multiplication tables when the teacher put the figures on the blackboard. Why? Because the visual aid indelibly impressed the same upon your mind.

Plaintiff has the burden of proof of teaching "the multiplication tables" to the jury and his time is limited. It is not only the responsibility, but it is the *duty,* of the counsel for plaintiff to help present the cause in a manner that can best be understood and remembered by the jury as they are considering the case. If he does not do this, the verdict reflects confusion and uncertainty, not fact. Defense counsel, as well as plaintiff's, certainly should not desire a verdict of caprice.

During a three or four day trial many doctor bills, bills for X-rays, nursing bills, car repair bills, hospital bills, future doctor bills, X-rays, nursing, and other special damages and related expense are introduced at various points of the trial. These amounts are not written down by the average juror. They may add up to $10,000 at the time of trial and indicate $20,000 in the future. As these amounts are offered into evidence by documentary bills or by oral testimony they should be written on the blackboard and this blackboard should be kept in plain view of the jury during the entire trial up through final argument and the judge's charge. (Of course, the blackboard cannot go into the jury room except by stipulation.) If an attorney can stand in front of the jury and remind them of all these figures, certainly it is his duty to put them on the blackboard so that the jury may remember and consider them.

EXAMPLES OF DEMONSTRATIVE EVIDENCE

You have a duty to go into the hospital and take a picture of your client as he lies in the hospital bed. If the doctor does not cooperate in taking off the bandages, where there is no danger of the patient's well-being, court order should force him so to do, so that the jury will see the true picture and not have to speculate. Defense counsel certainly should not encourage speculation, it is your duty as plaintiff's lawyer, to see that there is none.

Let me also say at this juncture that in California we accord the defendant, as a matter of right, as many examinations by as many doctors as he wants of our plaintiff. We do this because again, we want facts to be manifest. We hide nothing, we want the defendant to prove for himself. However, when our plaintiff goes to the defendant doctor's office, someone from our office goes with him or her, goes into the examining room and stays through the entire examination. A doctor has no more privilege of examining the human body than the lawyer. Indeed it is the lawyer who must explain fully and in minute detail the nature of the injury to the jury, whether it be an injury to the spine, the brain, the female organs, the rectum, the patella.

Of inestimable value to you are the *Visual Aids to Medical Science* put out by Clay Adams Company of New York. You may look at this catalogue after my lecture and see what is available to you for jury use. Here are charts showing the neurological system, the skeletal system, the circulatory system, here are charts showing the course of pregancy, interruptions there, brain injury, flesh injury.

Of course you don't take into court neurological diagrams and surplus visual aids when only one part of the body is involved. But if you don't show the jury the actual skeletal fibula when you are asking for damages for a broken leg, how is the jury to determine factually what has happened to that particular part of the body?

USE OF THE BLACKBOARD IN THE OPENING STATEMENT

We start to use the blackboard from the opening statement. If your case is prepared as it should when you go into court, you have every fact that you are going to disclose to the jury available to you. You know the actual sum of money that you are going to ask for and it is your duty to tell the jury, and the jury expects of you as a lawyer to advise them what you feel your case is worth. You cannot exaggerate the amount of money you ask for in just compensation because the jury will penalize you in other phases of the case if they see this exaggeration.

Consequently, when we make our opening statement we write down the amount of money in *dollars and cents* that we are asking for. If we have prayer for too much, we tell the jury we have and limit our figure. If we have prayed for too little, we amend our complaint.[13]

We start with this premise: the only judgment allowable in a personal injury case is dollars and cents. Yet, in Pennsylvania for a lawyer for the plaintiff to advise the jury the amount of money he is asking for his client is misconduct! This is as ridiculous as plaintiff trying an equity case to enjoin defendant from flooding his land and then being prevented from advising the jury or the judge, if without a jury, what relief he wants!

Blackboards are available in all types of cases. Will contests, divorce cases, criminal cases, personal injury cases.

I recall using a blackboard in a divorce case that I tried in Honolulu. I felt that the judge was not appreciating the various dates at which times we alleged misconduct, the various dates financial settlements were claimed, so we put them all on the blackboard as we tried the case. I watched this judge glancing at the blackboard during the entire trial and making notes. She commented afterwards that the blackboard was of inestimable benefit and value to her. If this helps the trial judge, trained in the law, think what help it is to the unlettered jury.

I have not devolved a perfect system in the use of the blackboard. Its use is still in its infancy. Applicability is limited only by counsel's ingenuity. Perhaps you prefer to prepare charts before trial instead of going to the blackboard. Even if you do this, I suggest still that you use the blackboard and let the jury follow you as you do your actual mathematics. They in their minds will follow your computations and be factually impressed.

13. There is a problem of procedure in amending your complaint asking for a larger prayer. In California it has recently been held that to do this in the presence of the jury or for the judge so to advise the jury is reversible error! *Sangueneti v. Moore*, 98 A. C. A. 423, 220 P.2d 398 (1950).

You should have the blackboard in your office. Work on it as you are preparing your case. See that you have all facts on the blackboard so that when you get to court you will reproduce this for the jury.

No one is born a perfect trial lawyer. He who will be one must work, work hard, be sincere and humble. It is he who will be the trial lawyer. Give me a man who is sincere, humble and prepared to use his ingenuity and he is the trial man of today. He is not the histrionic, brilliant jurist who pulls the rabbit out of the hat.

DISCLOSE FACTS IMMEDIATELY

The opening statement is factual. You cannot make an argument. The court should stop you if you attempt to make argument in the opening statement. You recall in the old days that opening statements ran two and three days and if you will read these old trials you will see more arguments in the opening statement than at the close of the case. The length of the opening statement is limited only by the length of time it takes you to recount every fact that you are going to prove in that case.

Our opening statements take from one to two hours, because we take advantage of this first opportunity to run as fast as we can in this race for disclosure. I sincerely feel that the defense man who waives his opening statement is handicapping himself in this race. When the law suit begins, plaintiff knows what his case is. Defendant certainly knows what his case is and little that can be said on either side should surprise the other—if both sides are adequately prepared.

LISTING WITNESSES

If Dr. Catton is to testify, we advise, as we are writing his name on the board, that he is one of the leading psychiatrists in San Francisco, that he is the author of numerous books, that he on the teaching staff of the University of California, that he was hired by the United States Government for psychiatric examinations during the War, that he has practiced in the City and County of San Francisco for twenty years, and that he maintains offices at 490 Post Street. You will note that your jury will steal a glance at the blackboard when Dr. Catton is called to testify. They have met him, they have heretofore been introduced to him. They expect him to be called. They await his testimony.

When we put Mr. Jones' name on the blackboard, we advise that Mr. Jones was standing at the corner of Post Street and Powell as such and such an hour, and we write the hour on the blackboard, and that Mr. Jones will testify that he, at that hour, was waiting for a street car and saw defendant come through a red light and strike the left hand side of the plaintiff's car. We advise that Mr. Jones is a schoolteacher who was on his way home from work, that he lives at such and such an address and has been a resident of the City and County of San Francisco for over thirty years, that his deposition has been heretofore taken and we know what his

testimony is going to be as well as do the defendants. This is *statement,* opening statement, not *argument.*

Sometimes it is necessary to call a witness out of order. If you have told the jury who all of your witnesses are, what their testimony is to be, they will not be confused by interruption in the sequence of presentation. So, on this side of the board we put all of the fact of time, place, witnesses, to show liability.

On the other side of the board we put, or you may even use another board, in a complex case, the end result at which you are aiming in the personal injury law suit; to-wit, the interpolation of pain and suffering into dollars and cents.

THE DOLLAR FIGURES

On the other side of the board, we write down our plaintiff's name, that he has a thirty-year life expectancy, that he is earning $300 per month, and that he is almost totally disabled. We advise the jury that at the time of trial, and we know these facts precisely because they are in our preparation brochure, that there are doctor bills of $2,000, hospital bills of $2,000, and there will be future bills of $2,000. This is $6,000 special, and I challenge you to reduce this figure. In the great majority of cases, these special damages will be far in excess of this.

Let us say that in our hypothetical case we have proved brain damage. In the *Reckenbiel* case here was an award of $225,000. Do you know what the State Compensation Insurance Fund put in as their lien? (Reckenbiel was working for the Fire Department and would be entitled to life-long workman's compensation under California law.) Their lien was $90,000! In other words, they estimated that his life expectancy times $400 per month, the amount of money to keep him in an institution, plus his wages under the Compensation Act, would be $90,000! I think $90,000 is probably higher than any verdict achieved in your state. Yet, when an insurance company, or a state carrier, had to put down in dollars and cents under its minimum standards of compensation, the value of this case, they had no difficulty in reaching a price figure of $90,000. (People in your state have been injured as severely.) And don't forget this is under the niggardly standards of workman's compensation.

Now let us put down the figure of $3,600, loss of wages until the time of trial, $300 per month times 12 months. It takes about a year to get to trial in California.

Then let us put down the figure of $25,000 for pain and suffering and general damages up to the time of trial. Do you think this is an extravagant figure? A case recently was handed down in New York wherein *$40,000 was allowed for ten hours conscious pain and suffering.*[14]

14. *Naylor v. Isthmian Steamship Co.,* 10 F. R. D. 128 (S. D. N. Y. 1950).

Add these figures together and you have $36,000 up to the time of trial. Twenty-five thousand dollars is not, of course, as precise a figure as the special damages, but, let us leave $25,000 on the blackboard in the opening statement and integrate that when we come to final argument.

Now how about the loss of wages for a man 30 years of age for the rest of his life? Remember your doctors will testify *factually* that this man is not going to be able to work again and this jury is going to have to compensate him for that if the defendant cut off his earning capacity for the rest of his life. Certainly a state institution or a state agency should not be forced to carry him if defendant was wrong. Let us cut the $300 a month down to $250 for the rest of this man's life, fully realizing that with the rise of the cost of living, this man would probably be earning $500 a month in ten or fifteen years in absolute figures even if he stayed at the same salary. If you have any doubt of this go to the Department of Labor figures for the cost of living. This man at the same salary fifteen years ago was earning $150 per month in purchasing power. Two hundred and fifty dollars a month times the man's life expectancy for the rest of his life gives us a figure of $90,000 in loss of wages!

Let's look at this figure of $90,000 and see if it's fair, see if it's precise. In some states the judges erroneously argue that this $90,000 is a present sum of money and it should be *discounted* say to $60,000. Again go to the Bureau of Labor Statistics and you will find that ten years ago the dollar was worth twice as much as it is today, that the cost of living has been increasing steadily since 1900 and not in possibilities, but in definite probalities, the cost of living will double in ten or twenty years from now. This man has a life expectancy of thirty years. Should we discount this $90,000? Rather than discount it, we should double it to $180,000. In ten years $180,000 will only be worth $90,000! This is mathematical fact, not fancy.

So, we add these figures of $90,000 and $36,000 and we have a sum of $126,000. One hundred and one thousand dollars, ($25,000 for pain and suffering) is precise, proved, mathematically certain, as certain as are your witnesses who testified. You cannot award this man less than $101,000 and be mathematically correct.

Yet you have not considered anything for general damages of pain and suffering. Recall again, "all this man does is live." What compensation is going to be accorded to the man by way of general damage whose right to live out his life free from pain and suffering has been traumatically infringed by the negligent defendant?

It is not such a difficult job to interpret pain and suffering into the necessary dollars and cents that go to make up the personal injury award. It is the lawyer's duty to do this.

BREAK DOWN INTO FINITE PERIODS

This is the key: You must break up the 30-year life expectancy into *finite* detailed periods of time. You must take these small periods of time, seconds and minutes, and determine in dollars and cents what each period is worth. You must start with the seconds and minutes rather than at the other end of thirty years. You cannot stand in front of a jury and say, "Here is a man horribly injured, permanently, disabled, who will suffer excruciating pain for the rest of his life, he is entitled to a verdict of $225,000."

You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, year after year for thirty years. You must interpret one second, one minute, one hour, one year of pain and suffering into dollars and cents and then multiply to your absolute figure to show how you have achieved your result of an award approaching adequacy at $225,000. If you throw a novel figure at a jury or an appellate of $225,000, without breaking it down, you are going to frighten both your trier of facts and your reviewer of facts.

EMBARRASSMENT AND RIDICULE INTO DOLLARS

How are we going to turn ridicule and embarrassment into dollars and cents? You must do this. The law says defendant must compensate the plaintiff in dollars and cents for ridicule and embarrassment. Unless the lawyer shows the jury how to do this, he is derelict.

Let us take the case of the woman who had the ineptly performed hemorrhoidectomy.

Defendent doctor severed the sphincter muscle in three places. It will never regenerate. Through the rest of this woman's life she will have no control over her rectum.

I shall take this woman into my office and ask her to describe her living day. I shall ask her to describe what she does when she gets up in the morning, her breakfast, her duties about the house in the morning, her lunch, her afternoon, her evening, her going to bed. I shall ask her to describe her intimate life with her husband and family. I shall ask her if she goes to church, if she drives an automobile and if she does not, why? I shall have her later, on the stand, give to the jury a minute description of her life after this operation and her life before the operation.

What does it mean to have a husband, and to have children, to be an active and intelligent and attractive woman in the community, and what does it mean to have an operation like this and then be subject to this embarrassment. You can't go to the moving picture show anymore. You can't go automobile riding, and let her tell you and then you ask her the questions when it comes up to trial. What she does when she gets up in the morning. She gets up in the morning at seven in the morning.

"What do you do?"

"I get up at seven in the morning. I have to do this mechanical operation of evacuating my bowels."

You have to tell that to the jury and describe that to the jury.

"What do you do at eight o'clock in the morning?"

"I used to go down to the store and over to Mrs. Jones."

"What do you do now?"

"I don't do that now. I just stay in the house."

"Why?"

And these are objective fact things that should be in that record. The reason she doesn't do that is because of her embarrassment and because of ridicule. She can't lead a normal life. And then you break it down through the twenty-four hours of the day, multiply it by the thirty years, whatever the life expectancy is, you come up with figures that will give you this adequate award.

Unless I show in detail the embarrassment and ridicule that she will suffer, and has suffered, this jury in its verdict will have to speculate. They may surmise that it is only in her mind that she hesitates in mingling with other people. I must show that because of this operation she is subject to the embarrassment actually of knowing that she has no control of fecal matter, that she has no control of flatulency, that she is humiliated and embarrassed, that she may even develop psychotic tendencies as a result. I tell the jury that ridicule does not have to be a boisterous thing. I have said that ridicule is objective, that what people think of us, is as subjective as our own feelings. Those who are overly indulgent toward the person with the physical impairment in one sense ridicule them. They do not mean so to do but they impose an abnormal relationship. The world reflects this toward the plaintiff. Her right to live normally has been infringed.

I must in detail show through each second, minute, hour, day and then multiply times the life expectancy, just precisely how that right to live normally has been infringed, before I can ask for dollars and cents for ridicule and embarrassment. How shall I do it in dollars and cents? I shall ask my jury to give one dollar a day for ridicule, times 365 days, times thirty years, and I achieve a figure of only $10,000. I shall do the same with embarrassment, I shall write down on the blackboard one dollar a day for this embarrassment, and I shall recount the embarrassment that this woman with the hemorrhoidectomy suffers, times 365 days, times thirty years, and I achieve a figure of $10,000.

If I asked for $10,000 for the ridicule and $10,000 for the embarrassment, the jury would not see in detail how I achieved these figures. But when I ask for a dollar a day and I detail the amount of embarrassment and ridicule, my jury may well figure that ridicule and embarrassment should be assessed at three dollars a day or even four dollars a day; and the appellate court, in reviewing the record, should sustain them.

So let's then add the $10,000 for ridicule and the $10,000 for embarrassment, and the figure now that we have on the blackboard is $206,000 —$206,000 for a case of a man or a woman with a thirty-year life expectancy, incapacitated from working. And don't forget that with the woman, it is not necessary that she be working at the time of the accident in order to claim future loss of wages.

Furthermore, when you write down "ridicule," "embarrassment," and "pain and suffering," you are using the precise words that your judge is going to use in his charge to the jury when he advises the jury as to the component parts to which the quantum of damages is to be assessed. In my argument to the jury I like to use the same words and phrases the judge will use in his charge. This forces me to explain the law to the jury, and it forces me to interpret legal language in lay terms. Further the judge then empahsizes my argument.

CLOSING ARGUMENT

It is a factual thing. You don't want that jury to forget that if that is an important thing. So during the course of the trial use another blackboard to put your exhibits on, or to put these dates on. Get your doctor down there and have your doctor go to the blackboard, and most of these doctors are pretty good at drawing.

During the course of the trial, come over to another blackboard. As I said today, I like to walk around and always have a piece of chalk in my hand because it magnifies the use of the blackboard, and the jury then has their eyes focused on the blackboard. When anyone testifies to a date, August the 16th, or the time they give an intravenous injection of glucose in a malpractice case at 11:01 on Sunday evening, write as you are talking to that witness, "11:01 Sunday" evening on the blackboard.

That may be one of the most important things in that case. It points it out to the jury again and again.

We have two arguments in California. We open, the defense gives its argument, then we close. May I suggest in keeping with this whole idea of fairness in the trial of a jury case that you discuss every phase and fact of liability and damage in your opening statement, saving for your close only the answers to that which your opponent produces on his argument. It is a mistake to make a brief opening argument and then unfairly detail your case when your opponent does not have an opportunity to answer you. Defendant makes only one argument. If you have made a brief opening argument, you may not be able to catch him on your close.

You're not privileged to embarrass your jurors by imposing the subjective argument in asking, "what would you take for an injury like this?[15] You're not permitted to say "Mr. Jones, if I were to lay ten $1,000 bills down on this jury rail, would you pick them up and put them in

15. But see *Merrill v. Los Angeles Gas*, 58 Cal. 510 (1910).

your pocket if you knew you had to suffer the injury that my plaintiff suffered?"

Yet in some manner you must bring home to that jury that this is a real flesh and blood plaintiff in front of them; you must make them realize what pain and suffering is, particularly those jurors who have not had their right to live out their life free from pain and suffering infringed in a personal injury case.

I like to see that my jury is following each part of the case. Sometimes proof becomes technical, sometimes a thought process becomes tedious. If I note that my jury is abstracted, I will often ask the one so abstracted if he can see the blackboard from where he is sitting, if he can hear the witness. I want my judge equally attentive during the entire trial.

I recall in *Sullivan v. City & County,* when my judge was too attentive. I had deliberately put upon the blackboard a series of figures that should have added up to $125,000, and I had deliberately miscalculated to $110,000, because I wanted my jury to follow the complete computation in their own minds. I wanted them to remember the facts and figures and be able to multiply them out when they went into the jury room. So as I deliberately miscalculated upon the blackboard, I noted my trial judge come from the bench, walk into the body of the courtroom, and mentally calculate. Instead of a juror correcting me, His Honor said, "Just a minute, Mr. Belli, your damages should have been $125,000, instead of $110,000!" Of course, I would rather have had him say this on motion for new trial, rather than comment during the course of argument. As a matter of fact, the verdict was for $125,000, and one of the grounds of appeal was that the judge had commented on the evidence. (Our trial judges are so privileged in California, but counsel criticize this procedure as misconduct.) The appellate court in its decision commented that it was not beyond the realm of expectation that a trial judge at least could add and add properly. It was his duty to so do.

In the case of *Sullivan v. City & County* the award of $125,000 we felt was inadequate: There was a young red-headed kid of 21 years of age, just back from the South Pacific, a fireman in perfect health, married, one child. He had suffered an accident on the Municipal Railway. His hospital and doctor bills had been over $25,000. He had a rupture of the urethra at the junction of the prostate. He will be impotent for the rest of his life. He will have to have painful catheterization every ten days for the rest of his life; otherwise his urethra will close, his bladder will burst!

In that case I called a psychiatrist to show the psychic damage as well as the physical impairment. I sincerely believed that this boy's married life would be impaired, and I so told the jury. I was even fearful that the end result of this case would be self-destruction. Two years after this case

and its award, plaintiff is still incapacitated, his home is broken, his wife divorced him. He has little compensation in the $125,000 awarded.

As lawyers, let's look at the verdicts realistically. The client doesn't get $125,000. Generally one-third of this goes to the lawyer. Should our appellate judges be practical and take cognizance of this?

Gentlemen, I have more than digressed upon my time. There are a number of pictures and diagrams and briefs in which you may be interested and which I would like to show you from my briefcase.

I thank you again and again for the privilege of appearing before your great Bar Association. You've been most hospitable in sitting through the entire noon hour, but it was no more than I expected. Your state is one of the homes of hospitality. I would like to be asked back. I would like to spend more time here with you in informal as well as formal discussion. I hope I shall have my entire book *"Demonstrative Evidence and the Adequate Award"* available before long.