## VIII. TRIAL PREPARATION

### § 76 In general

To prepare for trial the plaintiff's attorney should develop a particular theory of recovery for the case and keep it in mind at all times.[8] Counsel must know what facts need to be proved at trial and what evidence is available to establish them. In order to properly present the case counsel should first outline those provable facts that support each element of the prima facie case.[9]

In mapping the trial,[10] counsel needs to make some judgments about the order of the witnesses that will be called to testify.[11] Four major factors should be kept in mind when setting the order of the witnesses. The first is the character of the plaintiff,[12] the second is the theme of the trial,[13] the third is the relative strength of the witnesses,[14] and the fourth is the coherence of the entire case.[15]

### § 77 Developing a theme for the case

One of the first steps to effectively mapping the case for trial is to develop a short, effective, and saleable theme for the trial.[16] Counsel should plan to organize much of the case around a particular theme or fact pattern of the case. Choosing the theme is essentially a matter of looking at the evidence and picking out the facet of the case that is most likely to impress

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[8] See § 78.

[9] See §§ 82, 83.

[10] Mapping the Trial—Order of Proof, 5 Am. Jur. Trials 505.

[11] McCown, "Trial Strategy/Case Management" in G. Nothstein, ed., Toxic Torts: Litigation of Hazardous Substance Cases §§ 22.00–22.22 (Shephard's/McGraw Hill 1984).

[12] See § 79.

[13] See § 77.

[14] See § 81.

[15] See § 82.

[16] See Kanner, Trying the Toxic Tort Case, 23 Trial 32, 33 (Oct 1987).



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the jury. In the model trial factual situation,[17] the misconduct of employees of the painting contractor were of a particularly aggravated nature and that has become the central theme of the plaintiff's case from the beginning to the conclusion of the evidence. Thus, the first witnesses were those who were in the area when the plaintiff was exposed and who could describe the incident in the most graphic detail. Those witnesses helped develop the theme early in the case and enabled counsel to present other evidence more effectively. For example, when the expert testified about the effect of what was termed "the exposure," the fact of that exposure resonated in the jury's mind.

There are problems, however, with selecting one theme for use in a case involving the negligence of several types of defendants. One problem is that a sole theme may be effective against only one defendant. In some cases, however, the theme can be made to apply against several different types of defendants, perhaps as a minor theme or variation for the others. In the model trial case herein, of course, the painting contractor's negligent spraying was the main theme, but a variation of it also was made to apply to the site manager on the theory that the latter should have more properly supervised the conduct of the former.

### § 78 Mapping the trial

The best way to prepare the case during the early stages is to map out the evidence according to the theories that the facts support. The plaintiff's attorney should make a checklist of the prima facie case for each theory of recovery that counsel will pursue.[18] Next to each element should be listed every piece of evidence counsel intends to offer to support or prove that point, along with the names of each witness who can testify to the facts. Counsel should also list all items of physical or documentary evidence that can be admitted to corroborate witness testimony or independently prove additional facts. After the list has been developed, it should be reviewed critically to determine whether the case has any weaknesses. Where the proof seems weak, the attorney should look for more evidence to support the case. The attorney should also identify and eliminate useless or repetitive information. Where several wit-

[17] See § 3.

[18] Rudlin, "Burdens of Proof" in G. Nothstein, ed., Toxic Torts: Litigation of Hazardous Substance Cases §§ 16.01–16.19 (Shephard's/McGraw Hill 1984).



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nesses testify to the same facts, juries may get bored by such repetitive testimony. Only those witnesses who have been assessed through investigation and discovery to have superior credibility, intelligence, memory and recall, and who were in the best position to observe what they can testify to, will be the most effective witnesses, and only such witnesses should be called at the trial.

After developing an outline of proof supporting recovery, counsel should make a negative proof outline to anticipate what evidence might be offered in defense by opposing counsel or what weaknesses on cross-examination might be developed. Plaintiff's counsel should take a hard look at favorable witnesses to see what they could say that would be harmful to the case. The attorney should also examine those witnesses defense counsel will be expected to call and review the substance of their testimony. After this outline has been made, plaintiff's counsel should prepare a third outline indicating what witnesses and what evidence might be available to offer in rebuttal to the evidence expected from the defense.

From these outlines the attorney should select the best witnesses available to call during the plaintiff's case-in-chief and prepare a question checklist for each. The witness checklist should cover all the facts which the witness can testify to. With these outlines and checklists in hand, the attorney should be able to effectively map the order of trial.

## § 79 Assessing and using plaintiff as a lead witness

Often the effect that the plaintiff has on the jury can mean the difference between winning and losing the case. Since the first witness frequently makes the greatest impression on the jury, counsel should call the plaintiff as the leadoff witness if the plaintiff is a particularly strong witness. Doing so also has other advantages. If the plaintiff's appearance dramatically demonstrates the debilitating effects of the illness or condition suffered as a result of the toxic exposure, an early appearance by the plaintiff may help to develop a favorable rapport between the plaintiff and the jury, particularly where, because of the condition, the plaintiff will be unable to sit at the counsel table throughout the trial. As the jurors listens to other evidence, they will be able to visualize the plaintiff in the testimony if they do not have to construct him out of thin air. Further, if the plaintiff can remember and articulate the facts of the exposure clearly on the stand, presenting the plaintiff as



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the first witness basically allows counsel the opportunity of repeating the opening argument, this time from the witness stand. There is no one who is in a better position than the plaintiff to set forth the facts of the exposure, describe the course of medical treatment, and relate the suffering and loss incurred as a result of the experience.

Of course there are also drawbacks to using the plaintiff as the lead witness, however. If the plaintiff's testimony is not consistent with other evidence presented during the plaintiff's case-in-chief, or with evidence that counsel reasonably expects to be developed by the defense on cross-examination, discrepancies will be created that may severely damage the plaintiff's personal credibility or the integrity of the plaintiff's prima facie case. If the damage is great, the attorney may be forced to recall the plaintiff to explain the inconsistencies, and this may have an unfavorable effect. Where this type of situation can be expected to be developed, it may be better strategy to save the plaintiff for the last witness, where his or her testimony can deal with such problems in a more straightforward manner.

If the plaintiff is not a particularly strong witness and does not project a favorable demeanor, another reason exists for calling the plaintiff at the end of the case rather than at the beginning. Where the facts of the plaintiff's exposure can be adequately established by other witnesses, the strength of the plaintiff's case will not rest on the strength of the plaintiff as a witness. In other words, if by the time the plaintiff testifies the jury will have accepted the principal facts of the exposure, any limitations in the plaintiff's demeanor or credibility as a witness may not weigh as heavily against him or her as they would if the plaintiff had been called earlier in the case.

If the plaintiff died as a result of the toxic exposure before the start of trial and a videotape deposition was taken to preserve the plaintiff's testimony, the tape should be saved for the end of the plaintiff's case in chief. Doing so may create a dramatic impression of the plaintiff that may remain in the jurors' minds during the presentation of the defendant's case that immediately follows. Some judgment is called for, however. If the defense conducted a particularly good cross-examination at the deposition and some weaknesses were developed, it will be better to show the tape earlier in the case and follow it with witnesses who may be able to rehabilitate the case on the points where it has been weakened.



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## § 80 Assessing and using defendant as an adverse witness

Some lawyers feel that it is best to put the defendant on the stand first in order to prove material facts of the plaintiff's prima facie case from a witness known to be hostile. One advantage to this is that counsel is allowed to put leading questions to an adverse witness during the direct examination,[19] and counsel who advocate this approach feel that the jury is more inclined to accept the facts of the plaintiff's case when testified to by witnesses identified with the other side.

Where the defendant is a corporation, which is usually the case in toxic exposure litigation, the plaintiff may call an officer, agent, or employee of the defendant as an adverse witness. The ideal adverse witness in this regard is one who played a major role in the exposure and whose testimony will be consistent with that to be developed through the plaintiff's favorable witnesses. Adverse witnesses should not be called unnecessarily, however, as they tend to be difficult to handle on the stand and present the defense with an opportunity to develop weaknesses in the plaintiff's case. If calling an adverse witness is essential to the plaintiff's case, however, and counsel is unsure as to how effectively the witness can be made to testify, then such a witness should not be called as the first or early witness in the plaintiff's case. Such a witness should be called somewhere in the middle of the plaintiff's case, rather than at the beginning or at the end, where the impression the witness creates may last long on the jury.

## § 81 Assessing relative strength of the witnesses

Another major factor in determining the witness order is the relative strength of all the witnesses, including lay as well as expert witnesses.[20] Primarily, this is most important in the sense of first and last impressions. A juror's attention will be keenest at the beginning of the testimony. It is important that a witness be chosen for the leadoff position who not only makes a strong, good impression, but who also has significant and substantial information to give. The jurors should be confronted

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[19] Fed R Evid, Rule 611(c).

[20] See Kanner, Trying the Toxic Tort Case, 23 Trial 32 (Oct 1987), in which the author recommends that counsel in a toxic tort case should rely more on lay witnesses than experts because jurors relate better to them and they tend to be more inherently credible.



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by the brunt of plaintiff's case at the beginning, when they are at their most receptive. Therefore, if there is a witness who can give a strong summery of the factual case against a given defendant, that witness should be selected to lead the testimony of the others.

The last witness may be the one that resonates the longest, and the final witness should be one that presents a strong and sympathetic testimony on the issue of damages. This has two main effects. It will enable the jury to listen to defendant's case with an ear sympathetic to the plaintiff. Also, it will be in the jury's mind when it comes to the arguments regarding damages. The best person for this position is usually the plaintiff's (or the decedent's) spouse.

### § 82 Continuity of the case

The final factor to consider in mapping the trial is continuity. The trial should unfold to the jury as would a story that is related clearly and succinctly. The testimony should build upon itself to present to the jury a logical sequence of action and reaction, cause and effect.

Generally, counsel should present the testimony in the order most appreciated by the jury. Thus, the first thing a jury wants to know is what happened, and this information comes from the "exposure" witnesses. The second thing the jury wants to know is why it happened, and this information comes from the "liability" witnesses. The third will be what the effects were, and this is best related by the medical causation witnesses and the witnesses on damages.

Naturally, there will be overlaps in the testimony since some witnesses can testify to more than one issue. Fact witnesses who know the plaintiff can be valuable witnesses on the issue of damages as well as to facts that tend to prove liability. Liability witnesses, who may have seen the exposure may also be good exposure witnesses. However, as a general rule, the calling of a particular witness should be scheduled for that point in the trial when the main thrust of the witness' testimony corresponds with the element of proof being developed during that stage.

In planning the development of the plaintiff's case at trial, counsel should also schedule the appearance of certain witnesses so that they may function as bridges that cover the gaps between major parts of the case-in-chief. A witness as to what happened, who is also usable as a liability witness, can be used



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as a bridge between the exposure and liability. A pharmacological witness may serve as a bridge between liability and causation. Ideally, the testimony makes sense in two different areas: the middle of the liability section to establish that the chemical company should have known of the hazardous effects of the chemical, and as a bridge between the treating doctor and the medical specialist.

## § 83 Checklist for Mapping the Trial

The following checklist may be helpful for counsel to review in analyzing a toxic exposure case and preparing it for trial. It is designed to show the desired continuity from one group of witnesses to another during the course of the trial. It may be noted that no witness was used to bridge the gap between proof of causation and damages. The difference in the subject matter relationship of the two topics is usually too great to handle the transition smoothly. However, in the model trial case, where plaintiff died shortly before trial, the gap was bridged through the testimony of the plaintiff decedent's children who testified on the issue of damages.

- ☐ Plaintiff or best fact witness
  - —Other fact witness
  - —Last fact witness, bridge to liability
- ☐ Liability witness
  - —Construction site personnel
  - —Construction site person who handled chemicals to chemical liability
  - —Pharmacologist or knowledge witness
  - —Chemical company personnel
- ☐ Causation witnesses
  - —Treating physician
  - —Pharmacologist
  - —Other expert
- ☐ Damages
  - —Children
  - —Employer or wage loss witness
  - —Economist
  - —Psychologist
  - —Spouse



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