



THE CANADIAN
BAR ASSOCIATION

CBA Skilled Lawyers Series V

**OPENING STATEMENTS AND EXAM-IN-
CHIEF – WINNING CASES IN CHIEF**

FEBRUARY 19, 2015



Canadian Corporate Counsel Association
Association canadienne des conseillers (ères)
juridiques d'entreprises



Using Technology and Demonstrative Aids at Trial (with a focus on Opening Statements & Examination-in-Chief)

Presented by:

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OVERVIEW

1. The Importance of Using Technology and Demonstrative Aids at Trial
2. Using Technology and Demonstrative Aids Effectively
3. Using Technology and Demonstrative Aids in the Courtroom (with a focus on Opening Statements and Examinations-in-Chief)



The Importance of Using Technology and Demonstrative Aids at Trial:

The Role of the Advocate:

- to persuade the trier of fact (often a jury)
- to effectively persuade, you and your witnesses (including expert witnesses) must have *credibility*
- to gain credibility, you must be able to validate all supporting facts and educate re complicated concepts



The Importance of Using Technology and Demonstrative Aids at Trial:

How We Can Best Educate/Persuade:

- we *learn* much more by seeing than hearing
- we *retain* more by seeing than hearing
- we retain much more if we both see AND hear
- **colour** visuals better than black & white for retention
- using demonstrative aids/evidence to supplement testimony helps the trier of fact learn and retain info



Using Technology and Demonstrative Aids Effectively:

Demonstrative Aids/Evidence: What is it?

- basically anything visual that assists the trier of fact
- can be real/substantive evidence
- or can just be an illustrative aid

see visual example that follows

Levels of Proof





Using Technology and Demonstrative Aids Effectively:

Three Key Practical Tips:

- 1) Use an ELMO
- 2) Develop Charts, Graphs and Diagrams
- 3) Use Understandable Images



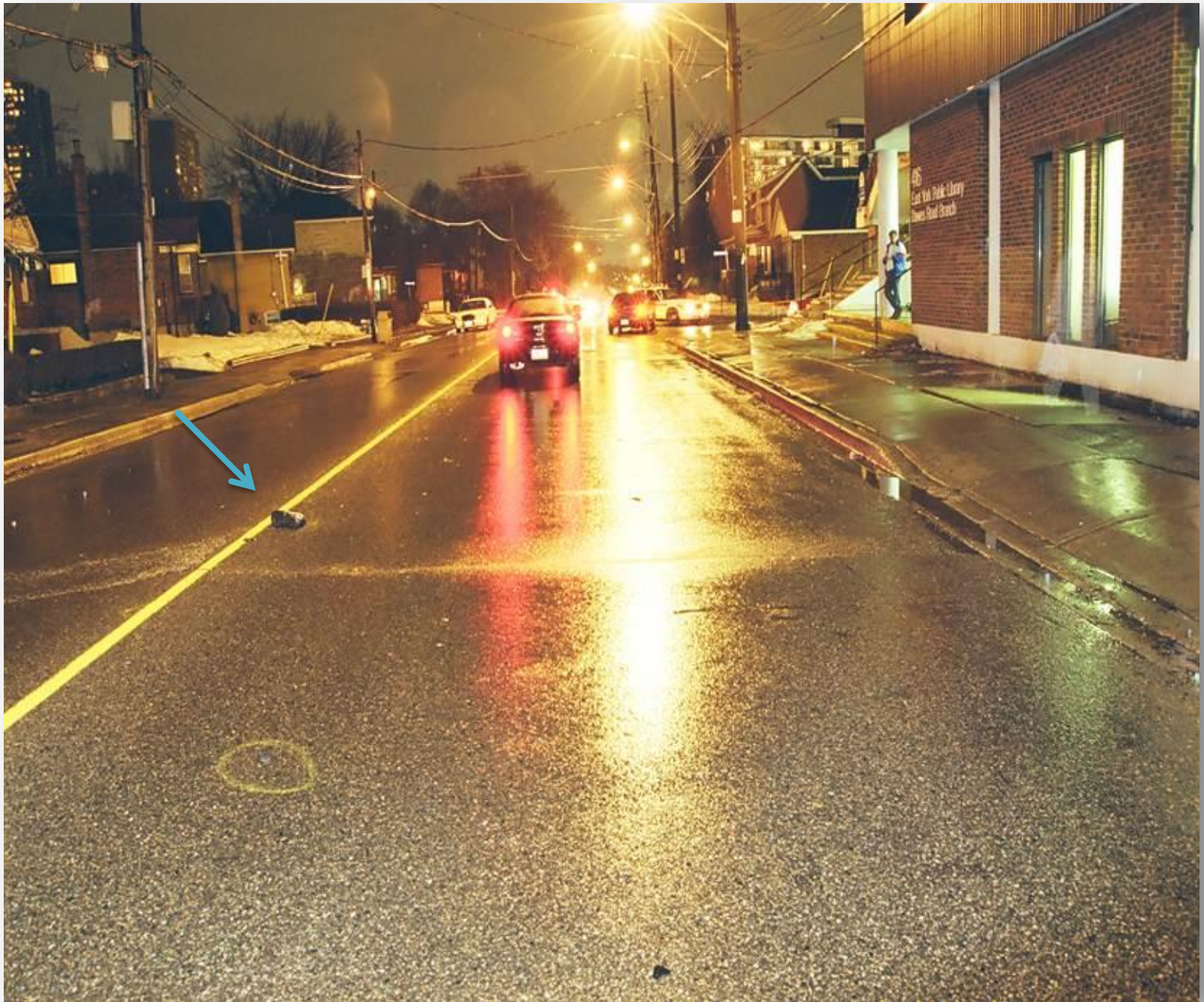
Using Technology and Demonstrative Aids Effectively:

- **Use An ELMO-**to show/highlight key references in:
 - supporting documents/photos/diagrams
 - supporting admissible reports
 - excerpts from discovery transcripts
 - excerpts from real time trial transcripts (if available)
 - test results or data

see visual examples that follow









Using Technology and Demonstrative Aids Effectively:

- **Develop Charts, Graphs and Diagrams:**
 - must be fully supported by information in evidence
 - can be used to highlight extensive treatment/medication
 - can be used to itemize future care needs and costings
 - can be used to explain income loss claims
 - very useful in identifying points of contention
 - can thereafter be used to simplify evidence of others

see visual examples that follow

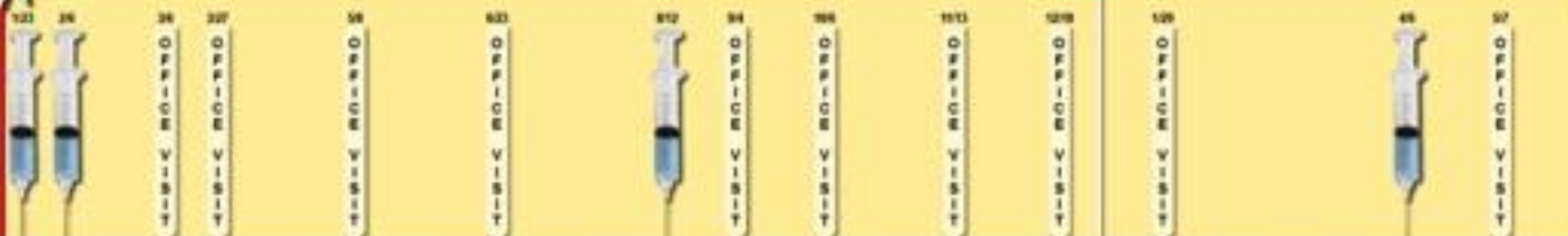
1/17/09

Lisa Burkett Medical Timeline - Post Motor Vehicle Crash



NECK, BACK, & KNEE INJURIES

ORTHOPEDIC



PHYSICAL THERAPY



2009

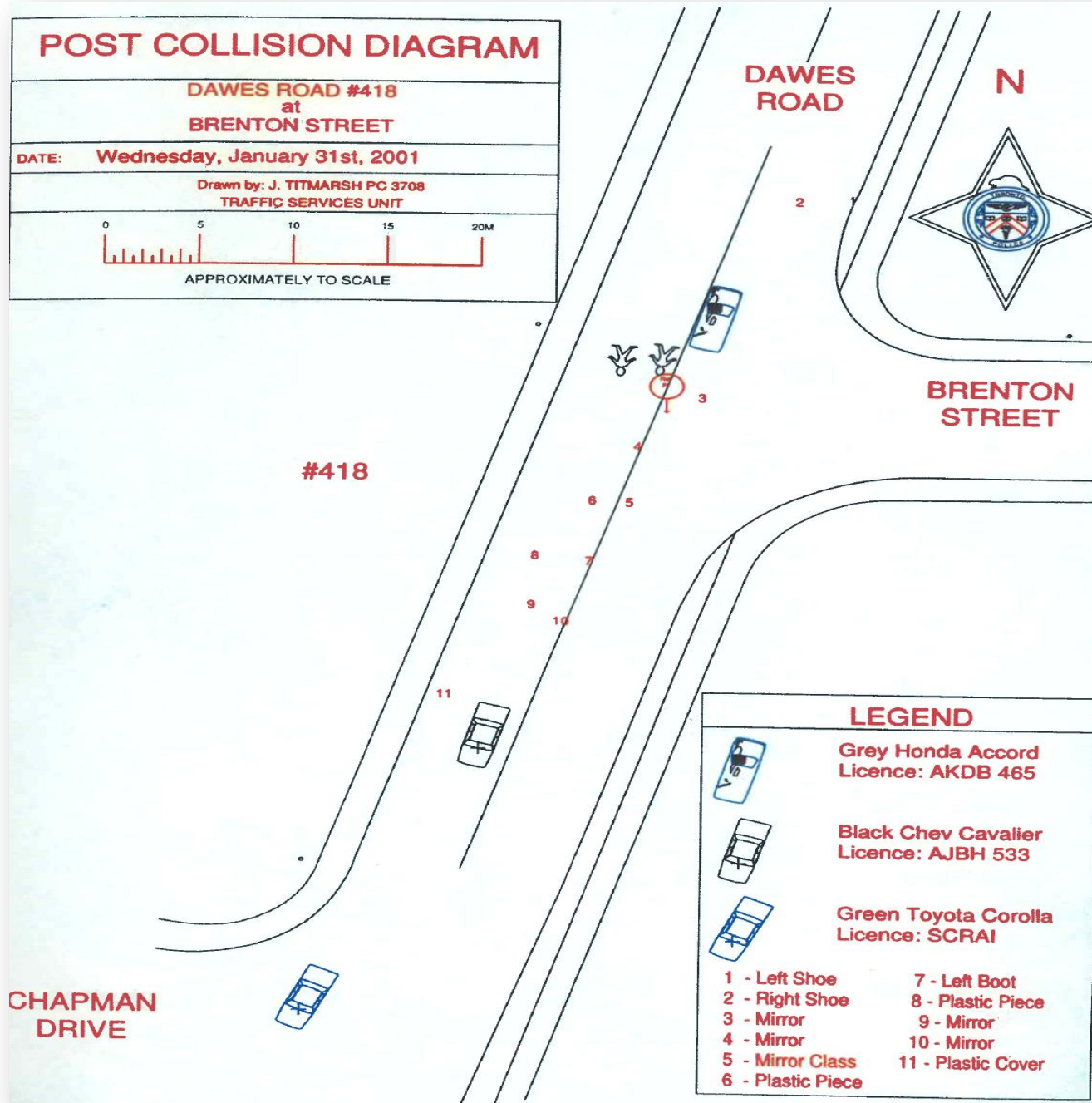
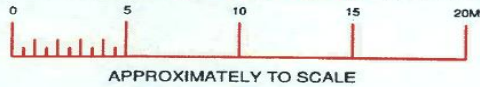
2010

POST COLLISION DIAGRAM

DAWES ROAD #418
at
BRENTON STREET

DATE: Wednesday, January 31st, 2001

Drawn by: J. TITMARSH PC 3708
TRAFFIC SERVICES UNIT



LEGEND



Grey Honda Accord
Licence: AKDB 465



Black Chev Cavalier
Licence: AJBH 533



Green Toyota Corolla
Licence: SCRAI

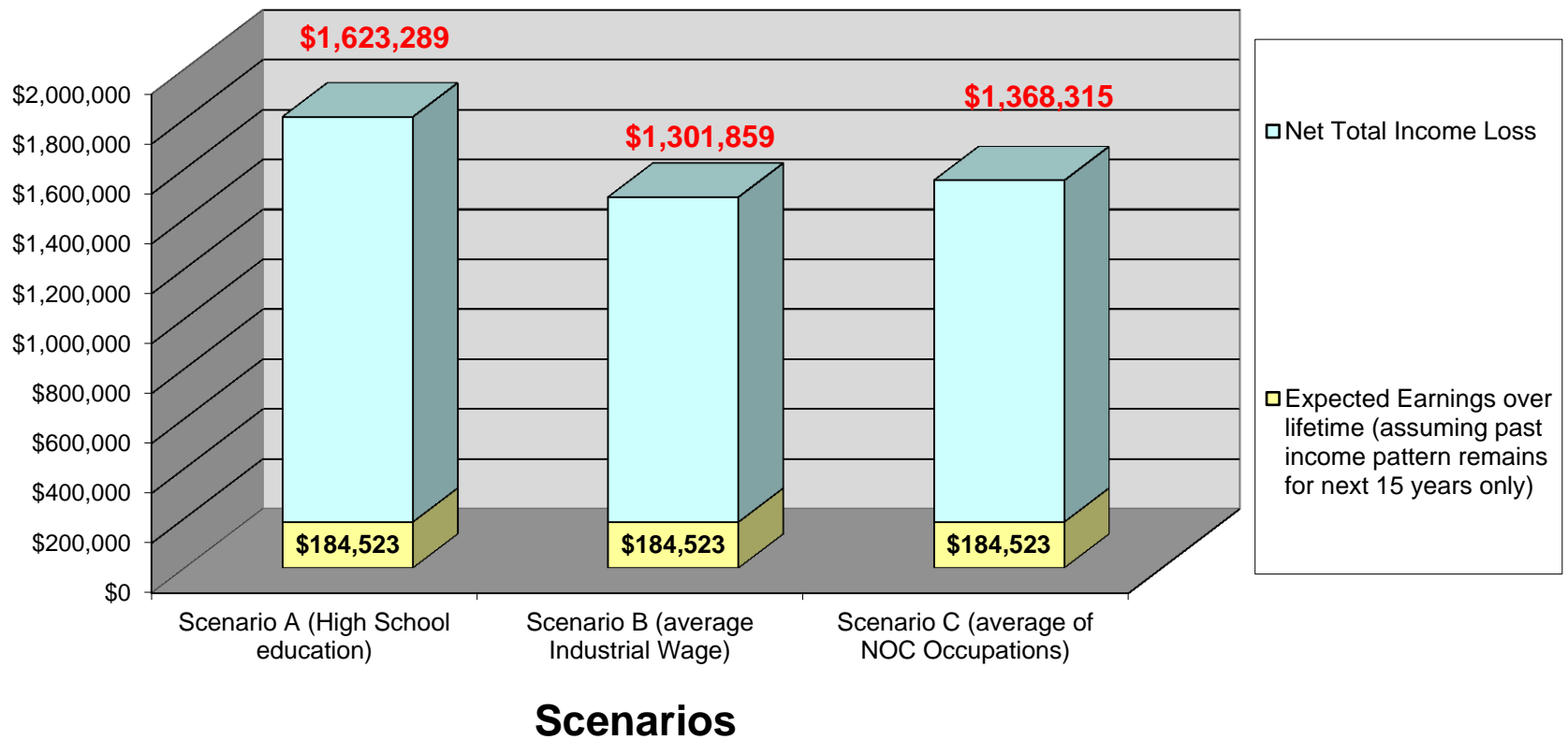
- | | |
|-------------------|--------------------|
| 1 - Left Shoe | 7 - Left Boot |
| 2 - Right Shoe | 8 - Plastic Piece |
| 3 - Mirror | 9 - Mirror |
| 4 - Mirror | 10 - Mirror |
| 5 - Mirror Class | 11 - Plastic Cover |
| 6 - Plastic Piece | |

FUTURE CARE COST ANALYSIS (EXAMPLE FROM RESCH V. CANADIAN TIRE)

Needs	Plaintiffs' Position (based on Martha Binstock's evidence)			Defendants' Position (based on Luana Troiani's evidence)			Jury's Findings Insert Present Value Totals
	One Time Cost	Annual Cost	Professor Carr's Present Values (as of Jan 31, 2008)	One Time Cost	Annual Cost	Calculated Present Values (as of Jan 31, 2008)	
Surgical Procedures							
Rhinoplasty	\$6,000.00			\$6,000.00			
Scar Revisions	\$20,300.00	Estimated 7 surgeries		\$29,000.00	Estimated 10 surgeries		
Orthodontic Treatment	\$2,740.00			\$2,740.00			
Prosthetic Treatment		\$200.00			\$200.00		
Bridge Replacement	\$10,500.00	\$1,050.00		\$10,500.00	\$1,050.00		
Contingency for Failed Implants	\$15,500.00	Believes failure more likely		\$7,750.00	Believes failure less likely		
Tissue Filler Procedure-Surgical	\$11,000.00	\$2,200.00		\$11,000.00	\$2,200.00		
Tissue Filler Procedure-Injections		\$3,919.50			\$3,919.50		
Totals	\$66,040.00	\$7,369.50	\$314,933.87	\$66,990.00	\$7,369.50	\$315,833.15	
Transitional Living Program							
Case Manager	\$7,200.00			\$7,200.00			
One month assessment in residential facility	\$24,000.00			\$24,000.00			
One month treatment at residential facility	\$16,500.00			\$16,500.00			
Months of high supervision	\$105,000.00	Based on 10 months		\$52,500.00	Based on 5 months		
Months of low supervision	\$91,250.00	Based on 12 months		\$45,625.00	Based on 6 months		
Psychology	\$8,580.00	1 hr/wk for 1/2 year then monthly for 1 year		\$5,136.00	1 hr/wk for 1/4 yr then 1/mn for 1/2 yr		
Family Counseling	\$7,410.00	1 every 2 wks for 1 yr then monthly for 1 yr		\$3,852.00	1/2 wks for 1/2 yr then 1/mn for 1/2 yr		
Occupational Therapy	\$9,120.00	Believes cost is additional		\$0.00	Believes cost included in living cost		
Tutor	\$27,445.50	3 times/wk for 80 wks		\$8,132.00	1 time/wk for 80 wks		
Psychoeducational/Vocational Assessment	\$3,000.00	One assessment		\$4,250.00	Two separate assessments		
Totals	\$299,505.50		\$294,474.90	\$187,195.00		\$164,430.42	

Nathan's Future Loss of Earnings

(assumes Nathan can maintain work for the next 15 years only)



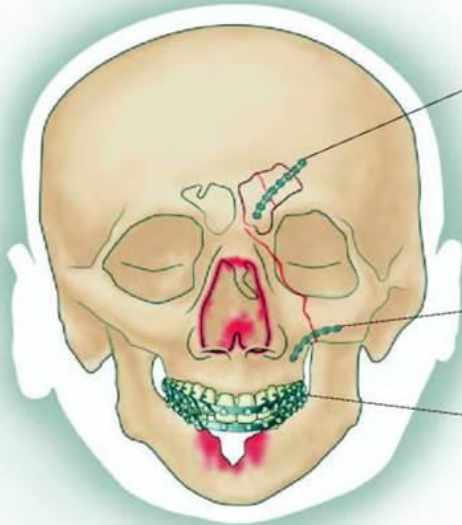


Using Technology and Demonstrative Aids Effectively:

- **Use Understandable Images:**
 - use medical illustrations rather than relying on black and white medical imaging (see examples that follows)
 - use video, like segments from a day in the life video to showcase and explain needs (see example that follows)
 - consider accident reconstruction animations (scientific visualization)
 - refer to charts/diagrams/graphs used in evidence with other experts (like a chart re treatment/medication)

Nathan Resch — 2

2h. Postoperative appearance: conceptual and based on CT scan below



"An 8-hole ... craniofacial plate was ... secured across the bony fragments ..."⁵

"... a 6-hole curved ... plate was ... secured across the fractured segments [of the zygomaticomaxillary process] ..."⁵

"Arch bars were ... secured [to the maxilla and mandible] ... intermaxillary fixation was obtained ... wiring the upper and lower arch bars together."⁵



CT scout taken at the Erie County Medical Center, Buffalo, NY, on May 19, 1998.

10/15/02

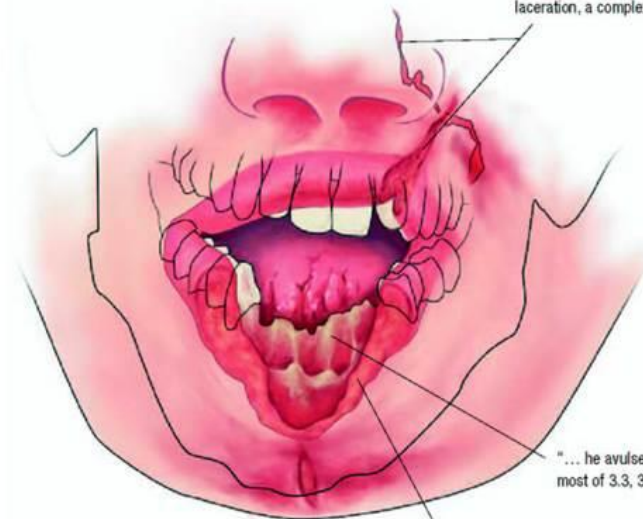
John Harvey, MScBMC for Thomson Rogers

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5) Operative report by Dr. W. Belles in reference to surgery performed at the Erie County Medical Center on May 26, 1998, on Nathan Resch.

Nathan Resch — 2

2g. Avulsed teeth, tongue and lip laceration: conceptual and based on X-ray below



"... thru-and-thru lip and cheek laceration, large complex tongue laceration, a complex left LeFort II ..."²

"... he avulsed teeth 3.1, 3.2, most of 3.3, 3.4, 4.1, and 4.2."³

"... there was a through and through dehiscence [of the left lower lip] ..."⁴



X-Ray taken at the Erie County Medical Center, Buffalo, NY, on May 19, 1998.

10/15/02

John Harvey, MScBMC for Thomson Rogers

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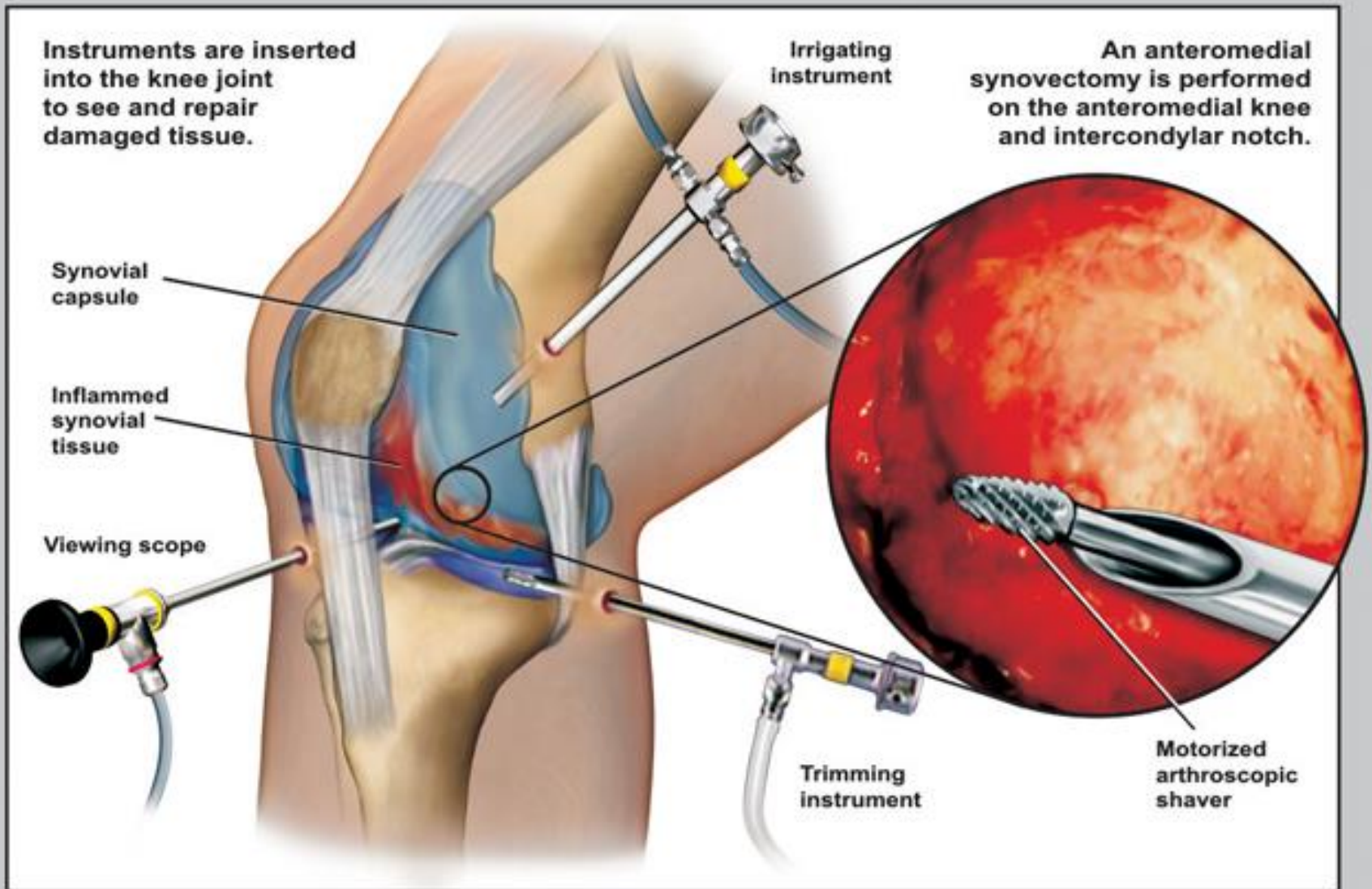
2) From a letter dated September 26, 2000 by Dr. W. Belles at the Sinus Center of WNY at ECMC, in reference to the surgery and post-operative care he performed on Nathan Resch.

3) From a letter dated November 11, 1998 by Dr. G. Sandoz at the Hospital for Sick Children, following examination of Nathan Resch.

4) From the operative report of Dr. G. Sandoz in reference to surgery performed at the Hospital for Sick Children on March 01, 1999, on Nathan Resch.

JOHN DOE

RIGHT KNEE ARTHROSCOPY & SYNOVECTOMY ON 5/9/2008







Using Technology and Demonstrative Aids in the Courtroom:

Plan to Use Technology and Demonstrative Aids:

- discuss demonstrative evidence *options* in witness/expert briefings
- review and consider all available tools (like the day in the life video, medical illustrations, etc.)
- ask your witnesses/experts for suggestions about any additional demonstrative aids that they would welcome (like medical illustrations, charts, day in the life video, etc.)



Using Technology and Demonstrative Aids in the Courtroom:

Lawyers Role Re Admissibility:

- Lawyer to lay foundation (re using aids with experts):
 - the visual aid must relate to the expert's evidence and expert must be familiar with the aid
 - the visual aid must fairly and accurately reflect the expert's evidence (and be based on information entirely within their report)
 - the visual aid must be of assistance to the trier of fact in understanding the expert's evidence



Using Technology and Demonstrative Aids in the Courtroom:

Lawyers Role Re Admissibility:

- Admissibility of Demonstrative Evidence:
 - varies depending on its purpose and what kind of aid it is
 - in short though the demonstrative evidence must be: relevant, accurate, fair and more probative than prejudicial
 - to comply with expert report rules, the information in the visual aid must be able to be footnoted to info in the report
- the judge determines if it can be used
- *Admissibility solution – develop the chart on the go...*



Using Technology and Demonstrative Aids in the Courtroom:

Cautions:

- over-exposure to a visual aid lessens its impact
- use professional looking aids only
- using too many aids may make case look concocted
- don't use them just to look modern
- jury will be online validating what they see
- have a backup plan (in case held not admissible)



CONCLUSION

1. Discuss technology and demonstrative aid options early on with your witnesses
2. Reach agreements on exhibits with opposing counsel before the trial so you can use images in your openings
3. Use an ELMO with witnesses to substantiate reliance on key documents (to add credibility to opinions)
4. Prepare charts or graphs to simplify facts and opinions



THANK YOU

Please feel free to call or email me with questions

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