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## **SPECIAL ISSUE: DEMONSTRATIVE EVIDENCE**

**Julie Campanini describes the importance of showing the jury a case's key points during opening statements.**

### **Verdicts & Settlements**

#### **See It Now**

[PHOTO NOT SHOWN 1] caption: Bruce G. Fagel used sophisticated litigation graphics to win \$12 million for a young woman in a coma resulting from inadequate post-operative care.

[PHOTO NOT SHOWN 2] caption: Nicholas R. Allis relied on simpler, more low-tech illustrations to convince a jury to award \$900,000 to his client, a truck driver with previous back injuries.

### **Show and Tell**

**AT ISSUE: Using litigation graphics helps jurors experience the case with more than one sense, thus organizing information for them and imprinting it more thoroughly in their minds.**

BY LEONARD NOVARRO

[PHOTO NOT SHOWN] caption: "[Jurors] soak up information if you give it to them in more than once sense," attorney Nicholas R. Allis says. "They're listening, but if I have a chart that demonstrates in a clear way what I'm saying, they're getting the information through their sight, also."

Nicholas Allis is not a big fan of PowerPoint. Bruce Fagel is.

"I'm sort of a believer in the simple," Allis says, although he did rely on a timeline storyboard, an enlarged medical chart and a medical illustrator to help him win a \$900,000 judgment recently for a client injured trying to remove part of a vehicle that struck his truck.

Fagel, on the other hand, believes the presentation software was instrumental in winning a verdict for his client, who suffered severe brain damage after routine breast augmentation surgery.

That presentation, plus two videos showing the condition of the woman since the surgery and an EKG strip, helped convince a jury to award damages of \$5.5 million. According to a complicated formula, the value of the award could grow to almost \$12.3 million if the plaintiff lives out a projected life span of 23 years.

The use of demonstrative technical evidence was key to both judgments in favor of the plaintiffs, according to Allis and Fagel.

“You hear [every] day how a jury is part visual,” Allis says. “Even if they’re not, they soak up information if you give it to them in more than one sense. They’re listening, but if I have a chart that demonstrates in a clear way what I’m saying, they’re getting the information through their sight, also.”

Fagel says he’s sold on PowerPoint. “This was the first case I used this on. It’s very helpful to be able to zoom in on parts of a chart so you could see them from a distance,” he says.

The result was not lost on Carol Salmacia, who represented one of the defendants in Fagel’s case.

Referring to Fagel’s video presentation, Salmacia says, “I thought that was very effective. It was a very meaningful and graphic demonstration to people who don’t go to a neurological facility to see what’s involved in caring for someone.”

Coincidentally, Allis, a sole practitioner, had helped organize a seminar on demonstrative technical evidence last June for the Beverly Hills Bar Association, where he serves as president.

“It’s interesting how much the emphasis seemed to be on using a clear board as opposed to something fancy. I’m not technically oriented, and I’m afraid of [confusion] with the more complicated stuff,” Allis says, although he does believe that sophisticated software such as PowerPoint serves a purpose in complicated cases.

However, the jury’s 9-3 verdict in his favor on Feb. 17 in Los Angeles Superior Court and its subsequent award “made me feel better about my way of doing things,” he adds.

Allis filed suit in September 1997 on behalf of Donald Baylis, 44, and his wife, Angelica, 48, residents of Lakewood. The previous April, in the city of Orange, Donald Baylis was sitting in his stopped truck when a Brink’s van trying to pass struck it from behind. Baylis wasn’t injured in the accident but began complaining of back pain a day later and blamed it on his trying to remove the truck’s step, jammed into his vehicle.

In the suit, *Donald and Angelica Baylis v. Brink’s Inc.*, BC178259 (Orange County Sup. Ct. 2000), Allis claimed that Baylis wouldn’t have injured himself if Brink’s hadn’t been negligent.

Defense attorney Sheldon Warren of Los Angeles’ Carroll, Burdick & McDonough contended that Baylis could have suffered the injury during his normal line of work and that he shouldn’t have tried to remove the step in the first place. Instead, he should have tied the step and taken the truck to be fixed.

Warren declined to discuss the case, other than to say, “It’s not fully resolved by any means.” He did not say whether he would appeal.

“In this kind of case,” Allis says, “you look to see if the impact caused the injury. Here, that wasn’t enough. So where do you go from there?”

First, he went to the Laguna Niguel office of Peter Dill, a biochemical engineer, who convinced him that impact wasn’t necessary to cause the injury, a herniated disc. Next, Allis had to show how the injury progressed and led to three surgeries, including bone grafts, disc evacuation and insertion of bone dowels and a stimulator to alleviate pain.

One of the surgeries required repetition and the stimulator removed because it wasn’t effective.

Allis, with the help of Executive Presentations of Los Angeles, a commercial provider of courtroom graphics, developed a timeline to lay out a history of injury and treatment.

Allis hoped the timeline would answer questions such as the following: Why did the pain take 24 hours to develop? Was that consistent with the injury? When did it get worse? Why didn’t his client get surgery right away? When did he first see a doctor?

“Rather than give a lot of dates, the timeline was helpful in laying down for the jury what really happened,” Allis explains.

“What he had going for him was that he had gone in for a lot of medical procedures. We had to emphasize to the jury what this poor guy had to go through,” he says.

## **SIDEBAR**

**Case:** *Donald and Angelica Baylis v. Brink's Inc.*, BC 178259 (Orange County Sup. Ct. 2000)

**Type:** Personal injury

**Verdict:** 9-3 (liability); 10-2 (damages, amounting to \$900,000)

**Attorneys:** Plaintiffs — Nicholas R. Allis, Beverly Hills' Law Offices of Nicholas R. Allis  
Defendant — Sheldon Warren, Los Angeles' Carroll, Burdick & McDonough

**Experts:** Plaintiffs — Peter M. W. Dill, biomechanical engineer, Laguna Niguel; Sandra Schneider, vocational rehabilitation, Santa Monica; Joyce Elaine Pickersgill, economist, Fullerton; Dr. Steven Nagelberg, orthopedic surgeon, Downey  
Defendant — Dr. Todd Moldawer, orthopedist, Van Nuys; Dennis Schneider, Ph.D., biomechanical engineer, San Diego; Ruth Amush, M.Ed., vocational rehabilitation, Los Angeles

Allis also enlarged a medical chart for each of the procedures, including a discogram, which involves injecting material into the injured disc to determine the extent of pain.

In addition, the attorney used the medical illustrations of Joel Schecter, a professor of anatomy at the University of Southern California, to portray graphically the effects on Baylis' back from a variety of procedures, including tests, the addition of a metal plate, the bone grafts and the surgeries.

An orthopedic surgeon, Steven Nagelberg of Downey, used the illustrations to demonstrate what happened to Baylis.

The jury took 2½ hours to render its verdict, after a five-day trial before Judge Judith M. Ashmann.

“What I got out of this is that boards can do the job, but you have to spend the time thinking about it and not overdo it,” Allis says.

“The problem is that sometimes you get too many boards showing too many things. That doesn't mean you just blow up a medical record. You have to spend time working on your timeline to get your point across,” he says.

Fagel, a Beverly Hills plaintiffs' attorney and physician, pulled out all the stops in his clients' suit against a plastic surgeon, anesthesiologist, outpatient center and cardiologist, all of whom he claimed had some role in a breast augmentation surgery gone awry. *Monique Thompson and Bret Thompson v. Paul Rohrer, M.D.; Keith Mathahs and Upland Outpatient Surgical Center*, RCV34534 (San Bernardino Sup. Ct., June 4, 1998).

The surgery, on April 2, 1998, was successful; the aftermath turned tragic. While recovering, Monique Thompson, who was 28 at the time, began experiencing seizures, which the suit claimed resulted from an overdose of the Lidocaine administered by her surgeon, Dr. Paul Rohrer.

Also named in the suit was Keith Mathahs, a registered nurse anesthesiologist who first noticed the problem.

Mathahs' attorney, Carol Salmacia, a partner with Santa Ana's Ahrens, Rosa & Salmacia, argued that her client did not recognize what was going on but did alert the center's nursing staff and the doctor to a problem that might require hospitalization.

Fagel, on the other hand, argued that Mathahs should have understood that intubation, hyperventilation and medication could have relieved Thompson's seizure, the result of oxygen deprivation. Nurses at the center also failed to recognize that the patient's heart rate and respiration were increasing. Nor did they do anything about it, according to the suit.

Rohrer had called in another doctor, cardiologist Richard Bruck, to assess the situation and, according to Rohrer, Bruck said that the problem was neurological. By the time a neurologist arrived to examine her, Thompson was experiencing a grand mal seizure and going into cardiac arrest.

Paramedics came and rushed her to San Antonio Community Hospital, where doctors diagnosed her with brain damage. Today, she lives in a neuro-care facility with little hope of returning to normal.

Fagel introduced two videos taken eight months apart to portray Thompson's condition. The first shows her virtually a vegetable. In the second, she is able to hit a switch to sound a buzzer. The subtle change offered hope that she could improve, however slight.

"Psychologically, juries want to help people, but it's easier for jurors not to give money when there is no hope, for someone who is functionally dead. We wanted to show that there's a person inside there," Fagel says.

"Two video clips taken at two points in time are far more effective than testimony from a doctor who examined her at those two points," Fagel says.

"In all my cases now, I'm taking video footage as early as possible," he adds.

The videos also induced one of the defense experts to increase his estimate of Thompson's life expectancy, which ultimately affected the amount of the award, according to Fagel.

Although the patient was in recovery for 1½ hours, an EKG strip displayed a readout for only the last 15 minutes. Fagel introduced that to show a discrepancy in the medical records, and he claimed that the center's record was more complete than the surgeon's. The center also had written a policy indicating that a nurse anesthetist must recognize abnormalities.

Fagel took all of this and documented it on screen through the use of a computer projector, zeroing in on documents and isolating specific parts of them.

He also argued during the trial that simply clearing Thompson's airway and making sure she didn't choke easily could have corrected her condition. To prove his point, he introduced a paramedic's ambulance bag with a face mask that squeezes to supply oxygen.

"The problem here was that you had an anesthetist who didn't understand the simplicity of what happened, a physician hoping the patient would just wake up, nurses who took a back seat and didn't want to assert themselves and a cardiologist who didn't want to assert himself," Fagel says.

Indeed, William Ginsburg, who represented Upland, says, "My belief throughout the case was that the jury would understand that nurses serve like privates in the Army or seamen aboard a ship."

Ginsburg said he found distressful the jury "essentially saying that nurses had to call 911 and disobey the chain of command and act on their own," maintaining that would be analogous to flight attendants seizing control of an airliner from a pilot who refused to act in the face of danger.

"In all likelihood, an appeal will be filed," he says.

Ginsburg adds that, in his view, "The verdict is \$12,298,262 gross anticipated receipts by plaintiff of [a] periodicized judgment based on an assumed lifespan of 23.1 years, subject to prior

settlement offset, and periodicized by annuity, reducing judgment to an actual sum of approximately \$2.5 million.”

Ginsburg opined that the plaintiff would live five to seven additional years. Assuming a six-year additional lifespan, the gross value of the verdict is approximately \$3 million.

Salmacia offered similar sentiments. “Our argument was that we can’t prescribe as a nurse,” she said. “It’s the function of a physician. We made an appropriate recommendation for her condition. The doctor refused to take our recommendation and did another thing.”

Before the trial, Rohrer settled the case against him for a confidential amount, which allowed Thompson to move to a specialized neuro-care facility costing \$560 a day. Bruck settled his case, also for a confidential amount, during trial.

The trial before Judge Jeffrey King lasted 17 days. The jury’s verdict, which apportioned fault among all four defendants, was unanimous.

## **SIDEBAR**

**Case:** *Monique Thompson and Bret Thompson v. Paul Rohrer, M.D.; Keith Mathahs and Upland Outpatient Surgical Center, RCV34534* (San Bernardino Sup. Ct., June 4, 1998)

**Type:** Medical malpractice

**Verdict:** 12-0 (liability and \$5.5 million in damages)

**Attorneys:** Plaintiffs — Bruce G. Fagel, Beverly Hills’ Law Offices of Bruce G. Fagel and Associates.

Defendants — William Ginsburg, Los Angeles’ Cotkin, Collins & Ginsburg, for Upland Outpatient Surgical Center Inc.; Carol Salmacia, Santa Ana’s Ahrens, Rosa & Salmacia, for Keith Mathahs; Terrance Shaeffer, Los Angeles’ Tuverson & Hillyard, for Dr. Paul Rohrer; Richard Carroll, Long Beach’s Carroll, Kelley & Trotter, for Dr. Richard Bruck

**Experts:** Plaintiffs — Ronald Wender, M.D., anesthesiologist, Los Angeles; Jay Schapira, M.D., cardiologist, Los Angeles; Hildergarde Shaw, R.N., Fullerton (by deposition); Richard Dauben, M.D., neurologist, Santa Ana; H. Richard Adams, M.D., rehabilitation, Long Beach; Gerry Aster, R.N., Pasadena; Peter Formuzis, Ph.D., economist, Irvine.

Defendants — John Ahlering, M.D., anesthesiologist, San Diego; Grant Stevens, M.D., plastic surgeon, Marina Del Rey; Diane Zavala, R.N., Northridge; Jerome Stenjhem, M.D., rehabilitation, San Diego; Doreen Casuto, R.N., San Diego; Michael Weiner, economist, Pasadena

## **Inside Insight**

**Attorney Bruce G. Fagel concentrates strictly on medical malpractice. His advantage is that he is also a physician and is intimately aware of what goes on in the operating room.**  
BY LEONARD NOVARRO

Bruce Fagel has an advantage over other attorneys in medical malpractice cases. He’s seen malpractice first hand.

Fagel, a licensed physician who got burned out on medicine and fed up with some of the unethical practices he saw over the years, says the problem with bad doctors is not exaggerated.

“We’re dealing with the tip of the iceberg,” he says. “There have been recent studies demonstrating that preventable injuries in hospitals are much larger than anyone knows.”

Recognizing this, he points out, President Clinton recently urged hospitals and medical associations to reduce patient injuries by 50 percent over the next 10 years. While doctors are finally admitting that problems do occur, “they’ll usually add, ‘But I don’t know of any,’” says Fagel.

Ask Fagel, and he’ll recite a litany of botched procedures, cover-ups and inadequate excuses, including a case he encountered while an intern at an Oak Park, Ill., hospital in 1973. He admitted a woman who had been seriously injured in an auto accident, but couldn’t find anyone to operate on her, so she bled to death.

“I kept promising her that she wouldn’t die. She was bleeding to death from the chest. I stabilized her, but I couldn’t get a thoracic surgeon to work on her,” he recalls. “It was a matter of insurance and an improper backup system.

“The first guy didn’t want to do it, and the second guy was too far away. It was a system failure which today would be the subject of a lawsuit.”

There’s more. While Fagel was assisting during a routine abdominal operation, the surgeon inadvertently cut the patient’s bowel and tried to cover it up.

“He made light of it,” says Fagel. “They kept the patient alive for five or six days. I was off duty one day and he died during the night because they deemed he wasn’t worth saving. I blew up.”

Fagel left Illinois in 1976 to become a staff physician in the emergency room at Cedars-Sinai Medical Center in Los Angeles. He later worked in the emergency rooms of several area hospitals. He was also a clinical instructor in the emergency department of Harbor General Hospital in Los Angeles and still teaches an advanced cardiac life-support course for the American Heart Association.

However, by the time he decided to shift gears and attend Whittier College School of Law in Los Angeles in 1980, he had decided he could do more for patients as an attorney than as a doctor. He graduated in 1982 and opened his own practice, currently located in Beverly Hills with satellites in Sacramento and Orange County.

“This has been the most gratifying and productive thing I could have done,” Fagel says.

“Being in an adversary position where everything you try to do is challenged is very intellectually intensive. What you did yesterday may not work tomorrow. Things constantly change,” Fagel adds.

Fagel, 53, only handles medical malpractice cases, two thirds of them involving obstetric procedures, such as injuries to children at birth. One such case, first tried in 1991 in Los Angeles Superior Court, has cemented his reputation as an expert in the field of medical malpractice.

The case involved Ashley Hughes, who was paralyzed at birth when a delivery room physician applied forceps the wrong way in removing her from her mother’s womb, and according to Fagel, it received widespread publicity. Fagel alleged that the doctor was under the influence of drugs at the time. So far, the Hughes family has collected half of the judgment, according to Fagel, who still keeps up with the progress of his client, now 13.

“She’s a genius,” says Fagel, describing the young girl, who experienced the same debilitating injury as actor Christopher Reeve. Yet, since the age of 3 when she was introduced to computers, she’s been able to attend regular school and gets around in a wheelchair that she controls with a headstick by moving her eyes.

More recently, Fagel won a \$5.5 million judgment for a young woman who had undergone breast augmentation surgery, only to lapse into a coma because of an overdose of Lidocaine.

In this suit, Fagel claimed that the surgeon, anesthetist and nursing staff of the center where the surgery was performed failed to do anything about the woman's convulsions, which eventually led to severe brain damage.

"You have to get the jury to understand how doctors and nurses work together and in a particular situation how they don't, to the point that someone ends up with catastrophic injuries," Fagel explains.

"He's very adept at bringing in technical medical evidence," says David O'Keefe of Bonne, Bridges, Mueller, O'Keefe & Nichols of Los Angeles, who has opposed Fagel in a number of cases.

"He uses overhead projectors, displays evidence on big screens and brings in mockups and models if necessary — a lot of visual graphics," continues O'Keefe.

"He has a very thorough grasp of medicine. He has a good facility for dealing with a lot of technical, medical facts without having to refer to notes or hesitate during his presentation," O'Keefe adds.

As an expert in his field, Fagel has lectured widely on medical malpractice to obstetric societies and other physician groups as well as attorneys. He's also been nominated as Trial Lawyer of the Year three times by the Los Angeles Trial Lawyers Association. He and his wife Trudy, who manages the practice, have three children. Their oldest, Devon, 23, attends Southwestern Law School.

One of the toughest things to get across during a trial is what can happen in a crisis, according to Fagel.

"It's a high-intensity situation in a delivery room, where things change rapidly, or in the emergency room," says Fagel. "To explain that to a jury, you need to know more than the medicine involved."

Indeed, he says, that's part of the fun of being a doctor.

"I couldn't do that as a doctor," he says. "I might have been involved in something first-hand, but I couldn't tell anyone about it."

## **SNAPSHOT**

### **Bruce Fagel**

**Law School:** Whittier College School of Law, 1982

**Career Highlights:** Private law practice, Beverly Hills' Law Offices of Bruce G. Fagel and Associates, 1982–present; emergency and staff physician, various hospitals in Illinois and Los Angeles, 1974–1982

**Case Type:** Medical malpractice