DAMAGES IN ILLINOIS CIVIL TRIAL PRACTICE

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Damages in Illinois Civil Trial Practice

By: G. Grant Dixon III

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I. Initial Considerations

A. Types of Damages

1. Compensatory

a) Defined - sum of all non-punitive damages.

b) Purpose - The purpose of awarding compensatory damages is to make the injured party whole and restore him to the position he was in before the loss. Harris v. Peters, 274 Ill. App. 3d 206 (1st Dist. 1995).

c) Elements of damage

(1) Survival cases

(a) Medical bills – Illinois Pattern Jury Instruction (Civil), 30.06

(b) Lost time – Illinois Pattern Jury Instruction (Civil), 30.07

(c) Disability/Loss of Normal Life – Illinois Pattern Jury Instruction (Civil), 30.04.01, 30.04.02

(d) Disfigurement – Illinois Pattern Jury Instruction (Civil), 30.04

(e) Pain and suffering – Illinois Pattern Jury Instruction (Civil), 30.05, 30.05.01 (emotional distress)

(f) Other damages – See Illinois Pattern Jury Instruction (Civil) 30.00

(2) Wrongful death cases

(a) Pecuniary injuries (740 Ill. Comp. Stat. § 180/1, 180/2)

(b) Money, goods, services received by the next of kin from the deceased

(c) Presumption of substantial pecuniary loss because of the death. Bullard v. Barnes, 102 Ill.2d 505 (1984)

(d) See Illinois Pattern Jury Instructions (Civil), 31.00

(e) Survival cases see 755 Ill. Comp. Stat. § 5/27-6.

2. Punitive

a) 2-604.1 Statute

Pleading of punitive damages. In all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on strict tort liability, where punitive damages are permitted no complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint if the plaintiff establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Any motion to amend the complaint to include a prayer for relief

seeking punitive damages shall be made not later than 30 days after the close of discovery. A prayer for relief added pursuant to this Section shall not be barred by lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted if the time prescribed or limited had not expired when the original pleading was filed.

b) Cases

(1) Procedural – must submit evidence for court to consider. Stojkovich v. Monadnock Bldg., 281 Ill. App. 3d 733 (1st Dist. 1996).

(2) What conduct is necessary

(a) Punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Barton v. Chicago and N.W. Trans. Co., 325 Ill. App. 3d 1005 (1st Dist. 2001).

(b) Punitive damages may be awarded against a corporation based on vicarious liability where: the principal authorized the doing and the manner of the act or omission; the agent was unfit and the principal was reckless in employing the agent; the agent was employed in a managerial capacity and was acting within the scope of employment; or the principal or a managerial agent thereof ratified or approved of the act. Barton v. Chicago and N.W. Trans. Co., 325 Ill. App. 3d 1005 (1st Dist. 2001).

B. Apportionment of Damages

Courts like people to settle, period. However, when some defendants settle and others elect to proceed to trial, a problem arises. Do the settling defendants end up on the verdict form? Generally, the answer is no. See Batteast v. Wyeth Laboratories, Inc., 137 Ill.2d 175 (1990). However the issue is still one of debate by some jurist.

Plaintiff's lawyers cite the Contribution Act, 740 Ill. Comp. Stat. § 100/0.01 et seq., as mandating finality of settlements. Dubina v. Mesirow Realty Dev., Inc., 308 Ill. App. 3d 348 (1st Dist. 2000). Defense attorneys cite Illinois Pattern Jury Instruction (Civil), B45.03.A and its commentary which suggests non-parties may be included in certain circumsantces (attached).

Logic dictates that if settlements are truly final, then the settling defendants should not be permitted to be on a verdict form subjected to apportionment of damages. Defendants who fail to settle do so at their own peril.

It is clear that apportionment of damages is not proper in a Wrongful Death case. Jones v. Chicago Osteopathic Hosp., 316 Ill. App. 3d 1121 (1st Dist. 2000).

C. Interest

1. Pre-judgment

a) Generally

(1) Tort claims do not generally allow for imposition of pre-judgment interest. Cress v. Recreation Servs., Inc., *341 Ill. App. 3d 149 (2nd Dist. 2003).*

(2) However, if there is a breach of fiduciary duty or the imposition of prejudgment interest is necessary to make the plaintiff whole, courts will impose such penalties. Neumann v. Neumann, *334 Ill. App. 3d 305 (3rd Dist. 2002).*

b) Purpose – to fully compensate a party when money has been wrongfully withheld. McKenzie Dredging Co. v. Deneen River, 249 Ill. App. 3d 694 (3rd Dist. 1993).

c) When applicable:

(1) Statutes, agreements of the parties, or equity requires it

(a) Tri-G, Inc. v. Burke, Bosselman & Weaver, 817 N.E.2d 1230 (2nd Dist. 2004) (prejudgment interest is proper where authorized by statute, agreement of the parties, or in cases where warranted by equitable considerations)

(b) Kleczek v. Jorgensen, 328 Ill. App. 3d 1012 (4th Dist. 2002) (prejudgment interest may be recovered

when warranted by equitable considerations, and disallowed if such an award would not comport with justice and equity).

(2) Equity

(a) Jones v. Hryn Development, Inc., 334 Ill. App. 3d 413 (1st Dist. 2002) (prejudgment interest is available in equity without the need of statutory authority).

(3) Question of discretion

(a) In re Blinderman, 283 Ill. App. 3d 26 (1st Dist. 1996) (prejudgment interest must comport with justice; whether equitable considerations exist to support prejudgment interest is question of fact within sound discretion of trial court).

(b) Jones v. Hryn Develop., Inc., 334 Ill. App. 3d 413 (1st Dist. 2002) (trial court refusal to grant purchasers prejudgment interest on partial award for earnest money after vendor sold house to third party was abuse of discretion, where judgment awarding vendor a portion of earnest money was erroneous in that vendor had no actual damages from purchasers' breach of purchase agreement and purchasers were entitled to refund of all earnest money).

(4) Easily calculated damages

(a) Janes v. Western States Ins. Co., 335 Ill. App. 3d 1109 (5th Dist. 2001) (prejudgment interest is proper even when the amount due requires legal ascertainment).

(b) Marcheschi v. Illinois Farmers Ins., 298 Ill. App. 3d 306 (1st Dist. 1998) ($75,000 needed to bring an insured's award of uninsured motorist (UM) benefits up to the policy limits was a liquidated amount of damages from which prejudgment interest could be easily calculated; thus, such interest could be awarded).

(5) Good faith defenses

(a) Liberty Mut. Ins. Co. v. Westfield Ins. Co., 301 Ill. App. 3d 49 (1st Dist. 1998) (the existence of a good-faith defense does not preclude prejudgment interest under the Interest Act. 815 Ill. Comp. Stat. § 205/2).

d) Statutes authorizing prejudgment interest:

(1) Interest Act, 815 Ill. Comp. Stat. § 205/2

(a) Milligan v. Gorman, 348 Ill. App. 3d 411 (1st Dist. 2004) (Interest Act directs the award of prejudgment interest to fully compensate the injured party for the monetary loss suffered).

(2) Child Support, 750 Ill. Comp. Stat. § 5/505

(a) Burwell v. Burwell, 324 Ill. App. 3d 206 (4th Dist. 2001) (prejudgment interest on child support judgment was mandatory, rather than discretionary, and thus divorced mother was entitled to such interest on father's child support arrearage).

(3) Insurance Code, Bad faith insurance practice – 215 Ill. Comp. Stat. § 5/155

(a) Janes v. Western States Ins. Co., 335 Ill. App. 3d 1109 (5th Dist. 2001) (insurer's delay in paying stacked uninsured motorist benefits to insured was "vexatious conduct" that permitted additional costs assessed against insurer, and thus, insured was entitled to prejudgment interest on the award, even though insurer alleged that amount due was not liquidated or subject to easy determination; there was no bona fide dispute over permissibility of stacking, and purpose of sanction under Interest Act and insurance statute was to deter delay of payment in absence of bona fide dispute).

(b) Oak Park Trust & Savings Bank v. Intercounty Title Co. of Illinois, 287 Ill. App. 3d 647 (1st Dist. 1997) (prejudgment interest may be recovered from time money becomes due under insurance policy).

(4) Drug Dealer Liability Act, 740 Ill. Comp. Stat. § 57/65

(5) Commercial Real Estate Broker Lien Act, 770 Ill. Comp. Stat. § 15/10 (prevailing party gets prejudgment interest)

(6) Illinois Business Brokers Act, 815 Ill. Comp. Stat. § 307/10-115 (prevailing party gets prejudgment interest)

(7) Illinois Supreme Court Rule 219(c)(vii) (if judgment entered as sanction, the offending party may have to pay prejudgment interest for "any

period of pretrial delay attributable to the offending party's conduct")

e) **Prime Rate – U.S. Fidelity & Guar. Co. v. Alliance Syndicate Inc., 286 Ill. App. 3d 417 (1st Dist. 1997) (Illinois law permits award of prejudgment interest, at prime rate, where equitable considerations warrant it).**

f) **Discretionary standard - Whether to grant prejudgment interest is within the discretion of the trial court. The General Star Indemnity Co. v. Lake Bluff School Dist. No. 65, 2004 WL 2676558 (2nd Dist. Nov. 22, 2004).**

2. Post-judgment

a) **735 Ill. Comp. Stat. § 5/2-1303**

(1) Interest on judgment. Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied or 6% per annum when the judgment debtor is a unit of local government, as defined in Section 1 of Article VII of the Constitution, a school district, a community college district, or any other governmental entity. When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. Interest shall be computed and charged only on the

unsatisfied portion of the judgment as it exists from time to time. The judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment.

b) Appeals bond

(1) Old Law

(a) Price v. Philip Morris, 341 Ill. App. 3d 941 (5th Dist. 2003)

(b) Illinois Supreme Court, Civ. Docket No. 96236, 96644 (Sept. 16, 2003) (attached)

(c) Press Release (Jun. 15, 2004) (attached)

(2) New Illinois Supreme Court Rule 305(a) (eff. July 1, 2004):

(a) Stay of Enforcement of Money Judgments. The enforcement of a judgment for money only, or any portion of a judgment which is for money, shall be stayed if a timely notice of appeal is filed and an appeal bond or other form of security, including, but not limited to, letters of credit, escrow agreements, and certificates of deposit, is presented to, approved by, and filed with the court within the time for filing the notice of appeal or within any extension of time granted under paragraph (c) of this rule. Notice of the presentment of the bond or other form of security shall be given by the judgment debtor to all parties.

> The bond or other form of security shall be in an amount sufficient to cover the amount of the judgment and costs plus interest reasonably anticipated to accrue during the pendency of the appeal. If a form of security other than an appeal bond is presented, the appellant shall have the burden of demonstrating the adequacy of such other security. If the court, after weighing all the relevant circumstances, including the amount of the judgment, anticipated interest and costs, the availability and cost of a bond or other form of security, the assets of the judgment debtor and of the judgment debtor's insurers and indemnitors, if any, and any other factors the court may deem relevant, determines that a bond or other form of security in the amount of the judgment plus anticipated interest and costs is not reasonably available to the judgment debtor, the court may approve a bond or other form of security in the maximum amount reasonably available to the judgment debtor. In the event that the court approved a bond or other form of security in an amount less than the amount of the judgment plus anticipated interest and costs, the court shall impose additional conditions on the judgment debtor to prevent dissipation or diversion of the judgment debtor's assets during the appeal.

c) Other Statutes

(1) 735 Ill. Comp. Stat. § 5/2-1303

(2) Public Utilities Act, 220 Ill. Comp. Stat. § 5/4-203 (actions to recover civil penalties)

(3) Illinois Oil and Gas Act, 225 Ill. Comp. Stat. § 725/19.1 (leaking wells, repair) and 225 Ill. Comp. Stat. § 725/19.9 (delinquent fees)

(4) Code of Corrections, Restitution, 730 Ill. Comp. Stat. § 5/5-5-6 (in cases of injury due to criminal acts, restitution orders include post-judgment interest)

(5) Enforcement of Judgments, 735 Ill. Comp. Stat. § 5/12-109 ("Every judgment except those arising by operation of law from child support orders shall bear interest thereon as provided in Section 2-1303. Every judgment arising by operation of law from a child support order shall bear interest as provided in Section 2-1303 commencing 30 days from the effective date of each such judgment.")

(6) Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. § 505/10a

D. For Plaintiff's Attorney

1. Choosing and developing a case theme

a) Introduction

Few decisions of the trial lawyer impact a trial more than the selection of a theme. A good theme will incorporate the major elements of the trial strategy and drive home the point that your side is right and the other is wrong.

b) Why themes work

From the beginning of spoken language, man has struggled to convey his point in oration. Through trial and error, it was discovered that when presented in a common, systematic way, listeners were able to better listen and retain to the spoken word.

From our earliest times, we have been "taught" through stories, though we may not have known it at the time. We have been programmed to receive information in this way. Even the Bible says that Jesus taught through stories.

Today, everyone is bombarded with information. Mentally, we ignore the vast majority of information we receive and to only store much of the remaining in our short-term psyche. We are overwhelmed and as a coping mechanism we simple pass much of the information we receive in one ear and out the other.

At trial, jurors have no reason to pay attention. Most trials are conducted in dull, drab courtrooms. Jurors sit in uncomfortable chairs for hours on end. They listen to condescending lawyers and witnesses who drone on in monotone language. They ache for some excitement. And though they truly try, most find it almost impossible to pay attention to anything that is going on.

Themes unify. Themes give structure. Themes give life. Themes move people. When used effectively, themes give judge, jurors, and even lawyers(!) something exciting to talk about. A well-chosen theme can make even the driest subject come to life. But most importantly, themes help people remember what your case is about and that helps you win.

c) Selection of a Theme

Ideally, the theme of the case should be selected at the time of the initial client interview. However, practical considerations often make that impossible. Thus, a prudent practitioner will start with a loose theme in mind at the inception of the case but make it flexible enough so that the theme can be modified throughout the course of the case. In large measure, the theme will depend on the evidence developed. For example, responsibility might be a theme developed early on but the specific responsibility is not defined until much later. In any event, plaintiff's lawyers should always be on the lookout for good case themes throughout the course of the case.

Selection of a case theme is personal. Some lawyers always use the same themes. Some lawyers rely on consultants to help them develop a theme. Some just wait until a theme drops into their lap. However, it is most common that lawyers will attempt

to use words or phrases from the evidence itself to help define the themes.

For example, in a trucking accident case, the weight of the truck might serve as a basis for a theme on damages. In a medical malpractice case, a doctor's statement about effectiveness of treatments might serve as a liability theme. In a slip and fall case, the decision of a witness not to clean up a spill might serve as a theme for liability. Indeed, the possibilities are endless.

d) Choice of theme

A good theme will encapsulate the entire case into a brief, simple statement. The four year-old test applies here: if your four year-old son/daughter/ nephew/niece cannot understand what you are saying, the theme is too complicated. Keep it simple, direct, and concise.

Many times, a theme will be one word repeated in various contexts throughout the case. For example, words like choice, responsibility, and accountability are all good thematic words for liability. Words like pain, disability, or normal are all words that can be used as damages themes.

No matter which theme is used, it must be simple and non-offensive. Generally, themes involving

strong language are to be avoided. The idea is to give your central idea, not a bully pulpit.

e) Materials/Resources

There is no end to the resources for themes. There are dozens of articles on the topic, but one particularly good one is McElhaney, Great Arguments, ABA Journal, p. 48 (Mar. 2004). For plaintiff's lawyers, the Association of Trial Lawyers of America has a number of very good resources on the topic.

But lawyers often forget to think like human beings. Go to the Children's section in a library and start pulling stories out for little children. Almost every story has a theme to it and most can be modified to fit any plaintiff's case. Other resources include the Bible, the Constitution, even jury instructions.

f) Common themes - plaintiff

(1) Trust

(2) Responsibility

(3) Safety

(4) Irreparable harm

g) Common themes – defense

(1) Reasonableness

(2) Hindsight

(3) Judgments

(4) Emergencies

(5) Sole proximate cause

(6) So what?

2. Calculating the amount of compensatory damages

a) Economic loss

Calculation of economic loss need not be complicated or difficult. In most circumstances, the lost wages calculation is a simple math problem. Likewise, medical bill calculation involves totaling the bills and making sure a foundation is laid for them.

Economic loss gets more complicated in cases in which there is a contention of future loss. The jury instructions require that future medical expenses (Illinois Pattern Jury Instruction (Civil), 30.06) and future lost wages (Illinois Pattern Jury Instruction (Civil), 30.07) be reduced to present cash value. Likewise, in wrongful death cases, the amount of the pecuniary loss must also be reduced to present cash value. Illinois Pattern Jury Instruction (Civil), 31.12. In these circumstances, an economist can prove invaluable but is not required.

b) Non-economic losses

Few topics generate more controversy than the calculation of non-economic damages. Our current President, many legislators, and even "the man on the street" think that juries have no basis for compensating victims for non-economic loss. Yet a conversation with ANY trial lawyer and every juror where compensation for non-economic loss is given reveals that such compensation is almost always based on a reasoned and considered approach based on the evidence and nothing more. Contrary to what pundits might say, the amount of compensation for non-economic losses has remained nearly constant for the last 10 years. The system is not broken.

A plaintiff's lawyer must consider several factors when discussing non-economic loss. The foremost consideration is the nature of the loss. In other words, what type of non-economic loss is in play? Pain and suffering is far different than loss of normal life and that surely must be considered.

Additionally, the plaintiff's attorney must consider how long the loss lasted. Is this a short-term, transitory problem or a life-long condition? The age of the plaintiff, their activity level before (and after) the accident are also important. Finally, what kind of an impression will the plaintiff and other damage witnesses make?

The plaintiff's lawyer does not have to guess on numbers. One resource is the jury verdict reporters. Both local and national reporters can tailor a search based on many factors including age and type of injury.

Another resource is other trial lawyers. Speaking candidly about what other lawyers have done and think is reasonable can be a very useful tool.

Finally (and most expensive), a lawyer can use mock juries and/or trial consultants. This can be of enormous help but tends to be very expensive. For a further discussion of this topic, see the next section.

3. Deciding to use a trial consultant

In the right case, using a trial consultant is not an option, it is a necessity. Use of an effective trial consultant can help a plaintiff's lawyer turn a "NG" into a substantial verdict. But they are not appropriate for every case.

a) Factors

Several factors play into the decision of whether to use a trial consultant. However, the most important contribution of a trial consultant is preparation. Having a trial consultant forces the plaintiff's attorney to prepare earlier. You cannot make a presentation unless you have prepared. Moving the time-line up to

have trial consultants involved is primarily helpful in this regard.

Additionally, the trial consultant provides additional perspective. A good trial consultant has years of experience in a variety of cases and brings that experience to bear when doing her job for the plaintiff's attorney. Nothing is more dangerous to a plaintiff's case than a myopic eye. The trial consultant helps counteract that deficiency.

As stated above, not every case is ripe for trial consultant use. Factors to consider are:

(1) Potential case value

It is not unusual for a good trial consultant doing a full-scale work-up to cost $10,000 or more. Thus, the potential value of the case must support such an expenditure. A automobile crash involving transitory neck pain will almost never merit use of a trial consultant. A medical malpractice case almost always will.

(2) Risk of NG

Though a factor, it should not be the factor. If a lawyer took on a case, the time to be conservative about preparation is not in the months before trial. If the case is a loser, the time to get out is long before the time to hire a trial consultant.

(3) Types of services required

Which services you require will drive the cost. A discussion of the types of services offered is listed below. However, you should consider how much involvement you might need from a consultant before you make the call.

b) Types of trial consultant services

Most trial consultants have a variety of services they offer. Basic services can include document and exhibit preparation and witness preparation. Complicated (read expensive) services can include mock trials, surveys of juror attitudes, and case evaluation. Full trial simulations are possible as well. Some examples where trial consultants can provide services are:

(1) Themes and theme selection

(2) Jury selection

(3) Witness examination

(4) Opening/closing

(5) Damages

II. Plaintiff's Tactics for Maximizing Damages At Trial

A. Use of Economic Testimony to Prove Damages

1. Medical bills

The standard for admissibility of medical bills is whether they are reasonable AND necessary. Baker v. Hutson, 333 Ill. App. 3d 486 (5th Dist. 2002). Necessity has to be established through medical testimony. However, reasonableness can be established through one of two ways. If the bill has been paid, testimony that the bill is paid is *prima facie* evidence of reasonableness. An unpaid bill may still be established as reasonable if a knowledgeable person testifies that the bill for those services was reasonable. This may be someone in the billing department who can testify about the reasonableness of the charges.

2. Lost time

For a lost wages claim to be admitted, there must be testimony of the actual lost wages. Most typically, the plaintiff herself testifies she missed this many weeks from work and earns so many dollars per hour. However, the supervisor may be someone who is better suited to render such testimony. Likewise, an economist may be used.

B. How to Prepare a Damages Case Through Medical Testimony

1. Witnesses

When medical testimony is considered, most lawyers think of the treating physicians. Indeed, they are a potent source for medical testimony. However, many doctors can be stogy witnesses with little jury appeal. More importantly, the treating doctor may actually have limited hands-on time with the patient.

Prudent practitioners consider all medical providers as witnesses. Some of the best witnesses are physical therapists. Private duty nurses and home health care providers are often the best witnesses. They see the difficulties and problems the plaintiff experiences first hand. And they have the experience that puts those problems into perspective. They likewise don't have the attitude that often accompanies a medical doctorate.

Of course, hiring an expert witness may be needed. In those cases, a rehabilitative medicine person can be vital. Likewise, a home health care planner, and even an architect for home improvements can be used.

2. Preparation of witnesses

Months before trial, meet with the witnesses. Map out the general form of the testimony and the questions to be asked. Decide what areas are strongest for the medical person and which are weakest. Consider the defense arguments and questions for the witness and prepare the witness specifically for those questions.

Within about 60 days of trial, have the witness examine your client again. This will form the basis for permanency testimony and familiarize the witness with your client. Also have the witness review any exhibits you plan on using at trial and make sure they agree they are accurate and will be useful for her testimony.

C. How to Prove Non-Economic Damages

1. ***Question jurors – See below***

2. ***Exhibits***

   a) **Photos**

   b) **Day in the life films**

   c) **Devices**

      (1) Fixators

      (2) Hips, knees, etc.

3. Testimony

a) Victim

b) Family

c) Co-workers

d) Medical providers

D. Providing Necessary Proof for Punitive Damages

For a complete discussion of punitive damages and the proof necessary to sustain them, see above.

E. Jury Selection – Using Voir Dire to Choose the Best Jury Possible

1. Illinois Supreme Court Rule 234

The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching upon their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature and extent of the damages. Questions shall not directly or indirectly concern matters of law or instructions. The

court shall acquaint prospective jurors with the general duties and responsibilities of jurors.

Illinois Supreme Court Rule 234 (emphasis added).

The rule gives the parties of the case the right to supplement examination of jurors. This right can be limited to "a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature and extent of the damages" but questioning cannot be barred.

2. Challenges for Cause

a) Rule – 735 Ill. Comp. Stat. § 5/2-1105.1

b) Case law

Many cases address the need for a juror to be "fair" in order to serve. York v. El Ganzouri, 1-03-0222, 2004 WL 2192556 (1st Dist. Sept. 30, 2004). However, absent such a statement by the juror, courts are reluctant to excuse jurors for cause. For example, giving equivocal responses will not be a valid challenge for cause. People v. Williams, 173 Ill.2d 48, 670 N.E.2d 638, 218 Ill.Dec. 916 (1996). Neither will isolated statements of bias be enough. People v. Childress, 158 Ill.2d 275, 633 N.E.2d 635, 198 Ill.Dec. 794 (1994). There is no precise formula to determine whether a juror is biased. People v. Gregg, 247 Ill.Dec. 820, 315 Ill.App.3d 59, 732 N.E.2d 1152 (1st

Dist. 2000). Such conclusions are left to the sound discretion of the trial court. See, e.g., People v. Sims, 192 Ill.2d 592, 736 N.E.2d 1048, 249 Ill.Dec. 610 (2000).

c) Examples of Cause Challenges

(1) Party to a pending case (705 Ill. Comp. Stat. § 305/14)

(2) Served on a jury in the last year (705 Ill. Comp. Stat. § 305/14)

(3) Been asked to be a juror within the last 60 days (705 Ill. Comp. Stat. § 305/13)

(4) Not a U.S. citizen (705 Ill. Comp. Stat. § 305/2)

(5) Not living in county of case (705 Ill. Comp. Stat. § 305/2)

(6) Not 18 years of age (705 Ill. Comp. Stat. § 305/2)

(7) Not "free" from legal exception (705 Ill. Comp. Stat. § 305/2)

(8) Not of fair character (705 Ill. Comp. Stat. § 305/2)

(9) Not of approved integrity (705 Ill. Comp. Stat. § 305/2)

(10) Not of sound judgment (705 Ill. Comp. Stat. § 305/2)

(11) Not well informed (705 Ill. Comp. Stat. § 305/2)

(12) Not able to understand English (705 Ill. Comp. Stat. § 305/2)

(13) Someone asked them to be on a jury (705 Ill. Comp. Stat. § 305/13)

(14) Undue juror hardship (705 Ill. Comp. Stat. § 305/10.2(b))

(15) Physical impairment (735 Ill. Comp. Stat. § 5/2-1105.1)

3. Peremptory Challenges

a) 735 Ill. Comp. Stat. § 5/2-1106(a)

Each side shall be entitled to 5 peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed 3, on account of each additional party on the side having the greatest number of parties. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court.

When multiple parties are involved, counsel is well advised to clarify the number of peremptory challenges the court allows for each side. See Vrzal v.

Contract Trans. Sys. Co., 312 Ill. App. 3d 755, 728 N.E.2d 722, 245 Ill.Dec. 640 (1st Dist. 2000).

b) Back-striking

If you tender the juror(s) to the opposing side and then, during their questioning, they uncover information unfavorable to your client, can you then exercise a challenge? Until the panel is ACCEPTED by both sides, anyone can exercise a challenge. See People v. Murray, 73 Ill. App. 2d 376, 220 N.E.2d 84 (1st Dist. 1966).

4. Jury Selection Tips

a) Deselect, don't select

From the beginning, the "selection" mentality is wrong. Attorneys do not select the jurors they like to serve on their juries. Rather, they select the jurors they like the least to remove. With very few exceptions, the people you see are the people you get and the only hope you have is to deselect the ones you consider worst for your case.

b) Conversation, not indoctrination

Study after study reveals that lawyers who try to shove their case down the necks of potential jurors looses. So if you are in jury selection, talk WITH not to the jurors. Focus on them one at a time. Don't rush. Don't use lawyers' words. Speak like a human.

Now is the time to build rapport. Remember, you are pulling out and exposing private and personal information. Do it in a way that is least likely to show the juror is wrong.

c) Know Your Case

To succeed, you must be considered THE authority on every aspect of the case. A juror must not perceive un-filled holes or weaknesses in your case or it will spell doom. Therefore, you must be familiar with the liability and medical aspects of the case as well as all care provided.

Early on in the process, you should let jurors know what your case is about; not just the medical issue but the theme you emphasize. Use exhibits, diagrams, and models to the extent the Court allows it. This process won't happen with the first juror but will come out one piece at a time to juror after juror. However, it is critical that the venire know what issues you will be discussing during the course of the case. You want to know their feelings about those issues and, most importantly, what experience they have had with those issues.

d) Know Your Opponent's Case

There are defenses to the case. Do you know what they are? If so, what questions will the defense want to ask in order to emphasize their theme? You

should ask those to make their questions redundant and useless.

e) Juror's Medical Experience

In a trillion dollar industry, it seems everyone works in the medical field somehow. It is critical that each juror is questioned about medical experience. Do they/family members/friends work in medicine or a medicine-related field? Do they/family members/friends have any experience with the doctors/institutions in this case?

f) Burden of Proof

Most members of the venire have seen reports of criminal cases on television. Most have seen TV shows about lawyers and criminal investigations. And most believe the standards there apply in all cases.

Dissuade jurors from any mistaken belief that this is a criminal case. Explain the burden of proof and its distinction from your case. Quote the burden of proof jury instruction. Make sure they understand what you have to prove.

g) Money

It's a case about money. We don't send the defendant to jail or take away his license. Our system of justice – the best ever conceived – requires

defendants compensate victims for what defendants have done wrong.

You should ask about legal system experience. Have they had any and what was it like? Both positive and negative experiences are important. You can and should ask about preconceived notions of value. Questions in this area have been approved by Appellate Courts:

(1) If the law and the evidence leads you to a verdict, even for millions of dollars, would you be willing to sign that verdict?

(2) Is there any dollar amount – even millions of dollars – that you would never accept?

5. Other Resources

a) Jury consultants – See above

b) VoirDireBase – www.voirdirebase.com

c) ATLA and ATLA Exchange

d) Articles:

(1) Hans, Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection, Chicago Kent Law Review, vol. 78, pp. 1179-1201 (2003).

(2) Smith, Challenges of Jury Selection, ABA Journal, pp. 35-39 (Apr. 2002).

(3) Karp, Jury Selection in Catastrophe Cases, The Brief, pp.12-19 (Summer 2002).

(4) Singer, 10 Common Mistakes Attorneys Make With Jurors, Trial, pp. 76-81 (Jan. 2000).

(5) Carlton, Generation X and Civil Juries, Illinois Bar Journal, vol. 87, pp. 436-38 (Aug. 1999)

(6) Heaney, Jury Selection in the Era of Tort Reform, Trial, pp. 73-75 (Nov. 1995).

F. Starting with a Strong Opening Statement

1. What is an opening?

An opening statement is what an attorney expects the evidence will be. Illinois Pattern Jury Instruction (Civil), 1.01.

a) Case law

(1) Purpose

The purpose of an opening statement is to advise the jury of what each party expects the evidence to prove, including a discussion of reasonable inferences to be drawn from the evidence. People v. Sutton, 2004 WL 2272261 (Oct. 8, 2004)

(2) Latitude

Considerable latitude must be afforded counsel in opening statement or closing arguments. Northern Trust Co. v. Skokie Valley Community Hosp., 81 Ill. App. 3d 1110 (1st Dist. 1980); Augenstein v. Pulley, 191 Ill. App. 3d 664 (5th Dist. 1989)

(3) What the evidence will show

Counsel should be permitted to set forth on opening statement his theory as to amount of damages the evidence will show, and to set forth on closing argument the amount of compensation he deems proved and warranted under the evidence. Turner v. Wallace, 71 Ill. App. 2d 160 (3rd Dist. 1966).

(4) Good faith commentary

The comments made by an attorney in an opening statement concerning evidence to be introduced at trial are not improper if made in good faith and with reasonable belief that the evidence is admissible, although the intended proof referred to is later excluded. Dowd & Dowd, Ltd. v. Gleason, 352 Ill. App. 3d 365 (1st Dist. 2004).

(5) Admissible evidence

Opening statement must be based on the admissible evidence, not the evidence that expert relied on which was inadmissible. Rios v. City of Chicago, 331 Ill. App. 3d 763 (1st Dist. 2002).

(6) Out but in

Counsel's commentary that was admission of fault prevented showing some evidence was clearly improper but violation did not merit a new trial. Kinzinger v. Tull, 329 Ill. App. 3d 1119 (4th Dist. 2002).

(7) What you can't do:

Cannot argue evidence was tampered with unless you can substantiate it. Schaffner v. Chicago & N.W. Trans. Co., 129 Ill.2d 1 (1987).

Improper to ask jurors to step into the shoes of a party in rendering their decision. Robinson v. Wieboldt Stores, Inc., 104 Ill. App. 3d 1021 (1st Dist. 1982).

2. When is it conducted?

a) Illinois Supreme Court Rule 235

As soon as the jury is empanelled the attorney for the plaintiff may make an opening statement. The attorney for the defendant may immediately follow with an opening statement. An opening statement may not be made at any other time, except in the discretion of the trial court.

3. How long can it be?

An opening statement is to be a summary of what the evidence is intended to show. It will vary in length depending on how much evidence will be presented at trial. A simple automobile case with no liability arguments and simple damages might have an opening statement that takes 10 minutes. A complex product

liability case with multiple defendants might have an opening that takes 90 minutes. In most cases, less is more.

4. Use exhibits

One of the most basic mistakes young lawyers make is not using exhibits during opening statements. Exhibits have a natural way of breaking up long, monotonous statements and making them more interesting. It has been said that we remember more than 80% of what we learn visually (see Melvin M. Belli, MODERN TRIALS (2d ed. 1982)) so any time a lawyer can use exhibits to enhance her presentation, she should.

However, there is one caveat. Make sure you obtain permission from the Court (and preferably a written order) to use the exhibits before you start your opening statement. Failure to do so may not be reversible but can certainly cause innumerable headaches if you prevail. For an example, see Velarde v. Illinois Central Gulf, Co., 2004 WL 2546825 (Nov. 8, 2004) (day in the life film used in voir dire and opening not disclosed on timely basis).

G. Presentation of Evidence at Trial

Perhaps it's obvious, but the primary purpose of evidence at trial is to win the case. As Steven Covey says in his best seller, 7 Habits of Highly Effective People, "start with the end in mind." This means that plaintiff's

attorneys need to remember what it is that must be proved.

Most cases involve disputes over liability and damages. Therefore, the attorney must present evidence on every element of damage and every aspect of liability in order to prevail.

Organization is important. Several commercial publications offer guides on how to analyze and prove elements of each and many are useful. However, a nearly free resource is overlooked on many occasions – the jury instructions.

It is so obvious; why don't more trial lawyers don't use jury instructions to organize their presentations? The jury will be instructed on a pre-determined set of rules. They lay out the elements of the case that the plaintiff is required to prove. They spell out the elements of damage. And most importantly, the jury gets to use them during deliberations.

In using the instructions, plaintiff's attorneys should use the phraseology from the instructions themselves. If the liability issue is negligence, ask your questions using the definition of negligence from the instructions. If the damages issue is loss of normal life, quote the jury instruction when asking your questions.

The use of the instructions in your questioning serves two purposes. First, it shows the jury (in advance)

that you know the law and want to work within it to prove your case. That builds your credibility and if the jury thinks you are credible, more often you are going to win.

Second and equally important, psychologically the terms the jurors will hear in the instructions from the judge will resonate. The "aha!" occurs – "I remember him asking a question about that." This gives a common theme to your case and ties the whole case into a nice package.

H. Use of Demonstrative Evidence and Exhibits

1. Importance

The importance of using exhibits at trial cannot be overstated. No matter how dry the topic, no matter how boring the witness, exhibits ALWAYS bring the topic to life. According to Nielsen Media Research, Americans watch an average of 4 hours of television every day. This same research group found that an average American child spent more time watching TV in 2001 (1,023 hours) than he or she did in school (900 hours). Likewise, most jurors are accustomed to watching television in 10 to 15 minute bites. Remember, your favorite sit-com was only 30 minutes and had two breaks. The use of exhibits breaks up the trial and makes the case more tangible.

2. Real Evidence v. Demonstrative Evidence

Real evidence – this is the actual evidence of the case. It can be medical records, the car involved in the crash, or the pathology slides at issue in a medical malpractice case.

Demonstrative evidence – this is not real but it is not fake either. It is typically a summary or representation of real evidence. For example, it is impossible to show what plaintiff's spine looks like so an anatomically-correct model is a demonstrative exhibit that can be used. Likewise, it is often impossible to present thousands of pages of records showing lab values

in a medical malpractice case but a simple summary can bring that evidence to life.

3. Real Evidence

a) Foundation

Someone must be called to lay the foundation for the object. In other words, someone must testify that this object is what the plaintiff claims it is.

b) Examples

(1) Business Records

Illinois Supreme Court Rule 236

(a) Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind.

(b) Although police accident reports may otherwise be admissible in evidence under the law, subsection (a) of

this rule does not allow such writings to be admitted as a record or memorandum made in the regular course of business.

(2) Display of Personal Injuries

In cases in which a plaintiff is left maimed or otherwise has injuries which can be seen, display of those injuries is appropriate, even if gruesome. Generally this is considered the plaintiff's right. Stegall v. Carlson, 6 Ill. App. 2d 388 (1955).

4. Demonstrative Exhibits

a) Foundation and admissibility

(1) Foundation – there must be testimony that the exhibit is a fair and accurate representation of those things it tries to portray.

(2) Admissibility – demonstrative evidence has no probative value in and of itself. Therefore, courts consider whether the demonstrative evidence offered is relevant, fair, and assists the trier of fact in understanding the witness' testimony. Whether a particular exhibit is admitted lies within the discretion of the trial court. Bachman v. General Motors Corp., 332 Ill. App. 3d 760 (4th Dist. 2002).

b) Types

(1) Photographs and videos

Photographs and videos may be real evidence and they may be demonstrative. For example, a photograph of the damage to the car in an automobile crash can be considered real.

(2) Animations

The computer is a powerful tool for trial lawyers. Demonstrative exhibits using computer animation can make accidents come to life. For example, in a product liability case, an animation might show how the defective product injured the plaintiff.

(3) Summaries

Often these can be the most powerful of all exhibits. People rarely can wrap their minds around thousands of pages of records but can readily understand to a one-page demonstrative summary of those same records. As was noted by the Court in Murray v. Kleen Leen, Inc., 41 Ill.App.3d 436 (5th Dist. 1976), "[W]here the records to be examined are voluminous and the facts to be testified to may be ascertained by calculations, then a competent person who has examined the records may testify thereto, as this is the only method of intelligible presentation to the jury."

(4) Medical models and diagrams

Few types of demonstrative exhibits are used more than medical models and drawings. These can range from simple black and white diagrams to complicated working models. Whatever is used, it still must meet the foundational requirements for demonstrative evidence. Preston ex rel Preston v. Simmons, 321 Ill. App. 3d 789 (1st Dist. 2001).

(5) Other Models

(a) Scene

Scaled diagram of the scene drawn by police officer was admissible as demonstrative exhibit. Stenger v. Germanos, 265 Ill. App. 3d 942 (1st Dist. 1994).

(b) Planes, trains, automobiles

Working models of machinery and mock-ups are admissible in evidence when their admission tends to further clarify a subject or question in issue. Sherman by Sherman v. City of Springfield, 111 Ill.App.2d 391 (4th Dist. 1969).

(c) Lines of sight

(d) Drawings

A hand-drawn diagram of an accident scene showing the intersection where the accident occurred has been found admissible. Burke v. Toledo, Peoria & Western R.R., 148 Ill.App.3d 208 (1st Dist. 1986).

(e) Courtroom demonstrations

A courtroom demonstration showing that a three-year-old could reach the blades of a machine was held to be within the discretion of the trial court. Yassin by

Yassin v. Certified Grocers of Illinois, Inc.,
150 Ill.App.3d 1052 (1st Dist. 1986).

I. Handling Defense Experts

Perhaps the height of good lawyering is the ability to effectively handle an adverse expert witness. These individuals are usually very well versed in the methods of effective testimony. They rarely waiver from their opinions. In reality, they are professional witnesses as well as experts in their fields. That makes the task of cross-examination daunting at best.

Nevertheless, effective cross-examination can and should be made. Below are listed some ideas that will help even the novice do a good job of effectively handling the expert.

1. Start before the expert is disclosed

In every major case, the defense will hire an expert. Often from the initial pleadings, a plaintiff's attorney can sense where the defenses will be. Certainly by the time your client is presented for deposition, the defenses to the case should be crystal clear.

Make your best effort to destroy those defenses early in the case. Ask the witnesses questions relevant to those defenses and, hopefully, have them discredit them.

2. Demand opinions

When the expert is disclosed, make sure his or her opinions are disclosed. Don't tolerate wishy-washy opinions. The rule requires specificity and you should

demand it. Bring motions if you have to but get specific, detailed opinions.

3. Get the file

The disclosure of the expert witness means that the expert has reviewed materials. You are entitled to a copy of those materials. Get EVERYTHING. Get every piece of paper, note, x-ray, and picture the expert has reviewed. Then when you have it, Bates stamp each page so you know you have everything.

4. Get background

It is very likely the expert has a history. You want that information. Check the local court databases to see if he has been sued. Is he incorporated? Is he a member of any associations? Has he written any articles? Get them.

If the expert has testified in prior cases, ask for a list of them. Run a jury verdict search on the expert and find the cases she has testified in. Get those depositions and talk to those lawyers for their impressions.

5. Prepare, prepare, prepare

Nothing beats preparation. You need to know as much as you can about the topic about which the expert will testify. Starting reading up on the topic. Hire your own consultant to teach you the subject. Do whatever it takes so that when you walk in to the deposition, you know the topic.

6. Discovery Deposition

At the deposition, start with a list of opinions. Get the expert to provide you with the opinions in the deposition. Start with that list and work from there.

With the opinions in hand, start attacking them one at a time. There are holes, weakness, and problems. Expose them and get acknowledgement that there is an issue with that topic.

Get concessions. All experts concede something. Find areas of agreement and work with those. This can be critical.

Also at the deposition, mark the file with which you were provided. Get the expert to agree that is all the material he reviewed and prepared AND that nothing was omitted or destroyed.

7. Consider rebuttal

Many lawyers let the retained witness' testimony go unanswered. It is often prudent to retain a rebuttal expert to contradict the critical portions of the expert's testimony.

8. Trial

First, limit the opinions. Perhaps some of the opinions are inadmissible. Bar them. Perhaps the best you can do is limit the opinions to those disclosed.