6 Trial and Evidentiary Considerations in Wrongful-Death Actions

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I. [6.1] INTRODUCTION

While trying a wrongful-death action may seem the same as trying a personal injury case, there are significant differences that impact trial preparation, strategy, and presentation. For example, what if the only eyewitness to an accident resulting in a death turns out to be the defendant in a civil suit brought by the deceased's personal representative? Will the defendant be allowed to testify over objection? Or, if there are no surviving eyewitnesses at all, can a wrongful-death case succeed? And how does the plaintiff establish damages in a wrongful-death case? What special problems do defendants encounter in wrongful-death cases?

This chapter addresses these and other questions as well as some of the unique aspects of trying a wrongful-death case, while incidentally offering some information applicable to any type of case. For example, in the complex process of preparing for a wrongful-death trial, just like preparing for the simplest of cases, much emphasis should be placed on organizing the evidence and law, argument and witnesses, and conforming to the proper procedures and applicable court rules.

II. [6.2] ROLE OF JURY SCIENCE

Jury science is playing an increasingly important role in litigation generally and wrongful-death litigation in particular.

> **In high-stakes jury trials, lawyers rely on jury consultants to gain a winning edge. Jury consultants provide insight into juror behavior and help attorneys craft arguments and trial themes that will persuade juries. Jury consultants also use empirical data to predict juror predispositions and provide invaluable assistance in voir dire and the jury selection process. Jury consultants have grown in popularity due to highly publicized trials including the O.J. Simpson, Scott Peterson and Martha Stewart trials.** Sally Kane, *10 Hot Legal Careers for Non-Lawyers* (About.com, 2010).

Hiring jury consultants and conducting "mock" trials are now established methods employed by some trial attorneys trying to predict or influence a trial's outcome. Other techniques, such as shadow juries are also becoming increasingly popular. Jury science is a growing field, and when it comes to helping litigants know and influence their juries, this science is advancing rapidly. Gaining insight into the likes, dislikes, and predispositions of a venire or a jury gives the attorney the opportunity to develop a more informed trial strategy.

While the incorporation of jury science into trial preparation can be costly, the benefits in many wrongful-death cases outweigh the costs. Before the commencement of trial, focus groups or "mock" trials might be conducted to help lawyers and parties better understand the power or lack of power of their evidence and arguments. Moreover, it is no longer unusual for jury consultants to assist with developing arguments and demonstrative evidence, and they often attend the trial to assist with voir dire and provide continuous feedback thereafter.

No one, including jury consultants, has a fool proof crystal ball that can predict the outcome of jury deliberations in a wrongful-death case. However, trial lawyers in all cases need all the information they can get about how the decision makers are likely to view the case; and this is especially true in wrongful-death cases. Some people believe wrongful-death plaintiffs, even those with clearly meritorious cases, are wrongdoers themselves seeking blood money. What jury consultants can do is help trial lawyers ferret out such issues and develop strategies to deal with them.

III. CONFERENCES BEFORE JURY SELECTION

A. [6.3] In General

At the final pretrial conference or on the day of trial before jury selection begins, well-prepared trial attorneys have the opportunity to advance their client's position with the court. As in all other facets of trial, preparation for this is critical because this conference with the trial judge can set the tone for the rest of the trial.

Counsel for the plaintiff in a wrongful-death case must be prepared to introduce the decedent to the court and quickly state the central facts of the case, the legal basis for recovery, the items of legally compensable damages, and the negotiation history. Defense lawyers, on the other hand, should be ready to rapidly identify the disputed issues. It is common for trial judges to get involved in settlement discussions at this late phase and because most judges have less experience with wrongful death than personal injury damages evaluation, counsel should be prepared to explain the elements of recoverable damages and explain the evidence on each element in more detail than might be called for in an injury case. Both lawyers should also be in a position to privately and candidly discuss with the court not only the strengths and weaknesses of their client's position, but also the extent to which the client does or does not understand the risks. Above all, the trial lawyers who have lived with the case a for a long time and know more about it than the judge could about the case can fulfill their duties to the court and public, without sacrificing their duty of zealous representation of their clients, by quickly and accurately providing the judge with the information the judge will need to do the best job possible either assisting the parties to settle the case or presiding over the trial.

The last pretrial conference with the court before jury selection is also an opportune time for the trial attorney to alert the court to any scheduling or trial management issues, determine what procedures will be followed at each stage of the trial, and alert the judge to any other issues requiring special attention. Of course, counsel must also review and have copies available of all applicable rules. In state court, these include the new Illinois Rules of Evidence, the Illinois Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.*, the Illinois Supreme Court Rules, the local court rules, and the rules and procedures, if any, followed by the trial judge. In federal court, these include the Federal Rules of Evidence, the Federal Rules of Civil Procedure, the district court local rules, and the rules and procedures, if any, followed by the trial judge.

The last pretrial conference with the court before jury selection may also be the right time for dealing with any objections to the use of visual aids or exhibits during opening statements.

B. [6.4] Preparation — What To Bring

Some of the documents trial attorneys might prepare and bring to the final pretrial conference or day of trial preliminary conference include:

1. a statement of the case;
2. motions in limine;
3. other motions;
4. trial briefs;
5. notices to produce at trial;
6. draft jury instructions;
7. a pretrial memorandum;
8. exhibits; and
9. any other items requested by the court.

These items are discussed in more detail in §§6.5 – 6.13 below.

1. [6.5] Statement of the Case

Although a statement of the case is not required by any provision of the Code of Civil Procedure or the Illinois Supreme Court Rules, some local rules and most judges require a statement of the case. For example, one Illinois judicial circuit's rule states:

> **Unless the court orders otherwise, in all jury cases the State's Attorney in criminal cases, and the plaintiff's attorney in civil cases, shall prepare and submit to the Court and opposing parties a Statement of the Nature of the case to be read by the Court to the venire prior to voir dire examination. The statement shall include the time, date, and place of the alleged occurrence or offense and a brief description thereof, the name of the parties involved and their counsel and a list of witnesses, occupation if relevant and town of residence, whom the parties expect to call. Opposing counsel may suggest amendments to the statement prior to it being read to the venire.** 19th Judicial Circuit Court Rule 5.03.

Rule 5.03 is a clear statement of the purpose of a statement of the case and provides excellent guidance on how to prepare one for jurisdictions which have no rule of their own. The rule dictates that it is the plaintiff's attorney's job to prepare and submit the first draft of the statement, while defense counsel should be prepared to offer any desired changes.

For example, in a wrongful-death case the author tried in Winnebago County, this statement of the nature of the case was agreed to by the parties and read to the venire at the outset of jury selection:

This lawsuit arises out of a boating accident on June 30, 2001 on Clear lake, Wisconsin. Amanda Backes, age 9, was being pulled on an inner tube behind a power boat driven by Sonnie Smith. Joe Gibson was operating a Bombardier Sea-Doo personal watercraft on the lake. A collision occurred between the inner tube and the personal watercraft, and Amanda Backes died from the injuries. This lawsuit is brought by the parents of Amanda Backes, seeking money damages from Sonnie Smith as the operator of the power boat, Joe Gibson as the operator of the personal watercraft, and Bombardier, Inc. as the designer and manufacturer of the Sea-Doo personal watercraft. Bombardier, Inc. has also filed a claim against the spotter in the power boat, Yvette Oliver.

2. [6.6] Motions in Limine

A "motion in limine" has been defined as "[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial." BLACK'S LAW DICTIONARY, p. 1109 (9th ed. 2009).

> **One difficulty common to all motions *in limine* is that they occur — by definition — out of the normal trial context, and resolving such a motion requires the trial court to determine what that context will be. Thus, the court must receive offers of proof consisting either of live testimony or counsel's representations that the court finds sufficiently credible and reliable. Because a motion *in limine* typically asks the court to bar certain evidence, the supreme court has deemed such motions "powerful weapons" and has urged caution in their use. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill.2d 545, 550, 416 N.E.2d 268, 271, 48 Ill.Dec. 237 (1981).** *People of State of Illinois v. Owen,* 299 Ill.App.3d 818, 701 N.E.2d 1174, 1178, 233 Ill.Dec. 900 (4th Dist. 1998).

Motions in limine must be submitted in writing. *Cunningham v. Millers General Insurance Co.,* 227 Ill.App.3d 201, 591 N.E.2d 80, 83, 169 Ill.Dec. 200 (4th Dist. 1992); *Lundell v. Citrano,* 129 Ill.App.3d 390, 472 N.E.2d 541, 545, 84 Ill.Dec. 581 (1st Dist. 1984). The relief requested in a motion in limine should be specific. *E.g., Reidelberger, supra.* The moving party bears the burden, at the risk of waiver, to obtain a ruling from the court on the motion. *Department of Public Works & Buildings of State of Illinois v. Roehrig,* 45 Ill.App.3d 189, 359 N.E.2d 752, 760, 3 Ill.Dec. 893 (5th Dist. 1976).

Rulings on motions in limine are interlocutory in nature and may be changed during trial. *Cunningham, supra; Romanek-Golub & Co. v. Anvan Hotel Corp.,* 168 Ill.App.3d 1031, 522 N.E.2d 1341, 1347, 119 Ill.Dec. 482 (1st Dist. 1988). Trial courts have broad discretion and can deny motions in limine and instead consider the evidentiary issue only after the contested evidence is offered in the normal course of trial. *McMath v. Katholi,* 304 Ill.App.3d 369, 711 N.E.2d 1135, 1140, 238 Ill.Dec. 474 (4th Dist. 1999), *rev'd on other grounds,* 191 Ill.2d 251 (2000). To avoid any risk of waiver, counsel should make an offer of proof as to any matter

barred by the court's in limine rulings and should, perhaps outside the hearing of the jury, move to admit the evidence excluded at the appropriate point in the trial. Similarly, if the court rules in limine that evidence will be admitted, counsel opposing the introduction of the evidence should renew the objections on the record at the appropriate point during the trial. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.,* 163 Ill.2d 498, 645 N.E.2d 896, 898, 206 Ill.Dec. 644 (1994).

Motions in limine have at least two principal advantages. First, the attorney has time before trial to carefully research, reason, and draft the arguments relating to significant evidentiary issues. Second, if the judge rules on the motion, the attorneys have the advantage of preparing the case knowing the rulings. For a general discussion of motions in limine, see Christopher B. Mead, *Motions in Limine: The Little Motion That Could,* 24 Litig., No. 2, 52 (Winter 1998).

Attorneys trying wrongful-death cases should consider several strategic issues before filing a motion in limine. For example, by filing a motion in limine concerning the admissibility of contested evidence, counsel provides the opponent with additional time to respond to the evidentiary arguments and also to counter the evidence at trial. Similarly, the opposition will benefit from having advance notice of counsel's challenges to its evidence and may be in a better position to respond than if forced to respond in the heat of trial. Moreover, filing the motion may not result in any greater degree of certainty because the judge is not obligated to rule on a motion in limine before trial. And since any rulings are interlocutory, the trial judge may have a change of heart during trial. These and other competing considerations should be weighed for each substantive motion in limine before deciding whether it should be brought.

When a motion in limine is filed, the trial attorney should prepare a draft order granting the relief requested to save time and to ensure that the order is sufficiently comprehensive to provide the desired protection. The order should require that opposing counsel admonish all witnesses not to refer to any matters that have been barred and specify that the order applies to all phases of trial including voir dire.

The subject matter of a particular motion in limine is a function of the evidence, legal theories, and cast of characters involved. Some motions are no different from those filed in personal injury actions. For example, a corporate defendant may wish to move in limine to bar reference to the size or financial condition of the corporation. Other motions apply only to wrongful-death cases, such as motions seeking to disqualify evidence under the Dead-Man's Act, 735 ILCS 5/8-201, *et seq.* See §§6.24 – 6.29 below.

Examples of motions in limine that may be useful in wrongful-death cases follow. This list is meant to be illustrative, not exhaustive. The facts of the case, its problems, and counsel's creativity are the most important guideposts.

To bar the testimony of a witness who is incompetent to testify under the Dead-Man's Act. The so-called Dead-Man's Act is discussed in detail in §§6.24 – 6.29 below. It is appropriate for counsel for the personal representative of the deceased to raise Dead-Man's Act objections by motion in limine. *See Kelley v. First State Bank of Princeton,* 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist. 1980).

To bar evidence of the fault of the plaintiffs' employer, parties who have settled, and nonparties. 735 ILCS 5/2-1117 governs joint liability and sets forth Illinois' form of modified joint and several liability, which is sometimes referred to as the "25 percent rule." The statute specifies who is considered in the §2-1117 fault allocation — "the defendants sued by the plaintiff, and any third party defendant except the plaintiff's employer." *Id.* Moreover, the Illinois Supreme Court has held §2-1117 does not permit apportionment of fault to settling defendants. *Ready v. United/Goedecke Services, Inc.,* 232 Ill.2d 369, 905 N.E.2d 725, 328 Ill.Dec. 836 (2008) (plurality op.).

Thus evidence of the fault of the plaintiffs' employer, parties who have settled, and nonparties is irrelevant to allocation of fault under §2-1117 and, in some cases, may be an appropriate topic for a motion in limine. However, the law has been rapidly developing in this area. For example, in *Ready v. United/Goedecke Services, Inc.,* 238 Ill.2d 582, 939 N.E.2d 417, 422, 345 Ill.Dec. 574 (2010) (plurality op.), the Illinois Supreme Court plurality found the trial court erred in barring evidence of a nonparty whose conduct the defendant argued was the sole proximate cause of an accident resulting in wrongful death:

> **United was entitled to present evidence to support a sole proximate cause jury instruction, and the question becomes whether that evidence would have entitled United to such an instruction. . . . There must be some evidence in the record to justify an instruction, and the second paragraph of IPI Civil (2000) No. 12.04 should be given where there is evidence, albeit slight and unpersuasive, tending to show that the sole proximate cause of the accident was the conduct of a party other than the defendant.**

The plurality went on to review the evidence, however, and determine it was insufficient to justify the sole cause jury instruction and thus the trial court's error in excluding the evidence in limine was deemed harmless. 939 N.E.2d at 423 – 424. *See also Nolan v. Weil-McLain,* 233 Ill.2d 416, 910 N.E.2d 549, 331 Ill.Dec. 140 (2009); *Leonardi v. Loyola University of Chicago,* 168 Ill.2d 83, 658 N.E.2d 450, 212 Ill.Dec. 968 (1995).

Absent *any* evidence the sole proximate cause of the wrongful death was the fault of the plaintiffs' employer, parties who have settled, or nonparties, under *Ready, supra; Nolan, supra;* and *Leonardi, supra,* it would seem appropriate to grant a motion in limine seeking to preclude such evidence and argument. However, the latest word seems to be that such motions should be denied when there is *some* evidence, "albeit slight and unpersuasive, tending to show that the sole proximate cause of the accident was the conduct of a party other than the defendant." *Ready, supra,* 939 N.E.2d at 422. Nevertheless, "slight and unpersuasive" evidence does not appear to be enough to qualify for a jury instruction on nonparty sole proximate cause, and, without one, a nonparty sole proximate cause argument would be clearly inappropriate and a proper topic for a motion in limine. Clearly, the last word in this thorny area of the developing law has not been written.

To allow and set the parameters of counsel's participation in jury selection. Illinois Supreme Court Rule 234 requires the court to conduct the voir dire examination of prospective jurors, authorizes the court to allow parties "to submit additional questions to it for further inquiry

if it thinks they are appropriate[,]" and states the court "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." A motion in limine is an appropriate means to clarify with the court the role, if any, counsel will be allowed in direct questioning of jurors. The Illinois Supreme Court has clarified the meaning of S.Ct. Rule 234 in construing the identical language of S.Ct. Rule 431 (which applies in criminal cases):

> **Thus, what the rule clearly mandates is that the trial court consider: (1) the length of examination by the court; (2) the complexity of the case; and (3) the nature of the charges; and then determine, based on those factors, whatever direct questioning by the attorneys would be appropriate. Trial courts may no longer simply dispense with attorney questioning whenever they want. We agree with the *Allen* court's observation that the "the trial court is to exercise its discretion in favor of permitting direct inquiry of jurors by attorneys." [***People of State of Illinois v. Allen,*** 313 Ill.App.3d, 730 N.E.2d 1216, 1221, 246 Ill.Dec. 751 (2d Dist. 2000)].We are not prepared to say, however, that it is impossible to conceive of a case in which the court could determine, based on the nature of the charge, the complexity of the case, and the length of the court's examination, that no attorney questioning would be necessary. . . .**
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> **The rule does not state that the court shall allow the attorneys to question the entire venire in every case. Rather, it provides that the court shall allow whatever attorney questioning it deems proper after considering the factors set forth in the rule.** *People of State of Illinois v. Garstecki,* 234 Ill.2d 430, 917 N.E.2d 465, 474, 334 Ill.Dec. 639 (2009).

Evidence of consumption of alcohol or drugs without evidence of intoxication. Evidence of consumption of alcohol can be unfairly prejudicial when there is no evidence that the consumption played any causal role in the accident. This type of evidence is probably best dealt with by a motion in limine. *See Fraher v. Inocencio,* 121 Ill.App.3d 12, 459 N.E.2d 11, 76 Ill.Dec. 602 (4th Dist. 1984).

Collateral source payments. Evidence that an injured person's or decedent's economic losses have been paid by a third party independent from the tortfeasor is generally inadmissible under the collateral-source rule. *Arthur v. Catour,* 216 Ill.2d 72, 833 N.E.2d 847, 851, 295 Ill.Dec. 641 (2005). Such matters may be appropriate topics for a motion in limine. The theory behind this rule is to keep the jury from learning anything about collateral income that could influence its decision. *Boden v. Crawford,* 196 Ill.App.3d 71, 552 N.E.2d 1287, 142 Ill.Dec. 546 (4th Dist. 1990). One of the most common applications of the rule is to prevent defendants from introducing evidence that a plaintiff's losses have been compensated, even in part, by insurance. *Arthur, supra,* 833 N.E.2d at 852. Therefore, the plaintiff may claim the entire amount initially billed by the healthcare provider for services rendered even if the provider accepted payment of a reduced rate from the plaintiff's insurer. 833 N.E.2d at 849. Although in certain medical malpractice cases the judge may reduce the plaintiff's verdict after trial to reflect payment by collateral sources pursuant to 735 ILCS 5/2-1205 and 5/2-1205.1, evidence of the collateral source payments remains inadmissible during the trial. *See Boden, supra.*

Nontaxability of the award. In state court, the jury is normally not told that the wrongful-death award is not taxable. *Klawonn v. Mitchell,* 105 Ill.2d 450, 475 N.E.2d 857, 859, 86 Ill.Dec. 478 (1985). The opposite rule is followed by the federal courts in the Seventh Circuit, even in diversity cases. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979,* 701 F.2d 1189, 1200 (7th Cir. 1983). When the jury will not be instructed about the nontaxability of the award, a motion in limine is appropriate. *Id.*

United States District Court Judge Jeanne E. Scott of the Central District of Illinois most recently summarized the present state of the law on this issue:

> **In diversity cases, where state law decisions on jury instructions or the admissibility of evidence are based on substantive state law, federal courts must apply that state law. *Id.* Where such decisions are based only on procedural law, or on incorrect interpretations of federal law, federal law governs. *Id.* Under federal law, jurors are instructed that their lost wages damage award is not subject to taxation. *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979,* 803 F.2d 304, 314 (7th Cir. 1986) (Air Crash II). Thus, whether such an instruction — and argument or evidence related to it — is proper here depends on whether the Illinois prohibition is based on substantive law.**
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> **In 1983, in *Air Crash I,* the Seventh Circuit held that Illinois' ban on a tax instruction was not substantive. *Air Crash I,* 701 F.2d at 1200. Specifically, it concluded that in *Hall v. Chicago & North Western Railway,* the Illinois Supreme Court had prohibited such an instruction on two procedural bases and one misunderstanding of federal law. [*Hall v. Chicago & North Western Ry.,* 5 Ill.2d 135, 125 N.E.2d 77 (1955)]. In 1985, the Illinois Supreme Court issued another decision on this issue. *See* [*Klawonn v. Mitchell,* 105 Ill.2d 450, 475 N.E.2d 857, 86 Ill.Dec. 478 (1985)]. The Illinois Supreme Court did not address *Air Crash I,* but it noted that it disagreed with other federal cases allowing this instruction and reaffirmed its procedural bases for banning the instruction. See *Klawonn,* 475 N.E.2d at 860 – 61. In 1986, in *Air Crash II,* the Seventh Circuit reaffirmed, in *dicta,* its conclusion that Illinois had no substantive reason for refusing the instruction. *Air Crash II,* 803 F.2d at 315. It did not address *Klawonn.***
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> **District courts in this circuit have held that *Klawonn* did not change the state of the law in Illinois, however, and have continued to reject motions in limine calling for a ban on tax instructions. *See, e.g., Opio v. Wurr,* 901 F.Supp. 1370, 1373-74 (N.D. Ill. 1995); *see also Couch v. Village of Dixmoor,* 2006 WL 3409153, at *2 (N.D.Ill. Nov. 27, 2006); *Nichols v. Johnson,* 2002 WL 826482, at *1 (N.D. Ill. May 1, 2002). Thus, this Court concludes that it must follow federal law. It follows that argument or evidence on this issue is allowed as well.** *Cimaglia v. Union Pacific R.R.,* No. 06-3084, 2009 WL 499287 at **8 – 9 (C.D.Ill. Feb. 29, 2009).

Other motions in limine to consider include barring reference that the plaintiff may ask or may have asked for a greater amount of money than the plaintiff actually expects to receive (*Kallas v. Lee,* 22 Ill.App.3d 496, 317 N.E.2d 704 (1st Dist. 1974); *Carlasare v. Wilhelmi,* 134

Ill.App.3d 1, 479 N.E.2d 1073, 89 Ill.Dec. 67 (1st Dist. 1985)), barring reference that the plaintiff and the defendant have discussed the possibility of settling the plaintiff's claim (*Barkei v. Delnor Hospital,* 176 Ill.App.3d 681, 531 N.E.2d 413, 126 Ill.Dec. 118 (2d Dist. 1988)), barring any evidence concerning opinions not raised by the defendant's experts in timely filed answers to S.Ct. Rule 213 interrogatories and in deposition testimony, and barring the defendants from calling witnesses other than those listed in interrogatory answers.

3. [6.7] Other Motions

Frequently, there are problems with the pleadings and other miscellaneous legal matters to be resolved at the outset of trial. Written motions pertaining to such matters are appropriate.

In addition, parties commonly file motions, usually uncontested, to exclude nonparty witnesses from attending the trial while other witnesses are testifying. *E.g., People of State of Illinois v. Mack,* 25 Ill.2d 416, 185 N.E.2d 154 (1962).

The new Illinois Rules of Evidence cover the topic:

> **At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by law to be present.** Ill.R.Evid. 615.

On the plaintiff's side in a wrongful death, the law is clear that "[t]he real party in interest cannot be excluded under an exclusionary order even though he is not named as a party." 1 Robert S. Hunter, TRIAL HANDBOOK FOR ILLINOIS LAWYERS, CIVIL §17.21, p. 253 (7th ed. 1997). *See also Grant v. Paluch,* 61 Ill.App.2d 247, 210 N.E.2d 35 (1st Dist. 1965). Therefore, in a wrongful-death case, the statutory beneficiaries, as real parties in interest, are entitled to attend the entire trial in addition to the personal representative of the deceased's estate.

4. [6.8] Trial Briefs

Whether the rules require it or not, well-prepared trial lawyers usually supply the court with one or more trial briefs before the trial begins. Trial briefs can be particularly important in wrongful-death cases because these cases are less common than personal injury cases.

Usually, there is no set form for trial briefs. They range from a full treatment of the facts and law to short briefs on particular issues of law likely to arise during trial. While the lawyer has lived with the case for months or years, the judge is called on to make important rulings soon after his or her first introduction to the facts of the case. Consequently, trial briefs, like all presentations to the trial judge, should be concise, candid, and accurate. Liberal use of argument headings is a good practice, so that the judge may skim the brief and stay oriented to the main points. The brief should not dwell on obvious points of law. Contested points of law, on the other hand, should be explained in detail with citations to the crucial statutes and cases.

Trial briefs should not be written in haste just before trial. Instead, beginning with the first interview with the client and continuing through all stages of trial preparation, the important issues of law should be identified and organized.

Trial briefs in wrongful-death cases should specifically address the problems of the case. For example, if there will be no eyewitness testimony regarding the critical events, the plaintiff should prepare a brief explaining why the evidence is sufficient to withstand a motion for directed verdict. If the Dead-Man's Act, 735 ILCS 5/8-201, is not waived, the court should be informed of this fact in a trial brief and persuaded that the case can be proved on that basis. When defending such a case, counsel should prepare a trial brief concerning the inapplicability of the Act or waiver. If at trial the plaintiff unintentionally waives the Dead-Man's Act objection then argues he or she did not, the defense attorney will have a better chance of a favorable ruling on waiver if a strong trial brief prepares the judge to be on the alert for a waiver.

There is an advantage in some cases to separate trial briefs on each significant legal issue. Since opposing counsel may not anticipate all issues, the briefs can be used on an as-needed basis as issues arise during trial, without overeducating an unprepared opponent.

5. [6.9] Notices To Produce at Trial

Supreme Court Rule 237(b) states:

> **The appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of . . . documents or tangible things. . . . If the party or person is a nonresident of the county, the court may order any terms and conditions in connection with his or her appearance at the trial that are just, including payment of his or her reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in Rule 219(c) that may be appropriate.**

The notice to produce at trial can be used for exhibits as well as for compelling witnesses to appear for adverse examination. Pursuant to S.Ct. Rule 237(b), parties may also be required to bring witnesses under their control to Illinois from other states.

Attorneys should review their Rule 237 requests with opposing counsel and obtain responses on the record before jury selection begins. The court will usually not be present when this is done. In addition, lawyers should prepare any objections to the opponent's notice to produce and be prepared to produce all responsive items and witnesses. Any remaining issues requiring rulings can be brought to the court's attention at the conference before jury selection.

6. [6.10] Draft Jury Instructions

Trial lawyers should bring proposed jury instructions and verdict forms to the conference before jury selection, whether or not required by the rules. S.Ct. Rule 239(a) provides:

Whenever Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law. Whenever IPI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given in that subject should be simple, brief, impartial, and free from argument.

There are pattern jury instructions concerning damages in wrongful-death actions and the Dead-Man's Act.

7. [6.11] Pretrial Memorandum

At the preliminary conference, the plaintiff should have available an up-to-date pretrial memorandum. A pretrial memorandum that succinctly states the basic facts, including theories of liability and a damages summary, is an excellent way to begin discussion of the case, even if the court elects not to discuss settlement.

8. [6.12] Exhibits

The trial attorney must determine which exhibits will be offered at trial. Originals and sufficient copies should be pre-marked. While some courts require this and others do not, trial lawyers should pre-mark and exchange exhibits whether or not required to do so since this can help keep otherwise able advocates from bumbling with exhibits at trial. Good exhibit management from the start helps lawyers protect their credibility.

A strong visual presentation is at least as important in wrongful-death as in personal injury cases. Exhibits can range from expensive computer models and graphs to inexpensive blowups. All require thought and practice. Increasingly, use of video, digital imaging, and computer simulation is altering the way cases are tried. It is crucial that attorneys today understand and use current technology to benefit clients. While some courts require and are set up for the modern digital trial — and there are more of them every year — many courts do not yet require use of electronic imaging and lack the equipment to properly display it. But it is easier and less expensive than ever for trial attorneys to present evidence using digital tools, and use of these tools is especially helpful in wrongful-death cases. Going digital is no longer optional in wrongful-death and other high stakes litigation.

Approximately 75 percent of what people learn comes visually, and only about 10 percent of what we learn comes verbally. See, *e.g.,* Thomas F. Parker, *Applied Psychology in Trial Practice,* 7 Def.L.J. 33 (1960). Twenty percent of information delivered visually is remembered after three days, while only 10 percent of information presented verbally is remembered after the same period of time. Yet 65 percent of information delivered both visually and verbally is remembered after three days. See, *e.g.,* Stanley E. Preiser, *Demonstrative Evidence in Criminal Cases,* 3 Trial Dipl.J. 30 (Winter 1980). Therefore, the importance of demonstrative exhibits cannot be overstated, and the trial team should determine well in advance of trial the types of demonstrative evidence to be used so that these exhibits can be prepared and reviewed for effectiveness long before a jury is seated.

Demonstrative evidence can be used if it is helpful to the jury and shows what it purports to show. *E.g., Cisarik v. Palos Community Hospital,* 144 Ill.2d 339, 579 N.E.2d 873, 162 Ill.Dec. 59 (1991). A trial court has the discretion to bar the use of demonstrative evidence that is inaccurate or would tend to mislead or confuse the jury. *E.g., Gill v. Foster,* 157 Ill.2d 304, 626 N.E.2d 190, 193 Ill.Dec. 157 (1993). For example, in *Barry v. Owens-Corning Fiberglas Corp.,* 282 Ill.App.3d 199, 668 N.E.2d 8, 217 Ill.Dec. 823 (1st Dist. 1996), a video taken during a surgical procedure was effectively used to illustrate the testimony of a thoracic surgeon and demonstrate abnormal lung tissue in a wrongful-death case arising out of asbestos exposure.

There are many other examples of the use of demonstrative evidence in wrongful-death cases. *E.g., Stenger v. Germanos,* 265 Ill.App.3d 942, 639 N.E.2d 179, 203 Ill.Dec. 140 (1st Dist. 1994) (use of diagram to assist jury in visualizing scene of accident); *Robles v. Chicago Transit Authority,* 235 Ill.App.3d 121, 601 N.E.2d 869, 176 Ill.Dec. 171 (1st Dist. 1992) (drawing depicting interlock system); *Grimming v. Alton & Southern Ry.,* 204 Ill.App.3d 961, 562 N.E.2d 1086, 150 Ill.Dec. 283 (5th Dist. 1990) (chart depicting itemization of damages claimed during closing argument).

9. [6.13] Items Requested by the Court

In addition to the items suggested in §§6.5 – 6.12 above, it is mandatory that counsel determine any special items that the court may require. These items, obviously, should be provided. Some judges assist lawyers by providing written lists of their rules or preferences. Attorneys who have tried cases before the judge are also good sources of information. It is appropriate to ask the judge directly about any special procedures to be followed. It may also help to find out what experience handling wrongful-death cases, if any, the court has.

C. [6.14] Checklist of Issues To Resolve at the Conference

Some of the matters that may be covered at the conference before jury selection include:

1. what the venire will be told in the court's opening remarks;

2. how voir dire will be conducted;

3. the number of peremptory challenges that will be allowed;

4. whether back-striking will be allowed;

5. motions in limine;

6. other necessary motions;

7. rulings on all pending motions;

8. whether use of exhibits during opening will be allowed;

9. the court's hours, procedures, and scheduling problems;

10. whether the case can be settled;

11. S.Ct. Rule 237 compliance conference with opposing counsel, usually just before or just after the conference with the court;

12. amendments to pleadings; and

13. stipulations.

IV. VOIR DIRE

A. [6.15] In General

To properly engage in voir dire, trial attorneys should begin with a clear concept of both the important traits of the ideal juror and the most feared traits. This knowledge, superimposed on a clear understanding of the rules, the judge's style, and human nature, may suffice in some cases. Increasingly, however, trial attorneys are going further, employing psychologists and other professionals to assist during jury selection.

The process by which venire members are questioned to determine their suitability to serve as jurors in a given case is called "voir dire," which is Law French for "to speak the truth." BLACK'S LAW DICTIONARY, p. 1710 (9th ed. 2009). The manner in which attorneys may conduct a voir dire examination rests within the discretion of the trial judge. S.Ct. Rule 234 states:

> **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.**

See People of State of Illinois v. Garstecki, 234 Ill.2d 430, 917 N.E.2d 465, 334 Ill.Dec. 639 (2009).

Wrongful-death actions invariably involve substantial damage claims. Accordingly, when a jury demand has been made, the wrongful-death action will be tried before a jury of 12. See 735 ILCS 5/2-1105(b). The court may direct that an additional one or two people be selected as

alternate jurors to be available to replace jurors who become unable to serve as jurors before the time the verdict is rendered. 735 ILCS 5/2-1106(b). To avoid the need for alternates, parties sometimes agree to waive alternates and stipulate that as few as ten remaining jurors at the conclusion of the case may decide it by unanimous verdict.

Implicit biases present a huge problem all counsel should be aware of. In a new article, United States District Court Judge Mark Bennett shed light into the dark closet of this the implicit bias problem starting with its definition:

> **Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. Indeed, social scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them.** Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions,* 4 Harvard L. & Pol'y Rev. 149 (2010).

This breaking news topic goes beyond the scope of this chapter. The reader is referred to the full text of Judge Bennett's article for more in depth study, available at http://hlpronline.com/wordpress/wp-content/uploads/2010/02/bennett_batson.pdf.

A judge's views and practices along with the local rules should be reviewed before voir dire. For example, Cook County Circuit Court Rule 5.3 provides:

> **(a) Order of calling jurors — Prospective jurors who are assembled in a central jury room shall be called into the jury box in the order in which they were drawn from the jury assembly room.**
>
> **(b) Examination of service cards — The attorney for any party may examine the official service record cards of prospective jurors before or during their interrogation.**

B. [6.16] Preparation

Preparing for voir dire in wrongful-death cases is similar to preparing for jury selection in personal injury cases; however, wrongful-death cases often involve substantial claims for noneconomic damages, and these may be poorly received by jurors inclined toward tort reform. For the plaintiff, removing such jurors for cause can be a challenge, and sometimes more peremptory challenges are needed than are available. And conditioning such jurors to be fair is easier said than done.

Trial lawyers should think long and hard about the types of people likely to view their case favorably or unfavorably. Then they must determine the questions needed to solicit the information and to condition jurors favorably to their case. Trial lawyers must also have a method to keep track of each of the venire members and their responses. Many attorneys have voir dire transcribed so that any error during voir dire can be preserved.

A detailed discussion on voir dire is beyond the scope of this chapter; for that, see Robert Marc Chemers, Ch. 2, *The Jury: The "Right" to It and the Selection of It,* ILLINOIS CIVIL PRACTICE: TRYING THE CASE (IICLE®, 2009). Nonetheless, the following is a brief list of some of the topics that, depending on the issues in the case, counsel may wish to explore (directly or indirectly) during voir dire:

1. knowledge of or predisposition concerning any of the attorneys, law firms, or parties, the decedent, the personal representative, the surviving spouse, or next of kin;

2. knowledge of or predisposition concerning any witnesses;

3. knowledge, opinions, or predisposition regarding any facts or issues in the case;

4. exposure to pretrial publicity;

5. attitudes regarding the subject matter and relevant disciplines;

6. right of the parties to file suit and to defend suit;

7. marital status;

8. family status;

9. employment history (jobs, employers, dates, descriptions, and any knowledge or attitudes regarding the parties, subject matter, and issues as a result of employment);

10. spouse or family members' employment;

11. any friend or family member who is a lawyer or in a field relevant to the case (*e.g.,* medicine, engineering, or the defendant's industry);

12. educational background;

13. residences;

14. activities and hobbies;

15. organizations and affiliations;

16. prior jury experience;

17. prior involvement in lawsuits as a party or witness;

18. pertinent health conditions of the juror and of family and friends;

19. accidents or injuries;

20. death of family members and friends;

21. papers and magazines read and television shows watched;

22. feelings regarding damages; and

23. feelings regarding the legal theories likely to be encountered in the trial.

There are many views on the goals of jury selection, some seemingly in conflict with the rules. For example, the law is clear that the overriding focus of voir dire is the selection of impartial jurors. *Scully v. Otis Elevator Co.,* 2 Ill.App.3d 185, 275 N.E.2d 905 (1st Dist. 1971). It is not the purpose of voir dire to indoctrinate or pre-educate the juror, obtain a pledge as to how a juror would decide under a given set of facts, or determine which party a juror favors in a case. *Gasiorowski v. Homer,* 47 Ill.App.3d 989, 365 N.E.2d 43, 7 Ill.Dec. 758 (1st Dist. 1977); *Christian v. New York Central R.R.,* 28 Ill.App.2d 57, 170 N.E.2d 183 (4th Dist. 1960). Notwithstanding this, one author has observed:

> **In addition to gathering basic information about jurors and their attitudes,** [successful trial lawyers] **(1) set the tone for the trial, (2) introduce concepts and evidence and condition the jurors for things to follow at trial, (3) obtain public commitments from jurors favorable to their cases, (4) use language that places their clients, their witnesses, and other relevant facets of their case in a favorable light, (5) rehearse the arguments they will use at trial, (6) refute opposition arguments, (7) enhance their credibility, and (8) create jury purpose. In other words, the period of voir dire becomes a preview of the entire trial, preparing jurors for what will follow and creating an atmosphere highly favorable to** [counsel's] **case.** Robert V. Wells, SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS, p. 84 (1988).

Can this seeming conflict be harmonized? Perhaps not, but trial lawyers certainly must ferret out biased or prejudiced jurors who would be unable to return a verdict favorable to the client due to bias or prejudice. In this regard, it has sometimes been said that voir dire is more a process of jury deselection — eliminating jurors that may be inclined to find against one's client — than of jury selection. See Hon. Ron Spears, *Jury Deselection: You don't pick who serves on your jury — you pick who doesn't,* 93 Ill.B.J. 420 (2005). The critical question, of course, is how to do this.

An example of a bias some jurors have exhibited in wrongful-death cases is a belief that it is wrong for a family to seek monetary damages for noneconomic loss. For example, in *Michael v. Kowalski,* 813 S.W.2d 6 (Mo.App. 1991), a case that involved the wrongful death of a young adult survived by his parents in which only $100,000 in damages was awarded, one of the jurors said after the verdict she felt it was wrong to seek money damages for the loss of a son, and two others said it was wrong to seek monetary compensation in a wrongful-death case such as the one presented. Yet during voir dire this prejudices did not come out. For the plaintiff, it is crucial to ask appropriate questions and follow up to make sure that jurors such as these are not allowed to sit. Biases must be carefully rooted out. After a bad verdict is no time for jurors biases to first come to light.

A frequent source of litigation involving voir dire in wrongful-death cases is whether the fact a decedent's surviving spouse has remarried may be mentioned. *E.g., Mulvey v. Illinois Bell Telephone Co.,* 53 Ill.2d 591, 294 N.E.2d 689 (1973) (fact of remarriage introduced by defense counsel in voir dire; defense verdict upheld against claim of error by plaintiff even though court acknowledged fact of remarriage would not have been admissible). In *Mulvey,* the majority of the court acknowledged that "there may be cases in which errors which go to the question of damages may be so pervasive and prejudicial as to create the likelihood that they may have affected a jury's decision on the issue of liability. However, we do not believe this to be such a case." 294 N.E.2d at 694.

Of course, *Mulvey* was decided before loss of consortium and loss of society were recognized as elements of the pecuniary loss suffered by the surviving spouse of a person wrongfully killed. *Elliott v. Willis,* 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982). It has been held that the fact of remarriage is relevant in loss-of-spousal-consortium claims. *Martin v. Illinois Central Gulf R.R.,* 237 Ill.App.3d 910, 606 N.E.2d 9, 179 Ill.Dec. 177 (1st Dist. 1991); *Dotson v. Sears, Roebuck & Co.,* 157 Ill.App.3d 1036, 510 N.E.2d 1208, 110 Ill.Dec. 177 (1st Dist. 1987); *Carter v. Chicago & Illinois Midland Ry.,* 130 Ill.App.3d 431, 474 N.E.2d 458, 85 Ill.Dec. 730 (4th Dist. 1985). *Cf. Simmons v. University of Chicago Hospitals & Clinics,* 162 Ill.2d 1, 642 N.E.2d 107, 204 Ill.Dec. 645 (1994) (acknowledging principle). If loss of society is waived by the surviving spouse, the fact of remarriage should not be admissible.

C. [6.17] Challenges

The court or any party may challenge a juror for cause. If a prospective juror has a physical impairment, the court shall consider the juror's ability to perceive and appreciate the evidence when considering a challenge for cause. 735 ILCS 5/2-1105.1. There are several statutory grounds for challenging a petit venire member for cause, including not being a United States citizen, not being an inhabitant of the county, being under the age of 18, not being free from all legal exception, not being of fair character, not being of approved integrity, not being of sound judgment, not being well-informed, not being able to understand the English language, not being one of the regular panel, having served as a juror on the trial of a cause in any court in the county within one year previous to the time the individual is being offered as a juror, and being a party to the pending suit. See 705 ILCS 305/2, 305/14.

There are several other bases for which a potential juror may be but is not necessarily required to be excused for cause, including prior jury service on an earlier trial in the same case, being affiliated with or related to one affiliated with an insurance company of the defendant, having a fixed opinion as to the merits of the case or any material issue involved in the case, having bias or prejudice against or in favor of a party, having a familial relationship with a party, and being a stockholder, officer, agent, employer, or employee of a party.

In addition to challenges for cause, each side is allotted peremptory challenges. A peremptory challenge provides the right to challenge a certain number of jurors without showing any cause or reason. There are some constitutional limits, however, on the exercise of peremptory challenges. *See, e.g., Tucker v. Illinois Power Co.,* 217 Ill.App.3d 748, 577 N.E.2d 919, 160 Ill.Dec. 594 (5th Dist. 1991) (principles of *Batson v. Kentucky,* 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), precluding use of peremptory challenges to exclude jurors on basis of race, applied to customer's civil action against gas utility based on alleged violations of Illinois Public Utilities Act).

Counsel must know the number of peremptory challenges he or she is allotted in a case. In a civil action pending in state court,

> **[e]ach 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.**
>
> * * *
>
> **If alternate jurors are called each side shall be allowed one additional peremptory challenge, regardless of the number of alternate jurors called. The additional peremptory challenge may be used only against an alternate juror, but any unexercised peremptory challenges may be used against an alternate juror.** 735 ILCS 5/2-1106.

In federal court, each party is entitled to three peremptory challenges. The court may consider several defendants or several plaintiffs as a single party or may allow additional peremptory challenges. See 28 U.S.C. §1870.

Because the plaintiff's personal representative is treated as one party even if there are several next of kin (*e.g., Johnson v. Village of Libertyville,* 150 Ill.App.3d 971, 502 N.E.2d 474, 104 Ill.Dec. 211 (2d Dist. 1986), *rev'd on other grounds, Mio v. Alberto-Culver Co.,* 306 Ill.App.3d 822, 715 N.E.2d 309, 239 Ill.Dec. 864 (2d Dist. 1999); *Rodgers v. Consolidated R.R.,* 136 Ill.App.3d 191, 482 N.E.2d 1080, 90 Ill.Dec. 797 (4th Dist. 1985)), it is reasonable to conclude in wrongful-death cases each next of kin is not a separate party for allocation of challenges.

D. [6.18] "Back-Striking"

In Illinois state court jurors are picked in panels of four. See 705 ILCS 305/21. By tendering a panel, the party is indicating that those four prospective jurors are acceptable to that party. In the event that the opposing party exercises a challenge concerning any member of the previously tendered panel, a "new" panel is formed. The new panel will have some members from a panel previously accepted. "Back-striking" occurs when a party that has tendered a panel receives the panel back and then exercises a challenge in relation to a prospective juror that had previously been accepted.

Back-striking is not favored by many courts; however, the rules do not forbid it. *See Needy v. Sparks,* 51 Ill.App.3d 350, 366 N.E.2d 327, 339 – 340, 9 Ill.Dec. 70 (1st Dist. 1977). But because some judges do not approve of back-striking, it is important that counsel determine whether back-striking will be allowed before attempting to back-strike a juror. *See People of State of Illinois v. Page,* 196 Ill.App.3d 285, 553 N.E.2d 753, 143 Ill.Dec. 46 (3d Dist. 1990) (trial court did not abuse its discretion by refusing to allow defense counsel to use peremptory challenge to back-strike juror); *People of State of Illinois v. Moss,* 108 Ill.2d 270, 483 N.E.2d 1252, 91 Ill.Dec. 617 (1985) (prohibition against back-striking did not deny or impair defendant's right of peremptory challenge).

V. [6.19] OPENING STATEMENTS

Opening statements are "intended generally to inform the jurors concerning the nature of the action and the issues involved [and] to give them an outline of the case so that they can better understand the testimony." *Gillson v. Gulf, Mobile & Ohio R.R.,* 42 Ill.2d 193, 246 N.E.2d 269, 272 (1969). Therefore, counsel has the right to "summarily outline what he expects the evidence admissible at the trial will show." *Id.* However, "no statement may be made in opening which counsel does not intend to prove or cannot prove." *Id.,* citing *Colmar v. Greater Niles Township Publishing Corp.,* 13 Ill.App.2d 267, 141 N.E.2d 652 (1st Dist. 1957). Statements made by counsel in opening statement are improper if they are not in good faith and are prejudicial. *Surestaff, Inc. v. Open Kitchens, Inc.,* 384 Ill.App.3d 172, 892 N.E.2d 1137, 1140, 323 Ill.Dec. 145 (1st Dist. 2008).

Trial lawyers have considerable latitude when making an opening statement, and the law is settled that "[q]uestions as to the prejudicial effect of remarks made during opening statement and closing argument are within the discretion of the trial court, and determinations as to such questions will not be overturned absent a clear abuse of discretion." *Simmons v. Garces,* 198 Ill.2d 541, 763 N.E.2d 720, 737, 261 Ill.Dec. 471 (2002).

The court will make clear to the jury what the purpose and limits of opening statements are. Therefore, trial lawyers should not waste their valuable time in opening statements repeating such matters. Instead, the opening statement provides the advocate with an excellent opportunity to tell the jury the "story" the evidence tells in a favorable light. Since trials are credibility contests, it is crucial that there be no exaggeration in the opening. Many good cases have been lost by a lawyer's embellishment.

Dr. David Ball provides these general guidelines for lawyers making opening statements: "[S]tay on topic, no wasted beginnings, no wasted words, no wasted topics, [don't ignore what the jurors think they need to know], go slowly, do not be an advocate, and don't ask the jurors to take your word for anything (they won't)." David Ball, DAVID BALL ON DAMAGES: THE ESSENTIAL UPDATE: A PLAINTIFF'S ATTORNEY'S GUIDE FOR PERSONAL INJURY AND WRONGFUL DEATH CASES, pp. 120 – 121 (2d ed. 2005).

Some believe that cases are won or lost in the opening statements. Therefore, careful preparation and presentation of opening statements are very important. There are many excellent sources of information concerning opening statements. *E.g.,* Mark L.D. Wawro, *Starting on the Right Foot: Effective Opening Statements,* 25 Litig., No. 1, 10 (Fall 1998); Thomas A. Mauet, FUNDAMENTALS OF TRIAL TECHNIQUES, p. 61 (6th ed. 2007). See also Nat P. Ozmon and Telly C. Nakos, Ch. 3, *Opening Statement,* ILLINOIS CIVIL PRACTICE: TRYING THE CASE (IICLE®, 2009).

Copies of the opening statements that were given on December 1, 2009 in an air crash wrongful-death damages trial are set out in §6.44 below.

VI. PRESENTATION OF THE EVIDENCE

A. [6.20] Illinois Rules of Evidence

On January 1, 2011, the Illinois Rules of Evidence went into effect, creating for the first time in Illinois a uniform and consolidated evidence code. Modeled after the Federal Rules of Evidence, the Illinois Rules provide an efficient and systematic guide for judges and attorneys charged with researching and identifying evidentiary rules. Prior to the adoption of the new rules, the law of evidence in Illinois was scattered amongst Supreme Court Rules, statutes, and caselaw. The lack of uniformity drove former Illinois Supreme Court Chief Justice Thomas Fitzgerald to appoint the Special Supreme Court Committee on Illinois Evidence in November, 2008, with the goal set at codifying the state's rules of evidence. Comprised of judges, attorneys, and legal scholars, the Committee submitted drafts for public comment and commentary, and on September 27, 2010, the court adopted the finalized code recommended by the committee.

While not as numerous as their federal counterpart, the Illinois Rules of Evidence follow the subject-matter sequence and numbering of the Federal Rules almost identically. The commentary within the rules provides short explanations of the evolution of some of the rules. The committee explains that, in the process of codifying the law of evidence in Illinois, it incorporated current law that had been clearly decided by Illinois courts within the last half century. Additionally, the committee incorporated 14 modernizations in which it was determined that the updates would be beneficial to trial proceedings in Illinois and not in conflict with current state statutes or recent court decisions. While the court granted the authority to the committee to establish and incorporate the new rules, it made it clear in Ill.R.Evid 101: "A statutory rule of evidence is effective unless in conflict with a rule or decision of the Illinois Supreme Court."

In codifying this succinct and systematic set of evidence rules, the Supreme Court has given trial attorneys and Illinois courts alike a simpler code to abide by, which should avoid confusion and result in a more efficient trial process.

B. [6.21] Trial Technology

In the technologically advanced world we live in, it is not surprising that high tech tools have infiltrated the courtroom. Courtrooms are more modern and trial attorneys are increasingly (and very wisely) using today's visual technologies to enhance presentations to the jury. And while technology will never replace proper trial preparation or a well-crafted argument, an attorney must not ignore the significant benefits that are associated with the use of these powerful trial tools.

Proper use of digital technology can transform a complicated legal concept into an easier-to-process idea for the jury. By deciding to present a visual breakdown of a theory or argument using a program such as PowerPoint, an attorney can pre-plan exactly what type of information he or she chooses to relay and how and when to relay it. During opening and closing arguments the attorney, with the push of a button or click of a mouse, can repeatedly reinforce a concept, strategically present a photograph, or make connections between facts or between law and facts that are more likely to be remembered. Lasting visual impressions are more likely to be recalled and discussed during deliberations.

C. Issues Associated with Establishing or Refuting Liability

1. [6.22] Use of Circumstantial Evidence

One of the fundamental differences between wrongful-death and personal injury trials is that in death cases the testimony of the injured person is not available at trial. There may be no eyewitness testimony to establish how the death occurred. Such testimony is not required; circumstantial evidence can be sufficient. *E.g., Mort v. Walter,* 98 Ill.2d 391, 457 N.E.2d 18, 21, 75 Ill.Dec. 228 (1983); *Mayfield v. City of Springfield, Illinois,* 103 Ill.App.3d 1114, 432 N.E.2d 617, 59 Ill.Dec. 831 (4th Dist. 1982). I.P.I. — Civil No. 3.04 provides:

> **A fact or a group of facts may, based on logic and common sense, lead you to a conclusion as to other facts. This is known as circumstantial evidence. A fact may be proved by circumstantial evidence. For example, if you are in a building and a person enters who is wet and is holding an umbrella, you might conclude that it was raining outside. Circumstantial evidence is entitled to the same consideration as any other type of evidence.**

At times, circumstantial evidence can even be more persuasive than an eyewitness account. *See, e.g., Oudshoorn v. Warsaw Trucking Co.,* 38 Ill.App.3d 920, 349 N.E.2d 648 (1st Dist. 1976); *Lobravico v. Checker Taxi Co.,* 84 Ill.App.2d 20, 228 N.E.2d 196 (1st Dist. 1967).

In *Brawner v. City of Chicago,* 337 Ill.App.3d 875, 787 N.E.2d 282, 272 Ill.Dec. 467 (1st Dist. 2003), the court held admissible circumstantial evidence establishing that police officers who shot the fleeing decedent had heard that the decedent had unlawfully restrained a person. The court also found that expert testimony indicating that the decedent's conduct was consistent with that of a person who had taken cocaine was also relevant and admissible because the testimony illustrated why the police believed that their lives were endangered when they shot the decedent.

In establishing negligence by use of circumstantial evidence, the courts do not ask a plaintiff to prove the impossible. Rather, courts allow use of circumstantial evidence whenever an inference may reasonably be drawn from it. *Mort, supra.* In *Mort,* a child was struck by a car and severely injured. There were no eyewitnesses to the accident. The court found the circumstantial evidence sufficient to raise an inference of negligence even in the absence of direct testimony.

Since there sometimes are no occurrence witnesses, the law requires only the highest proof of which the particular case is susceptible. *Campbell v. Ragel,* 7 Ill.App.2d 301, 129 N.E.2d 451 (4th Dist. 1955). In the following wrongful-death cases, circumstantial evidence was sufficient to prove an important element of the case. *National Bank of Bloomington v. Pickens,* 8 Ill.App.3d 58, 289 N.E.2d 64 (4th Dist. 1972) (decedent struck by vehicle and killed; court found circumstantial evidence sufficient to establish cause of death in absence of medical evidence); *Hamel v. Delicate,* 104 Ill.App.2d 241, 244 N.E.2d 401 (5th Dist. 1968) (flagman directing traffic struck and killed; court held circumstantial evidence sufficient to establish cause and time of death); *Bennis v. Chicago Transit Authority,* 33 Ill.App.2d 334, 179 N.E.2d 421 (1st Dist. 1961) (police officer struck and killed by CTA train; court held exercise of due care can be established by use of circumstantial evidence).

In the following wrongful-death cases, circumstantial evidence was insufficient to prove an important element of the case. *Majetich v. P.T. Ferro Construction Co.,* 389 Ill.App.3d 220, 906 N.E.2d 713, 329 Ill.Dec. 515 (3d Dist. 2009) (insufficient evidence to connect decedent's fall outside strip mall to defendants' recent replacement of the parking lot pavement); *Mann v. Producer's Chemical Co.,* 356 Ill.App.3d 967, 827 N.E.2d 883, 293 Ill.Dec. 2 (1st Dist. 2005) (insufficient evidence decedent relied on driver's wave in continuing to cross street); *Leavitt v. Farwell Tower Ltd. Partnership,* 252 Ill.App.3d 260, 625 N.E.2d 48, 55, 192 Ill.Dec. 88 (1st Dist. 1993) (not reasonable to infer decedent entered elevator shaft on second floor due to defendant's failure to have automatic door closure devices); *Kellman v. Twin Orchard Country Club,* 202 Ill.App.3d 968, 560 N.E.2d 888, 148 Ill.Dec. 291 (1st Dist. 1990) (decedent fell in shower stall at country club and died from injuries; court found circumstantial evidence insufficient to raise inference of defendant's negligence); *McInturff v. Chicago Title & Trust Co.,* 102 Ill.App.2d 39, 243 N.E.2d 657 (1st Dist. 1968) (janitor fell down flight of stairs and died from injuries; circumstantial evidence that decedent was careful man exercising due care just before injury was insufficient to raise inference of defendant's negligence).

2. [6.23] Evidence of Decedent's Careful Habits

Rule 406 of the Illinois Rules of Evidence governs the admissibility of habit and routine practice:

> **Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.**

The Committee Commentary to this rule states:

> **Rule 406 confirms the clear direction of prior Illinois law that evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.** Committee Commentary to Illinois Rules of Evidence, (3) Modernization.

It would now seem clear, under Ill.R.Evid. 406, "the habit of a [deceased] person . . . , whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the [deceased] person . . . on a particular occasion was in conformity with the habit." Thus proof of a deceased's careful habits, if relevant, appears to be allowed, subject to the caveat that this proof does not, ipso facto establish negligence or proximate cause in a wrongful-death case. *E.g. Strutz v. Vicere,* 389 Ill.App.3d 676, 906 N.E.2d 1261, 329 Ill.Dec. 650 (1st Dist. 2009). In *Strutz,* the trial court granted the defendants' motion for summary judgment on the issue of proximate cause, finding that the plaintiff failed to offer any evidence showing that the defendants' alleged negligence caused the decedent's fall down the stairs. On appeal, the plaintiff argued that evidence of the decedent's careful habits and training as a paramedic entitled the plaintiff to the presumption that the decedent was exercising due care for his safety at the time he fell. The appellate court affirmed the lower court's ruling, noting that while evidence of the

decedent's careful habits could be appropriate to refute an allegation of contributory negligence, such evidence had no bearing on whether there was proper evidentiary support for the element of proximate cause.

If evidence of the decedent's careful habits also proves the decedent's character, such evidence may also be admissible on the loss-of-society issue. *E.g., Cooper v. Chicago Transit Authority,* 153 Ill.App.3d 511, 505 N.E.2d 1239, 1246, 106 Ill.Dec. 448 (1st Dist. 1987).

However, a decedent's personal representative should be aware that the protections offered by the Dead-Man's Act, discussed in great detail in §§6.24 – 6.29 below, can be waived if the representative elects to introduce testimony of the decedent's careful habits in relation to the events leading to the death. In such a case, "the adverse party is rendered competent to testify to the event." *Yetton v. Henderson,* 190 Ill.App.3d 973, 546 N.E.2d 1000, 1004, 137 Ill.Dec. 887 (3d Dist. 1989).

Under prior law a deceased's careful habits could only be established through reputation testimony and proof of specific instances of conduct was not allowed. Michael H. Graham, GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE, §406.2, p. 289 (10th ed. 2010). It is unclear if this is still true. Compare Ill.R.Evid. 405, 406, and 608.

3. The Dead-Man's Act

a. [6.24] In General

Ill.R.Evid. 101 states in part that "[a] statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court." Explaining this principle in the Committee Commentary preceding the Illinois Rules of Evidence the Committee stated "[i]t is important to note that the Illinois Rules of Evidence are not intended to abrogate or supersede any current statutory rules of evidence." One such statute is the Dead-Man's Act, 735 ILCS 5/8-201, which deals with the competency of certain witnesses. Moreover, Ill.R.Evid. 601 states "[e]very person is competent to be a witness, except as otherwise provided by these rules, by other rules prescribed by the Supreme Court, or by statute."

The applicability of the Dead-Man's Act in federal court wrongful-death actions, however, is more complex. Rule 601 of the Federal Rules of Evidence states that "[e]very person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." Under this rule, the Dead-Man's Act applies in federal diversity cases but does not apply in federal cases governed by federal law. *Sundstrand Corp. v. Sun Chemical Corp.,* 553 F.2d 1033, 1051 (7th Cir. 1977); *Cooper v. City of Rockford,* No. 06 C 50124, 2010 WL 3034181 (N.D.Ill. Aug. 3, 2010).

Although the Dead-Man's Act usually does not affect a personal injury action, it can have a profound effect on trial strategy and practice in wrongful-death actions. The wrongful-death practitioner must be thoroughly familiar with the Act and must consider its potential impact from the time the action is commenced. The Act provides in part:

> **In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability.** 735 ILCS 5/8-201.

Consider, for example, an automobile crash in a controlled intersection with both drivers claiming a green light, no evidence of a light malfunction, and no other witnesses. If both parties were alive, each would provide his or her own version of what happened. But if one of the drivers was killed in the wreck and the personal representative brought a wrongful-death action, the Act might preclude the surviving party from testifying that the light was green when he or she entered the intersection even though this would be the best available proof of who ran the red light. Yet if the personal representative were to object at trial, the surviving driver's testimony might be barred by the Act.

However, the Act will not bar testimony of other eyewitnesses who are not parties and are not directly interested in the lawsuit. Similarly, pictures of the scene or testimony (even by the defendant) about what happened before the vehicle reached the view of the decedent or after it was out of the decedent's view would be admissible. Moreover, if the personal representative offers any evidence on a conversation or event, the defendant too may testify about the same conversation or event.

The purpose of the Dead-Man's Act is to protect decedents' estates from fraudulent claims and to equalize the parties' positions when giving testimony by removing the temptation of a survivor to testify falsely. *See, e.g., Balma v. Henry,* 404 Ill.App.3d 233, 935 N.E.2d 1204, 343 Ill.Dec. 976 (2d Dist. 2010); *Gunn v. Sobucki,* 216 Ill.2d 602, 837 N.E.2d 865, 297 Ill.Dec. 414 (2005). Despite the laudable motive behind the Act, it exacts a high price — exclusion of relevant evidence.

The Dead-Man's Act has been sharply criticized:

> **The Dead Man's Act manifests the cynical view that a party will lie when she cannot be directly contradicted and the unrealistic assumption that jurors, knowing the situation, will believe anything they hear in these circumstances. While motivated by the laudable desire to protect decedent's and legally disabled person's assets from attack based on perjured testimony, *Wells v. Enloe,* 282 Ill.App.3d 586, 218 Ill.Dec. 425, 669 N.E.2d 368 (1996), the validity of this approach is questioned with vigor; the modern trend is to remove the disqualification. 2 Wigmore, Evidence §§578, 578a (Chadbourn rev. 1979). In any event, it is by far the most frequent source of controversy over the competency of witnesses. Without considering the effect of the vast amount of litigation generated by the Dead Man's Act, it is felt that the Act should be abrogated on the ground that this surviving relic of the common law disqualification of parties as witnesses leads to more miscarriages of justice than it prevents. *Accord Smith v. Haran,* 273 Ill.App.3d 866, 878, 210 Ill.Dec. 191, 199, 652 N.E.2d 1167, 1175 (1995) ("Because there is room for disagreement in this area (*see,***

***for example,* the dissent to this opinion) and because the Act generates so much controversy and litigation, many commentators have suggested that the time has come for the legislature to repeal or modify the Dead Man's Act, as have more than half the States. (*See,* Kahn, Repeal of Dead Man's Act Advocated, 55 Ill.B.J. 430 (1967); Barnard, The Dead Man's Act Rears Its Ugly Head Again, 72 Ill.B.J. 420 (1984); Barnard, The Dead Man's Act is Alive and Well, 83 Ill.B.J. 248 (1995).)").** ***See generally Matter of Estate of Rollins,* 269 Ill.App.3d 261, 206 Ill.Dec. 774, 645 N.E.2d 1026 (1995).** Michael H. Graham, CLEARY AND GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §606.1, p. 335 (8th ed. 2004).

Notwithstanding these views, the Dead-Man's Act is alive and well in Illinois. *See, e.g., Balma, supra; Gunn, supra; Hoem v. Zia,* 159 Ill.2d 193, 636 N.E.2d 479, 201 Ill.Dec. 47 (1994). Courts in Illinois do not have discretion to ignore it, and trial attorneys must cope with it. The Act is a rule concerning the competency of witnesses and not the admissibility of evidence. *See Creighton v. Elgin,* 387 Ill. 592, 56 N.E.2d 825 (1944). In other words, the Act renders the adverse party incompetent to testify not generally, but only as to conversations and events occurring in the presence of the deceased.

The Dead-Man's Act extends protection to a "party [who] sues or defends as the representative of a deceased person or person under a legal disability." 735 ILCS 5/8-201. Accordingly, the Dead-Man's Act objection belongs to the personal representative of the deceased. *E.g., Moran v. Erickson,* 297 Ill.App.3d 342, 696 N.E.2d 780, 231 Ill.Dec. 484 (1st Dist 1998); *Harry W. Kuhn, Inc. v. State Farm Mutual Automobile Insurance Co.,* 201 Ill.App.3d 395, 559 N.E.2d 45, 51, 147 Ill.Dec. 45 (1st Dist. 1990). The representative has the option of objecting to or allowing the evidence to be adduced. In other words, even though a witness is incompetent under the Act, he or she may be called by the party who is protected under the Act to testify about the event or conversation. *Harry W. Kuhn, Inc., supra,* 559 N.E.2d at 51 ("The only parties entitled to object to the testimony of an interested witness under this statute are adverse parties suing as representatives of the deceased or incompetent persons."). Accordingly, in a wrongful-death action, the Act can work to the benefit of the plaintiff only unless the defendant also died before trial, because the Act cannot be used by a living defendant to bar evidence. When a defendant is deceased, on the other hand, his or her representatives may assert the objection as to testimony of codefendants or plaintiffs with interests adverse to the estate. 735 ILCS 5/8-201.

b. [6.25] Incompetent Witnesses

The only testimony barred by the Dead-Man's Act is that of an "adverse party or person directly interested in the action." 735 ILCS 5/8-201. This interest is determined by the substance of the action, not by the pleadings or status of the parties to the suit. *See Ackman v. Potter,* 239 Ill. 578, 88 N.E. 231, 233 (1909). A witness is a person "directly interested in the action" if, as a direct and immediate result of the judgment, he or she will reap pecuniary gain or suffer pecuniary loss. *See Harry W. Kuhn, Inc. v. State Farm Mutual Automobile Insurance Co.,* 201 Ill.App.3d 395, 559 N.E.2d 45, 51, 147 Ill.Dec. 45 (1st Dist. 1990). In the context of a wrongful-death action, the defendant generally is the adverse party whose competency may be subject to objection under the Act. As stated in §6.24 above, when one or more defendants are deceased and

represented by their personal representatives, the defendants may raise the Dead-Man's Act objection as to competency of the decedents' personal representatives or of other interested persons. The testimony of a defendant is incompetent against an administrator codefendant because it is to the defendant's advantage to have the estate held liable. *See Mernick v. Chiodini,* 12 Ill.App.2d 249, 139 N.E.2d 784 (4th Dist. 1956).

If a witness is disqualified under the Dead-Man's Act, the witness' spouse is also incompetent to testify as to the same matters. *See Babcock v. McDonnell,* 105 Ill.2d 267, 473 N.E.2d 1316, 1319, 85 Ill.Dec. 511 (1985). The disqualification of the spouse continues after dissolution of the marriage. *See Hann v. Brooks,* 331 Ill.App. 535, 73 N.E.2d 624, 629 (2d Dist. 1947). The child of a person with an adverse economic interest to the decedent is not usually disqualified. For example, the minor son of the defendant in a wrongful-death action was held competent to testify in *Bernardi v. Chicago Steel Container Corp.,* 187 Ill.App.3d 1010, 543 N.E.2d 1004, 1010, 135 Ill.Dec. 436 (1st Dist. 1989). *See also Hughes v. Medendorp,* 294 Ill.App. 424, 13 N.E.2d 1015 (3d Dist. 1938); *Williams v. Garvin,* 389 Ill. 169, 58 N.E.2d 870 (1945). *But see Kamberos v. Magnuson,* 156 Ill.App.3d 800, 510 N.E.2d 112, 109 Ill.Dec. 491 (1st Dist. 1987) (child of person adverse is incompetent when parent died, leaving child with direct rather than contingent economic interest).

The Dead-Man's Act renders incompetent only the adverse party or one with a direct interest in the outcome. The Act does not bar anyone else from testifying about conversations or events occurring in the presence of the decedent. Indeed, an admission made by a party during his or her lifetime may be testified to by persons who do not have a direct interest in the action. *See, e.g., Clifford v. Schaefer,* 105 Ill.App.2d 233, 245 N.E.2d 49 (1st Dist. 1969) (admission to police officer). Thus, counsel's investigation and discovery must be directed toward identifying others who have witnessed the event or conversation as well as other evidence such as tape recordings, pictures, etc.

As discussed in §6.29 below, the testimony of an agent or employee of a party is not rendered incompetent by the Dead-Man's Act unless the agent or employee is a named party.

c. [6.26] Incompetent Subjects

The Dead-Man's Act is not an absolute bar rendering the witness generally incompetent to testify as to any matter. *Manning v. Mock,* 119 Ill.App.3d 788, 457 N.E.2d 447, 454, 75 Ill.Dec. 453 (4th Dist. 1983). Instead, the bar applies only to "conversations" and "events" occurring in the decedent's presence. *E.g., Malavolti v. Meridian Trucking Co.,* 69 Ill.App.3d 336, 387 N.E.2d 426, 432, 25 Ill.Dec. 770 (3d Dist. 1979). Additionally, the Act only bars evidence that the decedent could have refuted had he or she survived; testimony related to evidence of facts that the decedent could not have refuted is not barred by the Dead-Man's Act. *Balma v. Henry,* 404 Ill.App.3d 233, 935 N.E.2d 1204, 343 Ill.Dec. 976 (2d Dist. 2010). Thus in *Balma,* the court found barring all evidence of an "accident" was an overly broad application of the Act. And in *Brown v. Arco Petroleum Products Co.,* 195 Ill.App.3d 563, 552 N.E.2d 1003, 142 Ill.Dec. 262 (1st Dist. 1989), although a truck driver's testimony concerning whether he stopped at a stop sign was barred, he was allowed to testify concerning the approach to the stop sign. There was no evidence that the decedent could have observed the approach; therefore, the decedent could not

have refuted this testimony. In essence, the approach did not occur in the presence of the deceased. Thus, the Act was inapplicable. *See also Balma, supra.* Similarly, even an incompetent witness may testify concerning events after the death of the decedent. *Swirski v. Darlington,* 369 Ill. 188, 15 N.E.2d 856 (1938).

d. [6.27] Exceptions

There are four exceptions to the Dead-Man's Act that render it inapplicable:

(a) If any person testifies on behalf of the representative to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.

(b) If the deposition of the deceased or person under legal disability is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted in evidence.

(c) Any testimony competent under Section 8-401 of this Act [735 ILCS 5/8-401]**, is not barred by this Section.**

(d) No person shall be barred from testifying as to any fact relating to the heirship of a decedent. 735 ILCS 5/8-201.

Of these exceptions, only the first three are of much interest in wrongful-death litigation.

The first and most important exception applies when the representative adduces testimony concerning an otherwise protected conversation or event. If any person testifies on behalf of the representative to any conversation or to any event that took place in the presence of the deceased or person under legal disability, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted into evidence.

Thus, if any witnesses testify on behalf of the personal representative concerning an event or conversation, the otherwise incompetent witness may testify, but only as to the same conversations or events. *E.g., Hoem v. Zia,* 159 Ill.2d 193, 636 N.E.2d 479, 201 Ill.Dec. 47 (1994) (in medical malpractice wrongful-death case in which deceased patient's family introduced medical records into evidence and plaintiff's expert went beyond what was written in records to state why deceased came to see defendant, defendant had right to testify to same conversation). *Compare Vazirzadeh v. Kaminski,* 157 Ill.App.3d 638, 510 N.E.2d 1096, 110 Ill.Dec. 65 (1st Dist. 1987) (introduction of defendant's medical records alone did not waive plaintiff's Dead-Man's Act objection). *See also Wassmann v. Ritchason,* 63 Ill.App.3d 770, 380 N.E.2d 1022, 20 Ill.Dec. 813 (2d Dist. 1978) (when plaintiff called defendant's passenger as eyewitness to collision, defendant was permitted to testify about collision). This exception reflects the policy of the Act not to disadvantage the living, but rather to put the parties on an equal footing. *See Morse v. Hardinger,* 34 Ill.App.3d 1020, 341 N.E.2d 172 (4th Dist. 1976). The

exception applies to an adverse examination of a defendant as well as to occurrence witnesses. The adverse witness is competent to testify to the whole transaction about which he or she is questioned. *See In re Estate of Deskins,* 128 Ill.App.3d 942, 471 N.E.2d 1018, 1026, 84 Ill.Dec. 252 (2d Dist. 1984); *Logue v. Williams,* 111 Ill.App.2d 327, 250 N.E.2d 159 (5th Dist. 1969). The adverse witness may not, however, testify about matters that were not covered on direct examination. *See Deskins, supra.* For an example of questions carefully tailored to avoid eliciting facts about conversations or events occurring in the deceased's presence, *see Buczyna v. Cuomo & Son Cartage Co.,* 146 Ill.App.3d 404, 496 N.E.2d 1116, 100 Ill.Dec. 51 (1st Dist. 1986).

In two cases, the Illinois appellate court addressed whether a decedent's medical records containing history recorded by a defendant doctor were admissible. *Theofanis v. Sarrafi,* 339 Ill.App.3d 460, 791 N.E.2d 38, 274 Ill.Dec. 242 (1st Dist. 2003) (plaintiff's adverse examination limited to conversations deceased and defendant doctor had on or after June 3, 1996, did not waive Dead-Man's Act objection to conversation taking place six days earlier); *Malanowski v. Jabamoni,* 332 Ill.App.3d 8, 772 N.E.2d 967, 265 Ill.Dec. 596 (1st Dist. 2002) (testimony by plaintiff's expert opened door to introduction of defendant doctor's records into evidence due to waiver by estate of Dead-Man's Act objection).

Under the Dead-Man's Act's second exception, if the deposition of the deceased or person under legal disability is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted into evidence. *See also Idleman v. Raymer,* 183 Ill.App.3d 938, 539 N.E.2d 828, 132 Ill.Dec. 265 (4th Dist. 1989) (plaintiffs made decedent's physician their witness by introducing into evidence his deposition taken by defendants, and testimony presented by defendants concerning decedent's visits to physician was admissible to extent it concerned conversations or events about which physician testified).

Under the Dead-Man's Act's third exception, dealing with actions founded on account books and records, certain otherwise incompetent testimony is rendered competent. However, this exception is not available to a defendant doctor in a medical malpractice case as an excuse to qualify his or her otherwise incompetent records as evidence. *Theofanis, supra.*

e. [6.28] Waiver — Strategic Considerations

As explained in §6.27 above, the protection of the Dead-Man's Act may be waived by the representative. 735 ILCS 5/8-201. Therefore, counsel for the representative is well-advised, if a decision has been made to invoke the Dead-Man's Act, to raise the issue by motion in limine, to try to head off or weaken the possibility an incompetent version of what happened will be stated by the adversary as a matter of fact in the opening statement. For the objecting party, Dead-Man's Act objections are usually best made outside the presence of the jury. *See Callaghan v. Miller,* 17 Ill.2d 595, 162 N.E.2d 422, 425 (1959); *Kelley v. First State Bank of Princeton,* 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist. 1980). Nevertheless, it is not reversible error to permit one barred by the Act to take the stand and testify until the objection is made, even though the making of the objection may create an unfavorable impression on the jury. *See Martin v. Miles,* 41 Ill.App.2d 208, 190 N.E.2d 473 (4th Dist. 1963).

f. [6.29] Other Strategic Considerations

Counsel for the representative in a wrongful-death action must carefully review the facts and circumstances of the case to determine (1) who should be added as defendants (since a defendant is automatically one with an adverse economic interest), (2) whether the estate will benefit by asserting the Dead-Man's Act objection, and (3) if so, how the case can be established without the incompetent testimony. In determining what testimony is incompetent, the Act and its exceptions must be studied. In cases of life-threatening injury or illness, counsel should evaluate the desirability of taking an evidence deposition (possibly video) of a party not likely to survive until trial or the possibility of advancing the case for an early trial. S.Ct. Rule 217. *See also Flack v. McClure,* 206 Ill.App.3d 976, 565 N.E.2d 131, 151 Ill.Dec. 860 (1st Dist. 1990); *Muka v. Estate of Muka,* 164 Ill.App.3d 223, 517 N.E.2d 673, 115 Ill.Dec. 262 (2d Dist. 1987). Opposing counsel must anticipate and be prepared to deal with Dead-Man's Act issues at trial and be alert for waiver by the representative.

Lawyers are not permitted to comment on the fact that another party objected to testimony offered from a witness who was incompetent under the Act. *See Crutchfield v. Meyer,* 414 Ill. 210, 111 N.E.2d 142 (1953). However, it is proper to explain that a witness was barred by law from testifying as to certain facts as a result of the Act. *See Smith v. Perlmutter,* 145 Ill.App.3d 783, 496 N.E.2d 358, 99 Ill.Dec. 783 (3d Dist. 1986).

When the Dead-Man's Act has been successfully invoked, it is proper for the jury to be instructed on the matter. I.P.I. — Civil No. 5.02 states:

5.02 Failure of Party to Testify

The [plaintiff] [defendant] in this case is [suing] [sued] as [administrator] [executor] [guardian] for a [deceased person] [incompetent person]. Since the deceased cannot be here to testify [since the incompetent person is incapable of testifying], the law does not permit the [defendant] [plaintiff] [or any person directly interested in this action] to testify in his own behalf [to any conversation with the] [deceased] [incompetent person] [or] [to any event which took place in the presence of the] [deceased] [incompetent person]. The fact that the [defendant] [plaintiff] did not testify to those matters should not be considered by you for or against him.

[In this case, however, the (plaintiff) (defendant) called (a witness) (the defendant) (the plaintiff) to testify on his behalf (to conversations with the) (deceased) (incompetent person) (or) (to an event which took place in the presence of the) (deceased) (incompetent person), and therefore the (plaintiff) (defendant) (interested person) had the right to testify as to the same (conversation) (event).]

[In this case, however, since the deposition of the (deceased) (incompetent person) was admitted in evidence on behalf of the (plaintiff) (defendant), the (plaintiff) (defendant) (interested person) had the right to testify as to the same matters admitted in evidence.]

[In this case, however, the law does not prevent the testimony concerning any fact relating to the heirship of the decedent.]

It should be remembered that the scope of the Dead-Man's Act is narrow. Accordingly, in many instances alternative forms of proof remain available. The Act does not bar evidence of the conversation or event, only the adverse or interested party's testimony about the conversation or event. The conversation or event is admissible if proved by competent evidence such as the testimony of a non-interested witness. *See Belfield v. Coop,* 8 Ill.2d 293, 134 N.E.2d 249 (1956). A tape recording of a conversation or statement is not barred by the Dead-Man's Act. *See, e.g., Muka, supra.* Similarly, the Act does not bar testimony concerning matters before or after the event. *See, e.g., Brown v. Arco Petroleum Products Co.,* 195 Ill.App.3d 563, 552 N.E.2d 1003, 142 Ill.Dec. 262 (1st Dist. 1989); *Malavolti v. Meridian Trucking Co.,* 69 Ill.App.3d 336, 387 N.E.2d 426, 25 Ill.Dec. 770 (3d Dist. 1979). *But see Murphy v. Hook,* 21 Ill.App.3d 1006, 316 N.E.2d 146 (2d Dist. 1974). Moreover, the Act does not alter the burdens of proof concerning the causes of action or damages. The plaintiff still has to prove the event or conversation if it is part of the prima facie case. In attempting to prove a case, the plaintiff may waive the objection. Nonetheless, the Act allowed the deceased's personal representative to selectively choose events or conversations for which testimony is adduced.

Illinois courts have held that servants of a defendant corporation, even though they may be liable to the corporation, are not "interested" persons under the Dead-Man's Act since the judgment is not binding on them. *See Feitl v. Chicago City Ry.,* 211 Ill. 279, 71 N.E. 991 (1904); *Johnson v. Matthews,* 301 Ill.App. 295, 22 N.E.2d 772 (1st Dist. 1939) (agent of party); *Sankey v. Interstate Dispatch, Inc.,* 339 Ill.App. 420, 90 N.E.2d 265 (1st Dist. 1950). Consequently, an employee of a defendant corporation may be competent to testify about conversations with the decedent or events occurring in the presence of the decedent. Thus, the Act may have very little impact on a corporate defendant because it acts only through its agents and employees. But if the personal representative perceives an advantage in barring such testimony, all that need be done is name the employee as a defendant, assuming this can be done in good faith. Similarly, trial lawyers must understand the likely impact dismissing parties from an action may have. When a party is dismissed or a verdict is directed in his or her favor, that individual's status as a party changes and any incompetency may, as a result, be removed. *See Hawthorne v. New York Central R.R.,* 2 Ill.App.2d 338, 119 N.E.2d 516 (4th Dist. 1954).

4. Use of Expert Testimony

a. [6.30] In General

Under S.Ct. Rule 213(f), there are three independent categories of witnesses:

(1) *Lay Witnesses.* A "lay witness" is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(2) *Independent Expert Witnesses.* An "independent expert witness" is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

(3) *Controlled Expert Witnesses.* A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.

S.Ct. Rule 213(g) states:

(g) Limitation on Testimony and Freedom to Cross-Examine. The information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination at trial. Information disclosed in a discovery deposition need not be later specifically identified in a Rule 213(f) answer, but, upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition. Except upon a showing of good cause, information in an evidence deposition not previously disclosed in a Rule 213(f) interrogatory answer or in a discovery deposition shall not be admissible upon objection at trial.

Without making disclosure under this rule, however, a crossexamining party can elicit information, including opinions, from the witness. This freedom to cross-examine is subject to a restriction that applies in actions that involve multiple parties and multiple representation. In such actions, the cross-examining party may not elicit undisclosed information, including opinions, from the witness on an issue on which its position is aligned with that of the party doing the direct examination.

See Barbara A. McDonald, *Striking the Right Balance: New Supreme Court Rule 213,* 90 Ill.B.J. 406 (2002).

While S.Ct. Rules 213(f)(1) – 213(f)(3) set forth a party's pretrial witness disclosure obligations, the new Illinois Rules of Evidence clearly set forth the rules governing the admissibility of the opinion testimony. See Ill.R.Evid. 701 – 705.

Ill.R.Evid. 701 governs the admissibility of opinion testimony of lay witnesses:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a)

rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Ill.R.Evid. 702 governs the admissibility of the expert witness testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.

The bases of an expert's opinion does not have to be admissible in evidence as long as it is the type of facts or data reasonably relied on by experts in that particular field. Ill.R.Evid. 704. Also, an expert can offer an opinion that embraces an ultimate issue to be decided by the trier of fact. *Id.*

The new rules carry over what has been the governing law in Illinois since the decision of the Illinois Supreme Court in *Wilson v. Clark,* 84 Ill.2d 186, 417 N.E.2d 1322, 49 Ill.Dec. 308 (1981).

b. [6.31] Reconstruction

Reconstruction experts are subject to the same requirements as other expert witnesses set forth in Rule 702 of the Illinois Rules of Evidence. *See, e.g., Watkins v. Schmitt,* 172 Ill.2d 193, 665 N.E.2d 1339, 216 Ill.Dec. 822 (1996); *Zavala v. Powermatic, Inc.,* 167 Ill.2d 542, 658 N.E.2d 371, 212 Ill.Dec. 889 (1995); *Plank v. Holman,* 46 Ill.2d 465, 264 N.E.2d 12 (1970).

While courts have historically been reluctant to admit reconstruction evidence when eyewitness testimony is available (*e.g., McGrath v. Rohde,* 53 Ill.2d 56, 289 N.E.2d 619, 622 – 623 (1972); *Plank, supra; Miller v. Pillsbury Co.,* 33 Ill.2d 514, 211 N.E.2d 733, 734 (1965)), the law is now clear that such testimony can be admitted. *Zavala, supra,* 658 N.E.2d at 374 ("Whether to admit expert reconstruction testimony, eyewitness or not, turns on the usual concerns of whether expert opinion testimony is appropriate generally."). When the testimony of an eyewitness is unclear or unconvincing and sufficient physical evidence is available to provide the basic data, a reconstruction expert will probably be allowed to testify. *See, e.g., Abramson v. Levinson,* 112 Ill.App.2d 42, 250 N.E.2d 796 (1st Dist. 1969), *cert. denied,* 90 S.Ct. 1868 (1970). However, in *Peterson v. Lou Bachrodt Chevrolet Co.,* 76 Ill.2d 353, 392 N.E.2d 1, 29 Ill.Dec. 444 (1979), *overruled on other grounds, Wills v. Foster,* 229 Ill.2d 393, 892 N.E.2d 1018, 323 Ill.Dec. 26 (2008), the Illinois Supreme Court held that it was reversible error to admit accident reconstruction testimony as to the speed of a vehicle when eyewitness testimony was available, and more recently the Supreme Court followed *Peterson* in *Watkins, supra* (speed of automobile

is not beyond ken of average juror). *See also Ahmed v. Pickwick Place Owners' Ass'n,* 385 Ill.App.3d 874, 896 N.E.2d 854, 324 Ill.Dec. 778 (1st Dist. 2008) (officer's opinion that decedent's cuts were caused from a rusted bicycle were barred because not based on any specialized knowledge or application of scientific principles)*; Colonial Trust & Savings Bank of Peru, Illinois v. Kasmar,* 190 Ill.App.3d 967, 546 N.E.2d 1112, 138 Ill.Dec. 57 (3d Dist. 1989). Nevertheless, some courts have allowed expert reconstruction testimony to contradict eyewitness accounts of an accident. *See, e.g., Zavala, supra* (reconstruction proper when it will help jury resolve issues beyond their ken); *Robles v. Chicago Transit Authority,* 235 Ill.App.3d 121, 601 N.E.2d 869, 176 Ill.Dec. 171 (1st Dist. 1992).

Numerous courts have addressed questions concerning accident reconstruction experts. The cases do not reflect a uniform approach. A trial court is afforded considerable discretion in determining whether reconstruction testimony will be allowed.

A leading wrongful-death case allowing reconstruction testimony is *Miller, supra.* This wrongful-death claim was filed on behalf of a truck driver who was killed when his semitrailer collided with two other semitrailers owned by the defendant. There were no eyewitnesses qualified to testify. The court allowed the testimony of a reconstruction expert because the physical evidence was sufficient to form a basis and it was necessary to rely on knowledge of principles beyond the purview of the average juror. Wrongful-death cases in which the plaintiff intends to enforce the Dead-Man's Act may be appropriate cases for use of reconstruction experts, although a reconstruction could result in waiver of the Act's protection under the right circumstances.

5. [6.32] Presumptions and Burden of Proof

Various presumptions and inferences may be useful in establishing or defending a wrongful-death case. For example, there is a presumption against suicide. *Kettlewell v. Prudential Insurance Company of America,* 4 Ill.2d 383, 122 N.E.2d 817, 819 (1954); *Wilkinson v. Aetna Life Insurance Co.,* 240 Ill. 205, 88 N.E. 550, 553 (1909). The jury may consider this presumption, along with all of the evidence in the case, in determining the cause of death.

When a collision occurs in one of two traffic lanes, it is presumed that the driver of the vehicle in the wrong lane was negligent. *Calvetti v. Seipp,* 70 Ill.App.2d 58, 216 N.E.2d 497, 500 (5th Dist. 1966).

In handling wrongful-death cases, it is important to remember that the mere fact of an accident does not alone raise any presumption of negligence. *E.g., Moss v. Wagner,* 27 Ill.2d 551, 190 N.E.2d 305, 307 (1963). However, this rule is subject to an important exception. When the plaintiff (or the plaintiff's decedent) is a passenger injured during the course of transportation and the defendant is a common carrier, there is a presumption that the carrier was negligent. *Tolman v. Wieboldt Stores, Inc.,* 38 Ill.2d 519, 233 N.E.2d 33 (1967). Therefore, under such circumstances, a prima facie case exists merely by virtue of the accident itself. The burden then shifts to the defendant carrier to establish why it should not be held responsible.

The fact that an injury took place while on a business' premises does not give rise to a presumption of negligence. *Halpin v. Pekin Thrifty Drug Co.,* 79 Ill.App.2d 153, 223 N.E.2d 708, 710 (3d Dist. 1967).

Because "[a] normal person is presumed to exercise due care for his own safety and preservation," contributory negligence will not be implied. 1 Robert S. Hunter, TRIAL HANDBOOK FOR ILLINOIS LAWYERS, CIVIL §34.40, p. 585 (7th ed. 1997). There is a presumption that the driver of an automobile is the owner. *McElroy v. Force,* 38 Ill.2d 528, 232 N.E.2d 708, 710 (1967). A child under seven is conclusively presumed to be incapable of contributory negligence. *Moser v. East St. Louis & Interurban Water Co.,* 326 Ill.App. 542, 62 N.E.2d 558, 560 (4th Dist. 1945). Further, a rebuttable presumption exists that a child between seven and fourteen is not guilty of contributory negligence. *E.g., Sramek v. Logan,* 36 Ill.App.3d 471, 344 N.E.2d 47, 49 (3d Dist. 1976).

Every person is presumed to be sane. *Shevlin v. Jackson,* 5 Ill.2d 43, 124 N.E.2d 895, 897 (1955). Furthermore, all persons are presumed to intend the natural and probable consequences of their voluntary acts. *Smith v. Birge,* 126 Ill.App. 596 (4th Dist. 1906). Additionally, mental incompetency will not be inferred merely from old age or physical illness. *Masterson v. Wall,* 365 Ill. 102, 6 N.E.2d 161, 165 (1936).

There are many other presumptions and inferences that may be drawn in wrongful-death cases, including res ipsa loquitur, failure of a party to testify, flight from the scene of an accident, spoliation of evidence, and validity of marriage.

D. Issues Associated with Establishing or Minimizing Damages

1. [6.33] Presumptions and Burden of Proof

The Wrongful Death Act, 740 ILCS 180/0.01, *et seq.,* creates a cause of action in favor of the personal representative for the benefit of the surviving spouse and next of kin. They are entitled to compensation for their "pecuniary" losses. There are two critical legal issues that arise in this regard. First, who are the "next of kin"? Second, what does "pecuniary loss" include? The persons entitled to recover are discussed in detail in Chapter 1 of this handbook, and the damages recoverable are discussed in Chapter 2.

In a wrongful-death case, the "next of kin" entitled to take are the heirs as defined by the statutory intestate succession rules. *E.g., Morris v. William L. Dawson Nursing Center, Inc.,* 187 Ill.2d 494, 719 N.E.2d 715, 241 Ill.Dec. 586 (1999) (rejecting arguments that this rule is outdated in light of recognition of loss of society). The intestate succession rules are found in Article II of the Probate Act of 1975, 755 ILCS 5/2-1, *et seq.* As an example of the application of these rules, if the decedent left a spouse or children, his or her parents or siblings are not next of kin within the meaning of the Wrongful Death Act. *See Wilcox v. Bierd,* 330 Ill. 571, 162 N.E. 170 (1928). However, the rules governing who may share, when it comes to loss of society damages, do not also govern the proportionate shares of the surviving spouse and next of kin. *Morris, supra.*

The meaning of "pecuniary injuries" has expanded in the past several decades. For example, in *Elliott v. Willis,* 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982), the Illinois Supreme Court held that pecuniary injuries include a surviving spouse's loss of consortium. In *Bullard v. Barnes,* 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984), the Supreme Court clarified that pecuniary injuries also include the loss of a minor child's society. Moreover, in *Ballweg v. City of Springfield,* 114 Ill.2d 107, 499 N.E.2d 1373, 102 Ill.Dec. 360 (1986), loss of society was allowed to the surviving parents of a deceased adult child. Such recovery has also been allowed to the adult children of a deceased parent. *In re Estate of Keeling,* 133 Ill.App.3d 226, 478 N.E.2d 871, 872, 88 Ill.Dec. 380 (3d Dist. 1985). The siblings of a deceased may recover for a proven loss of society, although such loss is not presumed. *In re Estate of Finley,* 151 Ill.2d 95, 601 N.E.2d 699, 176 Ill.Dec. 1 (1992). It was held that loss of society damages are available to the parents of a stillborn infant or a deceased unborn fetus, and that pecuniary loss is not solely dependent on a past relationship with the deceased, but can include the consideration of the companionship that may have been enjoyed in the future. *Thornton v. Garcini,* 364 Ill.App.3d 612, 846 N.E.2d 989, 301 Ill.Dec. 386 (3d Dist. 2006).

As reflected in I.P.I 31.04 below, a 2007 amendment to the Wrongful Death Act expanded the categories available for consideration when determining the extent of pecuniary loss to include the grief, sorrow, and mental suffering of the decedent's spouse or next of kin.

I.P.I. — Civil No. 31.04 explains:

"Pecuniary loss" may include loss of money, benefits, goods, services, [and] society [and sexual relations].

Where a decedent leaves _____,
widow and/or lineal next of kin, e.g., son
the law recognizes a presumption that _____
widow and/or lineal next of kin, e.g., son
has sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. Decedent's personal expenses (and other deductions);]

[4. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give his child had he lived;]

[5. His age;]

[6. His sex;]

[7. His health;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities;]

[10. The marital relationship that existed between _____ and _____;]
widow decedent

[12. The relationship between _____ and _____.]
lineal next of kin, e.g., son decedent

[_____ is not entitled to damages for loss of _____'s society and
widow decedent
sexual relations after _____.]
date of widow's remarriage

"Loss of society" is defined as "the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection." I.P.I. — Civil No. 31.11. *See also Singh v. Air Illinois, Inc.,* 165 Ill.App.3d 923, 520 N.E.2d 852, 117 Ill.Dec. 501 (1st Dist. 1988).

The long-standing rule in Illinois is that when a decedent leaves direct lineal kin or a surviving spouse, it is presumed that those persons have a substantial pecuniary loss by reason of the death. *Hall v. Gillins,* 13 Ill.2d 26, 147 N.E.2d 352, 355 (1958); *Dukeman v. Cleveland, C., C. & St. L. Ry.,* 237 Ill. 104, 86 N.E. 712, 714 (1908); *Ferraro v. Augustine,* 45 Ill.App.2d 295, 196 N.E.2d 16, 20 (1st Dist. 1964). The Supreme Court modified this rule in *Bullard, supra,* 468 N.E.2d at 1234. In *Bullard,* the court recognized a claim for the loss of a minor child's society by the parents. In light of the recognition of the loss of society, the *Bullard* court held that there is no longer a presumption of lost earnings upon the death of a minor child, but, instead, there is now a presumption of pecuniary injury to the parents in the loss of a minor child's society. Similarly, in the case of the loss of an adult child's society, it is now presumed that the parents have a substantial pecuniary loss by virtue of the loss of the adult child's society, but no longer is there a presumption of an actual loss of earnings. *Ballweg, supra,* 499 N.E.2d at 1379. There is no presumption of substantial pecuniary loss in favor of collateral heirs. *Finley, supra.*

As in all civil cases, the plaintiff has the burden of establishing every element of the case, including the items of damages recoverable. Sections 6.33 – 6.40 below address the practical problems encountered in proving or minimizing the available damages.

2. [6.34] Proving or Minimizing the Economic Loss

One of the best places to begin structuring the evidence is with the jury instructions that the court will read. Regarding economic loss, the jury will be told that it must fix the amount of money that will reasonably and fairly compensate the next of kin for their pecuniary loss. This amount may encompass the loss of money, benefits, goods, and services. I.P.I. — Civil No. 31.05. Relevant factors to consider include the decedent's age, sex, health, physical and mental characteristics, occupational abilities, and habits of industry, sobriety, and thrift. *Id.* Economic losses include the loss to the estate itself (*see, e.g., Fowler v. Chicago & E. I. R. Co.,* 234 Ill. 619, 85 N.E. 298 (1908); *Annot.,* 42 A.L.R.5th 465 (1996)) as well as the financial loss sustained by those who survived the premature death (*see, e.g., Keel v. Compton,* 120 Ill.App.2d 248, 256 N.E.2d 848, 852 (3d Dist. 1970)). Examples of financial loss include support, maintenance, gifts, and services around the house. Of course, the starting point is to establish, through admissible evidence, the money, goods, and services contributed by the decedent in the past as well as those the decedent would likely have contributed in the future had he or she lived out a normal life expectancy. With these legal standards in mind, the attorney preparing to try a wrongful-death case must marshal the evidence (lay witnesses, possibly experts, and exhibits), as discussed further in §§6.35 – 6.37 below.

Obviously, the representative will attempt to maximize damages recoverable. Plaintiff's counsel, however, must be careful not to overreach and request damage amounts not supported by the evidence and must also take into consideration how strong a case for liability has been made in requesting damages. Concrete evidence such as testimony of the employer generally has more impact than reliance on the testimony of experts alone. Defense counsel always faces a dilemma when liability is disputed. Should damages be argued at all? Defense counsel should conduct cross-examinations gently if at all concerning damages for loss of society in most cases. For example, while evidence of a decedent's extramarital affair that the spouse knew about before death is admissible (*see Countryman v. County of Winnebago,* 135 Ill.App.3d 384, 481 N.E.2d 1255, 90 Ill.Dec. 344 (2d Dist. 1985)), whether it would be wise to offer this type of evidence is another matter altogether.

a. [6.35] Lay Testimony

Both sides should creatively use lay witnesses to establish their "damages" facts.

In preparing a wrongful-death case for trial on behalf of the next of kin, the extent to which the next of kin should be used to prove the elements of economic damages is a matter of discretion. Numerous factors should be considered. In general, it is a good idea to use witnesses more neutral than the next of kin to establish as much of the damages case as possible. If the deceased was a wage earner, it may be wise to call appropriate lay witnesses from the decedent's place of employment. An admiring supervisor can make a powerful witness. For example, in *Lorenz v. Air Illinois, Inc.,* 168 Ill.App.3d 1060, 522 N.E.2d 1352, 119 Ill.Dec. 493 (1st Dist. 1988), the plaintiff's decedent was a professor at Southern Illinois University at the time he was killed in an airplane crash. A former dean testified on behalf of the professor's family, opining that if he had not been killed, the professor probably would have become dean of the university, earning substantially more money as a professor. This testimony was allowed, and, in light of the

decedent's background and ambitions, the technique of calling the former dean was very effective. Such a person can provide not only details about what the decedent had actually been making in the past but also detailed factual information about benefits lost and, most important, the decedent's earning capacity in the future, which is often much greater than the trier of fact would otherwise assume. However, testimony concerning future earning capacity will not be allowed if it is deemed to be too speculative. *E.g., Carlson v. City Construction Co.*, 239 Ill.App.3d 211, 606 N.E.2d 400, 179 Ill.Dec. 568 (1st Dist. 1992).

Plaintiff's counsel should consider calling witnesses to prove lost "services." Family members and close friends are good candidates for such testimony. Neighbors, acquaintances, and persons more distant from the family of the deceased may be even better. Observations of a near stranger that tend to show the losses suffered by the next of kin can be very effective since such a person is likely to be viewed as less biased and more independent.

For the plaintiff, determining the appropriate lay witnesses to call to prove the economic losses begins with spending a substantial amount of time with the next of kin. Counsel must come to know the deceased. Such knowledge is acquired over a period of time. The next of kin may be the best initial source of information concerning what potential witnesses should be interviewed. Those interviews often lead to others.

The defendant may choose to call or cross-examine lay witnesses to counter or minimize lost income or accumulation to the estate theories. Employers may testify that the decedent was not likely to be promoted or was likely to receive a pay cut, to be demoted, or to be terminated because of performance or other factors such as declining business, bankruptcy, etc. Coworkers, relatives, and others may have testimony valuable to the defendant. For example, treating physicians may testify that because of a condition unrelated to the defendant's alleged conduct, the decedent's work life would have been shortened. However, in many cases, the defense wisely chooses not to call any lay witnesses on damages issues at all.

b. [6.36] Expert Testimony

Experts from various disciplines may testify about the economic loss to the estate, spouse, and next of kin. Economists, actuaries, investment advisers, mathematicians, employment counselors, and business evaluation experts are among the available witnesses. The plaintiff's experts may calculate the loss suffered by the beneficiaries as a result of the decedent's death, including historic losses (to date of trial) and future streams of income lost or lost accumulations to the estate. Experts may also place a value to the next of kin of the decedent's lost services. Such experts may be called on to explain concepts such as present value, inflation, savings, increases in income through promotions, the economic value of fringe benefits, economic growth, investment, and cost-of-living raises. Obviously, the experts must be qualified. Just as important, they must be interesting. To be effective, the experts' testimony should be based on solid grounds and not be exaggerated.

The jury must discount future economic losses to "present cash value." *See, e.g., Schaffner v. Chicago & North Western Transportation Co.,* 129 Ill.2d 1, 541 N.E.2d 643, 653, 133 Ill.Dec. 432 (1989).

> **"Present cash value" means the sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future, will equal the amount of the [expenses] [and] [earnings] [benefits] at the time in the future when [the expenses must be paid] [or] [the earnings (benefits) would have been received].** I.P.I. — Civil No. 34.02.

Present cash value is clearly an appropriate topic for expert testimony. *See, e.g., Richardson v. Chapman,* 175 Ill.2d 98, 676 N.E.2d 621, 221 Ill.Dec. 818 (1997); *Varilek v. Mitchell Engineering Co.,* 200 Ill.App.3d 649, 558 N.E.2d 365, 146 Ill.Dec. 402 (1st Dist.), *appeal denied,* 133 Ill.2d 574 (1990).

Inflation can also be considered by the jury. In *Varilek,* the court held that inflation is relevant to determining the amount of future earnings. An expert was not barred "from testifying as to present cash value by utilizing a formula which incorporates inflation and real wage growth." 558 N.E.2d at 380. The court stated that "[o]f course, if there is no expert testimony or other evidence of inflation presented, it would be proper to sustain an objection to argument of counsel urging jurors to consider inflation." 558 N.E.2d at 380, citing *Prendergast v. Cox,* 128 Ill.App.3d 84, 470 N.E.2d 34, 39, 83 Ill.Dec. 279 (1st Dist. 1984).

In *American National Bank & Trust Company of Chicago v. Thompson,* 158 Ill.App.3d 478, 511 N.E.2d 1206, 110 Ill.Dec. 886 (1st Dist. 1987), the court precluded testimony or argument on the effect of inflation and the growth of real earnings in determining present cash value. The *American National Bank* court also required the use of neutral instead of actual figures. *See also Allendorf v. Elgin, Joliet & Eastern Ry.,* 8 Ill.2d 164, 133 N.E.2d 288 (1956). In contrast, in *Stringham v. United Parcel Service, Inc.,* 181 Ill.App.3d 312, 536 N.E.2d 1292, 1296, 130 Ill.Dec. 81 (2d Dist. 1989), the court explained:

> **[P]redicting future earnings without considering the effects of inflation on wage levels produces an unrealistically low estimate of the plaintiff's total future earnings. When this estimate is discounted by the market interest rate, the plaintiff will receive an award which, even if invested at that rate, would yield fewer dollars than if the plaintiff had continued earnings which kept pace with inflation.**

The Illinois Supreme Court ended the debate in *Richardson, supra,* 676 N.E.2d at 626. It is now clear that the "growth rate of wages and prices" may be included in a present value calculation and that an opinion witness is not limited to the use of neutral figures. *Id.*

Of course, the decedent's purely personal consumption should be deducted. *See, e.g., Baird v. Chicago, Burlington & Quincy R.R.,* 63 Ill.2d 463, 349 N.E.2d 413 (1976); *Bullard v. Barnes,* 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984).

Whether an economist should be called by either party in a wrongful-death case is a matter for the discretion of the trial attorney. Such testimony is usually offered by the plaintiff, less frequently by the defendant.

c. [6.37] Exhibits

Exhibits used to establish damages in wrongful-death cases are limited only by the imagination of counsel and the experts. Proving true economic losses may result in exhibits such as life expectancy tables, employment and personnel files, federal and state income tax returns, W-2 forms, North American Industrial Classification System tables, Statistical Abstracts of the United States, professional publications, and documents evidencing the nature and value of the decedent's fringe benefits at work (*e.g.*, pension and family medical insurance). *See, e.g., Hanlon v. Airco Industrial Gases,* 219 Ill.App.3d 777, 579 N.E.2d 1136, 162 Ill.Dec. 322 (1st Dist. 1991) (past income tax returns admissible to establish lost future income). With creativity and computer graphics, however, the key numbers and concepts can be made to jump off the page with vivid charts and graphs. Courts will take judicial notice of standard mortality tables. *See Allendorf v. Elgin, Joliet & Eastern Ry.,* 8 Ill.2d 164, 133 N.E.2d 288 (1956). Standard mortality tables and annuities tables may be admitted as an exception to the hearsay rule. *See Calvert v. Springfield Electric Light & Power Co.,* 231 Ill. 290, 83 N.E. 184 (1907); *Allendorf, supra.* Recovery for lost income must be based on remaining life expectancy as opposed to life expectancy alone. *McCray v. Illinois Central R.R.,* 12 Ill.App.2d 425, 139 N.E.2d 817 (1st Dist. 1957). Summaries of complex economic testimony should be prepared. Ill.R.Evid. 1006 provides:

> **The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.**

See also People of State of Illinois v. Crawford Distributing Co., 65 Ill.App.3d 790, 382 N.E.2d 1223, 22 Ill.Dec. 525 (4th Dist. 1978); *Joseph W. O'Brien Co. v. Highland Lake Construction Co.,* 17 Ill.App.3d 237, 307 N.E.2d 761 (1st Dist. 1974); Michael H. Graham, GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §1006.1, p. 1103 (10th ed. 2010).

3. Proving or Minimizing the Noneconomic Loss

a. [6.38] Lay Testimony

Losses of consortium and society are matters uniquely suited for presentation through lay witnesses. To understand the nature of the intangible losses suffered by the next of kin, the jury should get to know the deceased.

During the course of a one-hour television show, the average juror accumulates information about the lives of several main characters. Therefore, the jury will not patiently receive weeks of testimony before drawing conclusions about a decedent's life and the effect of his or her death on

next of kin. The plaintiff's attorney's challenge is, without appearing to play inappropriately on the sympathy of the jury, to present sufficient details about the decedent and the next of kin to increase the likelihood that an award of full, fair, and adequate damages will be made.

Professor Ball teaches plaintiffs' lawyers as follows:

> **[F]ew attorneys do enough to find out what all the harms and losses were or will be, and few present those harms and losses as effectively as possible. You must seek out and present information about your client's harms and losses as vigorously and thoroughly as you pursue and present liability matters.**
>
> **I once asked an attorney for a list of the harms and losses in his wrongful death case. He gave me the following:**
>
> **1. Death**
>
> **2. Loss of a husband**
>
> **3. Loss of a father**
>
> **A guy dies and the whole loss takes only nine words? To anyone who cares about him it should be more like nine volumes. And you want the jury to care about him.**
>
> **Learn the full range and depth of your client's harms and losses. "Harms and losses" means all the bad things that happened because of the defendant's negligence. It is never only nine, 90, or even 900 words. The best sources include the client, the people who know or knew him, the people who worked with him, helped him, observed him, and experts — such as social workers and other counselors — who work with people with similar harms and losses. The more you listen to those sources, the more you will learn about the harms and losses to your client.** David Ball, DAVID BALL ON DAMAGES: THE ESSENTIAL UPDATE: A PLAINTIFF'S ATTORNEY'S GUIDE FOR PERSONAL INJURY AND WRONGFUL DEATH CASES, p. 2 (2d ed. 2005).

Assembling several powerful lay witnesses to briefly share observations or stories about the deceased and his or her family can be effective. No generalizations can be made about who should be selected. The surviving spouse, neighbors, fellow PTA members, grocery store clerks, travel agents, family accountants, and doctors are some of the possibilities. Counsel's goal should be to underscore that which made the decedent special. Provided adequate time is spent with those who knew the deceased, the task is usually not difficult.

The plaintiff's attorney should pay close attention to witnesses who may be able to provide details about the losses of the next of kin. Family members and close friends provide obvious sources of such testimony. Neighbors, acquaintances, and persons more distant from the family of the deceased should also be considered. Observations of a near stranger that tend to show the

losses suffered by the next of kin can be very effective since such a person is likely to be viewed as less biased and more independent than persons with close relationships with the next of kin. Counsel may introduce evidence concerning gifts. Although this evidence can be presented by the next-of-kin gift recipient, it will be much more effective when introduced through the eyes of a more neutral observer. Defense counsel may point out facts such as estrangement to reduce recovery. *See Chapman v. Gulf, M. & O. R. Co.,* 337 Ill.App. 611, 86 N.E.2d 552 (3d Dist. 1949) (fact that woman was not living with her husband at time of death is relevant). *See also Bullard v. Barnes,* 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984) (presumption of pecuniary loss may be rebutted by showing that parent and child were estranged at time of death).

Some years ago, the author had to prove the relationship between a deceased eight-year-old girl and her father. The girl's parents were divorced and on bad terms. The mother had custody of the child; the father had visitation rights. The father was to pay child support, which he failed to do. In truth, however, he had a close relationship with his daughter. He provided more economic support than was required by his divorce agreement directly to his daughter in the form of clothing purchases and direct payments to her. At issue was the extent of this father's loss of society for determining his share of a wrongful-death settlement. One way of proving the relationship was through the father's testimony about his feelings for his daughter, the things they did together, the nature of their relationship, etc. Instead, counsel relied on brief testimony from a woman who barely knew the father but lived in the same neighborhood. This woman, who had no bias, described how the father and daughter walked hand in hand through the park when there was no one there to see, and the girl often wore a St. Louis Cardinals hat even though she lived with her mother in the Chicago area (her father, of course, living near St. Louis and being a devout Cardinals fan) as established through other witnesses. This type of testimony said more about the relationship between the child and her father than any self-serving statements the father made on the witness stand.

Usually, evidence of a wrongful-death beneficiary's wealth, health, poverty, or helplessness cannot be considered in determining damages. *See, e.g., Freehill v. DeWitt County Service Co.,* 125 Ill.App.2d 306, 261 N.E.2d 52 (4th Dist. 1970). A limited inquiry into medical condition may be allowed to describe close ties, dependence, amount of love, etc. *See Stringham v. United Parcel Service, Inc.,* 181 Ill.App.3d 312, 536 N.E.2d 1292, 130 Ill.Dec. 81 (2d Dist. 1989); *Cooper v. Chicago Transit Authority,* 153 Ill.App.3d 511, 505 N.E.2d 1239, 106 Ill.Dec. 448 (1st Dist. 1987).

Actions for conscious pain and suffering before death are frequently tried with wrongful-death counts. *E.g., Hall v. National Freight Inc.,* 264 Ill.App.3d 412, 636 N.E.2d 791, 201 Ill.Dec. 359 (1st Dist.) (26 minutes of conscious pain and suffering compensable), *appeal denied,* 157 Ill.2d 500 (1994). *See also Annot.,* 75 A.L.R.4th 151 (1990). Lay witnesses can be key to proving the extent of conscious pain and suffering.

b. [6.39] Expert Testimony

Most often, expert witnesses are not used to establish noneconomic losses in wrongful-death cases. However, a pathologist would be a common witness to call in a case involving conscious pain and suffering before death to prove the nature, extent, and duration of this suffering. In addition, some plaintiffs have used hedonic damages experts. *See Sherrod v. Berry,* 827 F.2d 195,

205 (1987), *vacated en banc on other grounds,* 856 F.2d 802 (7th Cir. 1988); *Johnson v. Inland Steel Co.,* 140 F.R.D. 367, 372 (N.D.Ill. 1992). However, such experts have also been rejected. *Fetzer v. Wood,* 211 Ill.App.3d 70, 569 N.E.2d 1237, 155 Ill.Dec. 626 (2d Dist. 1991) (noting that *Sherrod* was decided under federal, not state, law and that expert testimony on noneconomic losses is misleading because it gives illusion of certain value to intangible losses that are uncertain and that, in any event, are within ken of average juror). In some cases, however, testimony of psychologists and psychiatrists has been allowed to prove loss of consortium damages. *E.g., In re Air Crash at Lexington, Kentucky, August 27, 2006,* No. 5:06-CV-316-KSF, 2009 WL 1813137 (E.D.Ky. June 23, 2009).

Damages for loss of consortium or society, like damages for pain and suffering, are not reduced to present cash value. *Drews v. Gobel Freight Lines, Inc.,* 144 Ill.2d 84, 578 N.E.2d 970, 161 Ill.Dec. 324 (1991).

c. [6.40] Exhibits

Photographs of the decedent, even gruesome after-death photographs, will be admitted if their probative value outweighs their potential prejudicial effect. The trial judge is in the best position to make this determination, and that decision will be reversed only if the judge has abused his or her discretion. Use of gruesome photographs was allowed in *Drews v. Gobel Freight Lines, Inc.,* 144 Ill.2d 84, 578 N.E.2d 970, 978, 161 Ill.Dec. 324 (1991), and *Bullard v. Barnes,* 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984). *See also Hanlon v. Airco Industrial Gases,* 219 Ill.App.3d 777, 579 N.E.2d 1136, 162 Ill.Dec. 322 (1st Dist. 1991).

Videotapes, pictures, or recordings showing the decedent interacting, providing counsel, nursing, or assisting the beneficiaries can be very effective. In *Drews, supra,* for instance, videotapes depicting the decedent teaching his son to swim and play golf and photographs showing the decedent and his wife at a picnic on their land, the decedent building his new home, and the decedent with his son were introduced.

Trying damages in a wrongful-death case is more about the decedent's life than the decedent's death. A portrait may be drawn with words, memories, photos, mementos, things that the decedent created, and other tools so the jury has a chance to come to know the deceased at home, at work, and at play.

In *Barry v. Owens-Corning Fiberglas Corp.,* 282 Ill.App.3d 199, 668 N.E.2d 8, 217 Ill.Dec. 823 (1st Dist. 1996), the trial court admitted into evidence a 90-second video of a thoracoscopy procedure that was performed on the plaintiff's decedent in an asbestos-related wrongful-death case. The appellate court affirmed this ruling, finding that the video showed the diseased lung and fluid buildup that caused the deceased distress before his death. This is a good example of creative use of demonstrative evidence to prove a point. A $12.3-million verdict was ultimately upheld on appeal.

Often, survival and/or family expense statute claims are tried together with wrongful-death claims. In such cases, recovery for medical, funeral, and other expenses is usually sought. Proof of such items is generally straightforward and may include evidence that the bills have been paid

or that there is liability for the bills and that the charges are reasonable. Payment of a doctor or medical bill is prima facie proof that the bill was paid and that the amount was reasonable. *See, e.g., Wicks v. Cuneo-Henneberry Co.,* 319 Ill. 344, 150 N.E. 276 (1925); *American National Bank & Trust Co. v. Peoples Gas Light & Coke Co.,* 42 Ill.App.2d 163, 191 N.E.2d 628 (1st Dist. 1963); *Williams v. Matlin,* 328 Ill.App. 645, 66 N.E.2d 719 (1st Dist. 1946). When a plaintiff testifies that the bill was for services rendered and was paid, it is prima facie reasonable regardless of who paid it. *Flynn v. Cusentino,* 59 Ill.App.3d 262, 375 N.E.2d 433, 16 Ill.Dec. 560 (3d Dist. 1978). Unpaid bills are not presumed to be reasonable. *Omni Overseas Freighting Co. v. Cardell Insurance Agency,* 78 Ill.App.3d 639, 397 N.E.2d 112, 33 Ill.Dec. 779 (1st Dist. 1979).

Many times, through requests to admit and stipulations, the paid bills can simply be introduced into evidence. If not, testimony from the personal representative or family member that the bills were paid will be required. If the bills were not paid, testimony from a treating physician or expert, for example, can be introduced to establish that the charges are reasonable.

VII. [6.41] SUMMATION

Some believe that cases are won or lost in the summation. Careful preparation and presentation of the summation are central to success. The principles of making an effective summation are similar in wrongful-death and other types of cases. There are many excellent sources of information concerning summations. *E.g.,* Joseph F. Anderson, Jr., *The Lost Art: An Advocate's Guide to Effective Closing Argument,* 10 S.C.Law., No. 3, 26 (Nov. – Dec. 1998); Lawrence J. Smith, ART OF ADVOCACY: SUMMATION (1978); Thomas A. Mauet, FUNDAMENTALS OF TRIAL TECHNIQUES, p. 401 (6th ed. 2002); Larry S. Stewart, *Arguing Pain and Suffering Damages in Summation, How To Inspire Jurors,* 28 Trial, No. 3, 55 (Mar. 1992). See also Gerald L. Angst and Stephen C. Carlson, Ch. 12, *Closing Argument,* ILLINOIS CIVIL PRACTICE: TRYING THE CASE (IICLE®, 2009).

Copies of the summations that were given on December 1, 2009 in an air crash wrongful-death damages trial are set out in the appendix.

VIII. [6.42] DELIBERATIONS, RETURN OF VERDICT, AND ENTRY OF JUDGMENT

The rules governing deliberations, return of verdict, and entry of judgment are the same in wrongful-death and other types of cases. For details concerning the rules and principles relating to these subjects, see 735 ILCS 5/2-1201, 5/2-1108, and 5/2-1109. See also Karen L. Kendall and Gregory J. Rastatter, Ch. 13, *Return of the Verdict and Entry of Judgment,* ILLINOIS CIVIL PRACTICE: TRYING THE CASE (IICLE®, 2009).

IX. [6.43] POSTTRIAL MOTIONS

The rules concerning posttrial motions are the same in wrongful-death and other cases. It is important that the posttrial motion be specific. Matters not raised in the posttrial motion are generally waived. 735 ILCS 5/2-1202, 5/2-1203. See also 735 ILCS 5/2-1110.

For further discussion of posttrial motions, see ILLINOIS CIVIL PRACTICE: TRYING THE CASE, Ch. 14 (IICLE®, 2009).

X. APPENDIX

A. [6.44] Sample Opening Statements

Opening Statements in *Hebert v. Comair*, Inc., 5:06-CV-316 (December 1, 2009).

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things received into the record as exhibits, and any facts which the lawyers agree or stipulate to.

Certain things are not evidence, and I want to go over these things with you now. Statements, arguments, and questions by lawyers are not evidence. Objections to questions are not evidence.

Lawyers have an obligation to their clients to object when they feel something being offered is improper under our rules of evidence. So if you hear an objection and it is sustained, you just ignore the question. If it is overruled, then you would treat the answer to that question the same as you would the answer to any other question.

And if you are instructed that some item of evidence is to be received for a limited purpose only, you must follow that instruction. Testimony which the Court has excluded or told you to disregard is not evidence and must not be considered by you.

Anything you have seen or heard outside the courtroom is not evidence. You must decide this case solely on the basis of what you see and hear in the courtroom.

Now, it will be your job to decide or to judge the credibility of witnesses. You have to decide whether or not you believe what a witness is saying, all of it or some of it or part of it, or none of it at all. Judging the credibility is your job, not mine.

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Now, at the conclusion of the trial I will give you some instructions which hopefully will help you as you determine the credibility of witnesses.

Now, this is a civil case, and in this civil case the plaintiffs have the burden of proving their case by what is called the preponderance of the evidence. That means that the plaintiff has to produce evidence that when considered in the light of all the facts leads you to believe that what the plaintiff is claiming is more likely so than not so.

To put it differently, if you were to put the plaintiffs' evidence and the defendant's evidence on a scale, the plaintiffs are required to tip the scale somewhat to one side. If the plaintiff fails in this burden, then your verdict on that particular issue must be for the defendant.

Now, a few words about your conduct as jurors over the course of the trial. You must not talk about the case among yourselves or with anyone else. If anyone should attempt to talk to you about the case, please report that to me promptly.

Don't read or listen to anything in the media about this case, because you have to decide this case solely on the basis of what you see and hear in the courtroom. And you know as well as I do that very little of what you see and hear in the media is true, so you use your own judgment. You decide from what you see and hear in the courtroom. Don't

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pay any attention to what the media says.

Don't form an opinion until all of the evidence is in and until you retire to the jury room to deliberate on your verdict. If you wish, you may take notes, but I would instruct you that the notes you take are for your own personal use and should not be given to or read by anyone else.

Let me stress to you again that over the course of the trial do not talk about the case among yourselves or to anyone else.

The trial is now ready to begin. First, each side will make what is called an opening statement. An opening statement is not evidence and it is not argument. It is simply an outline of what that party intends to prove, and it's calculated to help you follow the evidence as it comes in.

After the opening statements, then the plaintiffs will present their witnesses and the defendant may cross-examine those witnesses. After the plaintiff finishes, then the defendant will present its witnesses and the counsel for plaintiffs may cross-examine those witnesses.

And then, after all the evidence is in, then the attorneys make their closing arguments where they summarize and interpret the evidence for you.

And after that, I will give you your instructions on the

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law of the case.

So those are your preliminary instructions. And Mr. Rapoport, are you ready to make the opening statement on behalf of the plaintiffs?

MR. RAPOPORT: Well, I am, your Honor.

THE COURT: All right, sir. Come around.

MR. RAPOPORT: May it please the Court, your Honor.

THE COURT: Mr. Rapoport.

MR. RAPOPORT: Counsel. And gentlemen of the jury. Forgive me, I hope I never say "ladies and gentlemen of the jury." I believe this is the first time in trying cases like this that I have had no women on the jury.

My name is David Rapoport, and let me begin.

Whenever a party, through negligence, kills someone else, they have to pay for the harm that they caused. But let me tell you the story of what happened on August 27th of 2006, near here.

An airplane that looks much like the one that we have on the table -- and I don't -- I don't mean to play with models here, but everyone needs to understand what we're dealing with.

So the plane was like this one. This is a regional jet. It was operated under the brand name Delta Connection by Comair, whose name appeared up here. And I'm sure you've probably seen airplanes like this.

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So what happened on August 27th in the predawn hours, just after 6:00 a.m., was this. This airplane was rolling down the runway for takeoff. It was gaining speed for takeoff. It reached the end of the runway and was not going fast enough to properly take off.

It began trying to take off, and it never got much off the ground. And what occurred over the next 11 to 12 seconds was roughly this: It covered a distance of about six football fields from the time that the wheels went off the pavement and onto the grass.

The first portion of that, roughly a football field, it was on the ground vibrating at high speed, and there was a 4-foot-high little hill, call it a berm. It hit that. And it popped up into the air briefly. It went another half-football field or so when the first impact occurred, and that was with a perimeter fence on the airport and with gates.

All I'm telling you aren't my opinions. These are documented facts. This had a Cockpit Voice Recorder in it, this had a Flight Data Recorder. We know a great deal about exactly what this airplane was doing. The facts that I'm telling you about come from the National Transportation Safety Board official investigation into the cause of this crash.

So it hits the berm, it's in the air. A portion of it

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crashes through the airport perimeter fence. You will see pictures of the damaged fence.

We know that about six football fields after it hit the grass on the ground and left tracks, it came to a stop. And either right then, shortly before, or shortly after, it was in flames with everybody inside of it.

The plane did various things after it hit the gate. It touched the ground. It never got very high off the ground; 20, 25 feet or so. It crashed into some trees initially. The left wing hit a tree, and this thing here clipped off. And it later hit a few more trees, still in the air. And more of the wing was ripped off.

The fuel sits in the wings on this aircraft. There's the left and right wing tanks, and also this had an auxiliary or central-centered fuel tank.

So fire began when the wing was ruptured, and this progressed and it hit more trees. And there was fire.

What happened to Bryan Woodward and to the other people that day could have happened to anybody. We know things about what he experienced, and you'll hear about those things.

The first person who got out to this site and could see anything was Bryan Jared, and Mr. Jared will be in the hallway here in uniform at 11:00 this morning, I hope.

Now, Mr. Jared is a police officer, and he had no idea,

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no special training associated with airplane crashes. He had no idea that when the call went out for help that he would be closest to the airport.

He went there as fast as he could. He saw the glow of the fire. He drove through farm fields, and he had to ditch the car and get through tall grass. And he finally made it to the scene.

And what he witnessed there still looked a lot like an airplane, but it was on fire. And the cockpit piece was more impact, but this was in a couple of pieces close together. It still looked like an airplane.

It was engulfed in flames, and he tried to get close. He did get close and he got a look in, and he tried to figure out who he could help.

But we know that by the time he got there, some six minutes or more after the crash, he could not help those that were in here because the fire had engulfed everything.

The copilot was alive, and he was able to help him.

But it was the fuselage. By an hour later, the fire had burned down the fuselage, so you won't be able to see any pictures of what this looked like six, seven, eight minutes later. It will only have Mr. Jared's testimony, because saving people is the call of the day. At the time anybody could take any pictures, it was burned down with people in it.

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Bryan Woodward's body was autopsied, and that autopsy provided important and perhaps the most important information about what happened to Bryan Woodward and what he experienced throughout this.

The autopsy revealed that he had soot in his airway. The autopsy revealed that he had elevated carboxyhemoglobin, which means that he breathed in carbon monoxide from the smoke. His cause of death included smoke inhalation, burning, and trauma. The only trauma that could be located was that he had what's called a C-3 fracture, which is up toward the neck area that was a nonfatal injury. You will hear the testimony of Dr. Tracey Corey, who was the chief coroner, and you will hear the testimony of other doctors about this.

One fact is uncontested here. Bryan Woodward was alive and breathing in the fire, and the fire and smoke killed him.

I'm sorry.

Now, in this case, you are going to be deciding various issues, as Judge Forester explained at the start, and he'll explain in more detail about that as it goes on.

But before telling you about those issues, I'd like to tell you the story of Bryan Woodward. And in order to do that, I'm going to show if I can first a picture, or actually a couple of pictures of Mr. Woodward so that you can meet him and so that you can meet his family.

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We're going to do our best during this trial to try to do justice to his memory and to try to let you know who he was so you can understand what's been lost.

You folks can see that now. You just let me know when they can see it.

Michael, will you twist that so I can see what the jury can see? Thanks.

Okay. Well, you'll know which one is Bryan. That's Bryan Keith Woodward sitting there. This photo was taken not long before the crash, on a family vacation. You can see that his daughters are there, Lauren and Mattie-Kay. Lauren is the older one. She was 15 when this happened. She's 19 now. And Mattie-Kay is the younger one. Thanks, Paul.

Next to him is Jamie Hebert. Bryan and Jamie met when they were in their late teens, about 20 years before Bryan's life ended. They met, they fell in love, they had a quite beautiful relationship. They lived together and they had these two children that they raised together, very much as soulmates and partners.

This is the family, and you'll be hearing more about Bryan Woodward's life. We have another image to show.

And you'll learn about what a nice guy Bryan was and what a great dad he was. He had special energy. And this is not for me. I didn't meet him. I wish I had the privilege of meeting him.

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From everything learned -- and we'll try to bring to you the essence of who was this person. And in many respects, he's like anybody. He was a hard-working 39 year old. He was an electrician. He was working very hard at a company that knew him well. You'll hear from his boss, Jeff Talley. You'll hear about what he was earning and also about what his future would have consisted of at that company, Del Corporation. They live in an area of Louisiana where offshore oil is a substantial business, and Bryan was not just an electrician but capable of really putting together and dealing with trouble-shooting on major machinery and major undertakings.

His company did business all over the world, and they would send him out both to set up machinery and as a trouble-shooter. He was a key man in the company.

Like everyone else who started in the morning, he liked to start at 8:00 so he could take his children to school. They did that every day. Jamie and her mom and dad work at a place there called Stop 92 at Lafayette. It's a filling station, convenience store, restaurant that the whole family worked in. You will hear about the life that they were building together, the home that Bryan and his -- and Jamie's dad were building together for them.

You'll hear all sorts of details about these things.

So what does it get down to? Well, you are going to be

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deciding in this case various issues, and some of them are easier than others.

One of the questions that will be submitted to you is for his estate, what is the value of Mr. Woodward's power to earn money for the rest of his life. And it will be your job to set an amount for that. That will be the subject of testimony of his boss and also an economist that we have hired and also an economist that the airline has hired.

There are disagreements, and I'm not going to get into arguing anything here, other than to tell you that they don't even disagree what the value of the power to earn money would be. That's an area of disagreement.

You will be judging the value of the loss of the love and companionship that his daughters have had and will have through the time that they're 18. And there are disagreements in that area.

You will also be addressing the conscious pain and suffering that Mr. Woodward experienced in the seconds or minutes following this tragedy, and about this there are also disagreements.

You'll hear from evidence from the airline that tries to paint this out as instant lights out, no pain, no stress. That's what they are going to say of a man who died from burning and smoke inhalation.

Listen carefully to all the evidence. I'm not going to

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make any attempt to sell you on anything, other than to just give you an introduction here of what this case is about, of what sort of evidence is coming.

At the end, because of the negligence of Comair and because they are liable for money damages in their case -- in this case, it's going to be your job to fully and fairly and reasonably compensate the girls and the estate for the losses that the law recognizes which will be specifically explained by his Honor at the appropriate time and have been roughly outlined by me now.

Thank you for listening, and we will return at the end of the case and have more to say.

Thank you.

THE COURT: Mr. Johnson.

MR. JOHNSON: Thank you, your Honor.

May it please your Honor.

THE COURT: Mr. Johnson.

MR. JOHNSON: Opposing counsel. Gentlemen of the jury. I'm Bill Johnson, and I'm a lawyer. And I'm here today to speak on behalf of Comair. Ronald Green, who sits with me, will be doing a great amount of the work. You have already been introduced to him. Dave Seiler is Comair's representative. That's the gentleman that's sitting there at the table. I want you to know who he is.

David Hobson, who sits behind Ron, is probably the one

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who really helps us more than anyone else. He is a paralegal. And then Denise Watts, who is sitting close to me. On over is Jessica Hoopis, who is here to help us with some of the technical events as we go through the day. So you will see those folks while the case is ongoing.

We're going to move the case right along from our standpoint and not waste your time, get right down to the important things, because what we're talking about in this case is the matter of compensation.

Comair wants to be fair and reasonable to the parties that have brought this action, and they ask that you in judging the case use your common sense and good judgment based on the evidence, and be fair and reasonable in awarding compensation to the parties that have sued in the case.

Now, Comair is a corporation. Corporations, as you know, do business in our country, and corporations have legal rights just as we individuals do. And so we'll ask you to treat Comair as you would treat anyone else, as a party to the lawsuit.

We're going to be talking today really about three areas of compensation that we will ask you to consider in the lawsuit. One of them is going to be the loss to the estate of Bryan Woodward, because under the law if one loses his or her life the only way of compensating that person for that loss of life is money. We will agree that that's a poor

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substitute, but that's all that is available and that's all that the law can give.

And in this case, of course, we're going to be talking a great deal about the law from the standpoint of what the law allows and what you should allow in making your determination as to what is fair and reasonable compensation.

So one of the areas we're going to be talking about today is with Bryan Woodward now being deceased, the question of what is a fair and reasonable amount of compensation to him.

Now, the law imposes, as Judge Forester has told you, upon the plaintiff the burden of proving the case. And, of course, they have the burden of proving damages. But that doesn't mean that we're not going to also be offering evidence in the matter. And so you are going to hear probably differences in numbers today on the three areas that I'm going to talk to you about briefly.

The first one being the loss to the estate. Bryan Woodward was 39 years old. He was an electrician. You will hear from the parties about the work records. We have the records. That's part of the lawsuit, as you know, in getting prepared. We know about his work. It appeared he traveled from job to job. But he was an electrician. You are going to hear about the various jobs that he held. And he did work offshore, I'm assuming -- I believe the evidence will show, in the Gulf area on oil rigs.

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And where this will become of some importance in the case is because when it comes to the question of how much would Mr. Woodward have earned, there's going to be a question -- one of the things that you'll need to take into consideration is, how long would he have worked?

The information that we believe comes from the plaintiff is that they have estimated his life to be until he would work until age 70. Our expert puts it at a lesser period of time for several reasons, based upon life and work expectancy tables, upon the fact that he was an electrician, the fact that as one gets older he's less likely to do certain types of labor.

And you are going to see a difference in the dollar amount, but there's going to be a dollar amount that Comair will suggest to you, based upon the evidence that Comair produces, as to what is fair and reasonable compensation to the estate of Mr. Woodward for the loss of his ability to earn money.

So there'll be a difference. Whereas they may be in some of the higher areas, our numbers will be perhaps in the median to median-wide number that Comair thinks is fair and reasonable, based upon his life expectancy and based upon his earnings, because we know his earnings averaged for the last two years of his life at around $45,000 per year.

I think you are going to hear from the plaintiffs' side

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that they would say -- they would say that by now he would be earning in the neighborhood of $80,000 a year. There will be a contest over that from the standpoint of the proof.

But you have to sort that out, based on the evidence. And judging the case as you must judge from a preponderance of the evidence, you must decide what is more likely than the other.

Another area that you are going to hear testimony about is going to be the question of whether Mr. Woodward's estate is entitled to compensation for what's called pain and suffering.

In this case, the evidence is going to indicate that from the time that the plane struck the berm which was off of Runway 26 by some distance of 100 to 150 feet, somewhere in that neighborhood, hit the berm. When that happened, that the plane became airborne and actually went into a row of trees. And the tree marks, the evidence will show, were 16 feet across the ground that the plane was airborne.

But when it came out of the trees and it was descending because of the slopage of the ground that when it impacted into what you will hear testimony referred to as the bank, that the plane had dropped 34 feet and that at that particular time the speed of the plane was somewhere in the neighborhood of 140 to 150 miles per hour when it hit into the bank, nose-first.

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Now, there will be a dispute about this, because they have an expert witness who says that the impact was not that great. Our testimony is going to be, though, that there was a tremendous impact with the ground and at that particular time the persons in the plane, including Mr. Woodward, would have either been killed from the impact or lost consciousness.

Sure, the airplane then was on the ground. It slid for a distance, hit a tree. The tree actually came into the plane. And it did burst into flame, we believe, as the plane was sliding on the ground.

And so we believe that the preponderance of the evidence will not be met by the plaintiff in showing that Mr. Woodward suffered pain and suffering, because from the time the plane struck the berm until it actually slid to a halt you're talking somewhere between 8 and 11 seconds, depending on what the experts say. It's a very short time that that happened.

When Mr. Woodward's body was examined, the official state autopsy was performed on the same day as the crash, which was August 27th, 2006.

An autopsy was performed on his body. The first listing in the preliminary report was that it was blunt force injuries with cervical spine fracture with associated soft tissue hemorrhage at levels of 3-C.

Cervical spine, as you know, is in the neck area. The

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C-3 is getting up close to the skull area. And the autopsy showed a fracture at that stage.

We will dispute the statement that it was not a death-causing type of injury. That will be something that I think you'll have to decide from the testimony.

But whether it was, the evidence will be that it was enough to cause Mr. Woodward to be unconscious so that then when the fire did occur in the plane and Mr. Woodward's body was burned that he would not have suffered the pain and suffering that is contended by the plaintiffs.

There's going to be proof, though, that there was some degree of carbon monoxide, and 13 percent is what the official autopsy showed in Mr. Woodward. Not a great amount of carbon monoxide, but certainly there, certainly indicating that at some stage he did take a breath of carbon monoxide, whatever was in the plane, and that that did probably occur prior to his death.

I think you'll hear about two other autopsies, because on September 6th of the same year, 2007, Mrs. -- Ms. Hebert, Ms. Hebert had an autopsy performed, I believe here in Lexington, by a Dr. Mitchell. And during that autopsy, performed on the same body -- that is, of Mr. Woodward -- he did not make a finding of a fracture at C-3. Neither did he find any soot in the airways.

Two days later Ms. Hebert had another autopsy performed,

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this time by a doctor from Madisonville. And his autopsy that was performed indicates there was -- he didn't find a C-3 fracture, either. And he says he found soot in the airways.

The pathologist who did the official autopsy for the Commonwealth of Kentucky and had found the C-3 fracture will explain why, as the body had deteriorated and the blood had been removed from the area, why the other doctors performing the autopsies didn't find the C-3 fracture.

But this will be another area that you are going to have to solve for all of us. You are going to have to consider the evidence and say, "Is it more likely than not, based upon the evidence that we have heard here today, that Mr. Woodward was alive at some stage and suffered pain?"

If you say that yes, that burden is met by the plaintiffs, then you'll have the duty of making an appropriate award for pain and suffering, however many seconds of life you would find.

If you think, though, that the plaintiffs have not met that burden, then of course you would not make an award for pain and suffering.

One of the big issues on this that you are going to hear in the dispute is about the impact. As I say, their expert is going to contend that there wasn't the impact that our expert says occurred. So you are going to have to sort that

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out from the evidence.

Then the third area covers the two children of Mr. Woodward, Lauren Hebert and Mattie-Kay. Under Kentucky law, as your Honor will tell you, the children of a deceased parent are entitled to what's called loss of consortium until the child reaches the age 18.

In this case, Lauren Hebert was quite close to 18. She would have had a little bit more than two years for the period of loss of consortium.

Mattie-Kay Hebert, the younger daughter, was close to 12. She would have had a little over six years of the period of loss of consortium.

And you may say why is it that it's just to 18? That's the law in Kentucky, and we, all of us here have to follow the law. And so that's what you have to deal with. And you have to deal with saying, "What is an appropriate sum for the loss of affection and companionship?" That's the way consortium is really defined. The affection that is lost, the companionship that is lost.

And in making that determination, you will want to take into consideration the evidence, of course, which we believe will show while Mr. Woodward was a person who did work, and certainly there's indication that he was well aware and looked after his children. But there are things that you will need to take into consideration, such as how much was he

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at home, did he reside in the same home with the children?
This will be the kind of information you will want to listen for, because we are dealing with areas here that, as I mentioned to you, it's difficult to translate these matters into dollars and cents.
We're going to help you as much as we can by giving you evidence that we think you should consider, but the big thing I think you will hear from our side of the case is that Comair does want to be fair and reasonable in all of these areas in this case.
However, Comair wants the amount that you fix to be a fair and reasonable amount, not a charitable gift simply because a tragic situation came about and an accident happened. And we will ask you to follow the law relative to the burden of proof being on the plaintiff, the preponderance of the evidence. But at the same time, listening to the facts and details about life in making a determination so that you can translate from the circumstances that occurred and put that into reasonable and fair amounts for a resolution of the case.
We think that after you've heard all the evidence, we know you will do that.
I will be back to talk to you later, but in the meantime you will get to hear quite a bit of testimony about these matters. And I thank you for your time.

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Thank you, your Honor.
THE COURT: Thank you.
Mr. Rapoport, are you ready to call your first witness?
MR. RAPOPORT: I am, your Honor.
Assuming Officer Jared is here, we will get him. If not, we will play the testimony of Dr. Corey.
(Witness enters the courtroom.)

BRYAN JARED, PLAINTIFFS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. RAPOPORT:
Q. Good morning.
A. Good morning.
Q. Please state your name for the record.
A. My name is Bryan Jared.
Q. What do you do for a living?
A. I'm a Lexington police officer. I have been employed with them for the last ten years.
Q. What did your training consist of as a Lexington police officer?
A. Basically go through the six-month academy, which is general procedures for patrol, how to answer calls, being proactive in responding to certain situations. And in passing years, then been given the opportunity to go to several schools, basic narcotic-type schools as part of the narcotics unit here in Lexington and some of the other specialized units.

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Q. What is your present job?
A. I'm basically involved with a specialized unit that's called CLEAR – Community Law Enforcement Action Response. We basically go into specific neighborhoods and target some of the issues they are dealing with, such as narcotics.
Q. Calling your attention to August 27, 2006, what was your job that day?
A. That particular day I was on what we call West Sector, third-shift patrol, just third-shift hours on the west side of town.
Q. What are the hours for the third shift?
A. It would be 10:00 at night until 6:00 in the morning.
Q. Calling your attention to that moment in your life when you heard anything about a problem near the airport, where were you?
A. Yes, sir. I was in the area of I believe it was Red Mile at Versailles, I guess what we would know as the Coca-Cola plant, in that general area, if you live here.
Q. What had you been doing right before you found out anything was going on?
A. It was a real busy night, prior to the crash going on, on the radio. At that point, I was meeting with several officers in the parking lot and getting our thoughts together and, to be honest with you, figure out where we could go have breakfast.
Q. All right. What happened next?
A. At that particular time, I went ahead and departed from the

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other officers and started to drive outbound Versailles Road. At that time, one of our dispatchers came over the radio, and it's what we call two tones. They tone it out twice, which means it's a serious call to get everybody's attention.
They basically -- I don't know the exact wording, but they basically advised that there was a commercial airliner jet somewhere down in the area of the airport. They couldn't advise if it was going to be in Lexington or just over the county line, which is very close to the airport, into the next county.
But nonetheless, they never asked for any available units. They usually tell a couple of officers to go out there, but they just said "Anybody that can go, go."
At that point, I just ran lights and sirens all the way out Versailles Road. It was Sunday morning, zero traffic on the road, so it gave me an opportunity to get there fairly quick.
Q. What was the weather conditions generally?
A. I remember it being clear. I don't remember anything else other than, you know, no rain, nothing like that.
Q. Had the sun come up yet?
A. No, sir, it hadn't.
Q. No sign of it even being predawn?
A. No, sir. If I remember correctly -- you'll have the time, but I want to say it was around 6:00 in the morning. It was

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B. [6.45] Sample Summations

Summations in *Hebert v. Comair*, Inc., 5:06-CV-316 (December 7, 2009).

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intangible things as pain and suffering need be produced."
We would ask that you add there "such things as pain and suffering or loss of affection and companionship."
MR. GREEN: If the Court wants to add that, there will be no objection.
THE COURT: Okay. We'll add that, then.
MR. RAPOPORT: Thank you. That's all we have.
THE COURT: All right.
MR. GREEN: These appear to us to reflect the Court's ruling.
THE COURT: I beg your pardon?
MR. GREEN: Otherwise, these instructions are okay with us relative to the Court's ruling.
THE COURT: All right. We will go ahead and make those changes. Just pencil in the changes. We will go ahead then and, for the copy going to the jury, type in the changes.
MR. RAPOPORT: Thank you.
THE COURT: All right. Are we ready for the jury?
MR. RAPOPORT: Yes, your Honor.
MR. GREEN: Yes, your Honor.
THE COURT: All right. Mr. Marshal.
(Jury enters the courtroom at 10:13 a.m.)
THE COURT: Good morning. Sorry for the delay. Madam Clerk, will you call the roll of the jury, please.
THE CLERK: Yes, your Honor.

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(Roll of the jury called by the Clerk of the Court.)
THE CLERK: All answer, your Honor.
THE COURT: All right. Thank you. So we're ready to proceed.
Mr. Johnson, are you ready to make the closing argument on behalf Comair?
MR. JOHNSON: I am, your Honor.
THE COURT: All right. Come around, sir.
MR. JOHNSON: Thank you.
May it please your Honor.
THE COURT: Mr. Johnson.
MR. JOHNSON: Opposing counsel, gentlemen of the jury.
Well, this will be the last time that I'll have the opportunity to talk with you about this case. I noticed this morning as I came in the door they had some coffee outside, and I was hopeful that some of that was for me. And then I found out that there's a legal education course going on, and so it really wasn't for us this morning.
But it made me think that we lawyers, we have to attend that for continuing legal education. And on occasion when you go to them, lawyers talk to us about how we ought to address a jury. And particularly, one of the big things is whether you ought to thank a jury for their service, because some say that that seems too much like pandering to the jury, to thank you for your service.

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But I guess I'm of the old school, and it seems to me when anyone takes the time to serve their country, their community, this Court, that they deserve to be thanked. And so being with the old school, I thank you.
As you know, you're the judges of the facts in this case. There are some things that are not at issue in this case, matters that really are of no importance in any lawsuit. And that's the question of bias or prejudice against a particular party. Or, for instance, in this case you've heard us talk about how Comair is a corporation and that it's to be treated like any other citizen, any other person involved in litigation, because the law is no respecter of citizens. We all come into court in the same way, whether we're an individual or a legal entity, whatever it is.
Same is true, really, of sympathy. One couldn't go through a trial like this and have two young women who have lost their dad come in without having sympathy, because if we didn't we would be the most callous people in the world if you don't have sympathy for someone like that.
And we all have it, and thank goodness for the human nature of sympathy. However, that's not a part of damages in this case. And that's something that, even though I'm confident you have sympathy, as I know I do, that you will put that aside and look at the case based upon the evidence, because as judges of the facts that's what we're going to

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talk about today.
And the suing parties -- in this case there are two suing parties: Ms. Hebert, who has brought the suit as Administratrix of the Estate of Bryan Keith Woodward. And she's also brought a suit, we will call it as a guardian for the minor child, Mattie-Kay. But I believe in Louisiana, where she qualified, they call it tutrixship. But whatever it is, she's brought the suit on their paragraph.
And then Lauren, who has reached the age of majority, has her own action pending in the case. They are the suing parties.
You have heard the burden of proof is on a suing party in any case. That's the way our system works. Whoever brings the suit has the burden of proving their claims, and they must prove them by what's called a preponderance of the evidence.
And as Judge his Honor Forester told you earlier about if you had the scales, if it tips the scales, this has met the burden by a preponderance of the evidence. And so that's what we need to look for in this case, have the plaintiffs tipped the scales in their case?
But this case is different than many cases, because in this case Comair wants you to be fair and reasonable and actually fix compensation for the suing parties where it is justified under the law. And you'll hear me use that term

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probably quite a few times, about being fair and reasonable in this case.

As we get into it, I want to mention one thing about the questioning of witnesses. During the trial Mr. Green, on behalf of Comair, questioned Professor Kennedy, Dr. Burton, and Professor Baldwin. They testified on behalf of the suing parties.

The questioning was for the purpose of bringing to you what Comair believes was and is the true information in the case. It was not for the purpose of saying that you should not give a fair and reasonable amount of compensation for the claims that have been asserted. It is for the purpose -- it was for the purpose of testing the testimony that those witnesses gave.

Now, the first issue, first part of the case that I want to talk with you about has to do with that claim that has been made by Ms. Hebert on behalf of the Estate of Bryan Woodward. What is a fair and reasonable compensation for the loss of his ability to earn money? We really heard two witnesses on this subject that gave you some guidelines.

Now, you heard other persons testify about Mr. Woodward. He certainly seemed to be a nice person. What we saw of him by way of photographs and video demonstrated him as a nice-looking, healthy-looking person. We know he was 39 years old at the time of his death on August 27, 2006.

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And so we need to look at what was the burden of proof that the suing parties brought to you about the loss of his ability to earn money over the remainder of his life.

Well, we know that Mr. Baldwin, Professor Baldwin, testified that he would have worked until he was 70 years of age. And he testified that was taking into consideration that between the time of his death and until he reached 70 he would have worked continually during that period of time.

Professor Baldwin also told you that he utilized a number that moved from about $48,000, which would have been -- which was really a projected number for the year 2006, because he died on August 27. But based on what he had earned earlier that year, had he worked to the end of the year, there was a projected number of something like $48,000.

Professor Baldwin, though, told you that he had raised that number to the year 2009, this year, and put Mr. Woodward in a category of earning $80,000. And the projection then was based upon an $80,000 number.

Now, Mr. Green's examination brought out from Professor Baldwin that Professor Baldwin had prepared two reports. And nobody's fussing at Mr. Baldwin about doing that and not raising any question about why he did it, because at the time he prepared his first report he was using data that he had which was based upon the $48,000 number.

It was after that time that Mr. Talley, who had been the

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employer of Mr. Woodward, sent in an affidavit that said that he, Mr. Talley, believed that by the year 2009 Mr. Woodward would have been in management and would have reached the $80,000 level. And then that caused Mr. -- Professor Baldwin to revise his first report.

Now, the difference between the first and the second report -- and I'm giving you round numbers, as I recall the testimony. But from the first report, when Professor Baldwin used the $48,000 figure, annual figure, as his salary, I believe his number for loss of earnings to the estate was $1.8 million.

Whereas, when he revised it based upon the $80,000 number, that rose to $2.9 million.

Now, Mr. Talley, though, testified at a later time. Here again, Mr. Baldwin, Professor Baldwin, didn't have those numbers when he came up with the $2.9 million figure. And when Mr. Talley testified -- and you saw that by video -- he testified to at least two very important things that you need to take into consideration, I submit.

One was that, well, really, it might not be $80,000 a year. It might be closer to $70,000. He also mentioned, you know, it could be above $80,000. He also mentioned the $70,000.

And he also mentioned that because of the economy that the company that Mr. Woodward had been working for at the

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time of his death and Mr. Tally was an officer of had had to reduce its salary to regular employees by 10 percent and to management by 20 percent.

I submit to you that's important, because that will help you in having an understanding about the industry in which Mr. Woodward worked. And that's very important in the overall case, because looking down the road of life -- and that's really what you have to do -- you have to make these projections and thought based upon your common sense as well as the evidence that you heard.

Another thing Mr. Baldwin -- Professor Baldwin -- testified to is that he assumed there would be the constant work between the age as of 39 and 70, that he did not use the work life expectancy tables.

But on cross-examination, Mr. Green was able to get Mr. -- Professor Baldwin to admit that he was aware of work life expectancy tables, that he knew about them and, in fact, in his professional work as one who evaluated life expectancies and loss of earnings that he had used the work life expectancy tables in other cases.

And in this particular case, I believe he agreed with the number that later our witness -- the witness that came in, Dr. Hudgins, that it's 21.71 years was the work life expectancy.

You heard testimony about that, about how that didn't

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mean you just worked consistently for 21.71 years and quit. It meant that within the life span that you have that that was the statistical number that one would be likely to work being at the age of 39 years, as Mr. Woodward was at the time of his death.

Comair brought to you a witness, and the purpose, of course, was to help you be fair and reasonable in fixing compensation. Dr. Hudgins, if you remember, was the last witness called in the case, and it was in the late afternoon the day we worked late. And her testimony differed from Professor Baldwin's. For instance, she used a life expectancy table of 21.71 years.

She used it based on the $48,000 number, which was what it was projected he would have earned in the year 2008. And the number that she came up with was $1,077,072, just a little over $1 million.

Now, she questioned some of the additions that Professor Baldwin had put in. For instance, he had added in a 401-k, a retirement-type plan. However, during the period of time that Professor Baldwin analyzed the records of Mr. Woodward he did not have a 401-k plan, so he was projecting that he would do something that he hadn't done in the past.

Dr. Hudgins took the other approach; that if he hadn't done it in the past that there's no evidence, really, that he'd do it in the future.

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You know, this gets to one of those preponderance of the evidence things that you can think about. What's most likely? The fact that he had never utilized the 401-k plan, which way does it go? Is it more likely he would have started, or is it less likely that he would have?

But she also found, and she believed, that the employer's Social Security payments should not have been added in. And she raised some question about the amount that Professor Baldwin had used for the truck that was made available by the employer.

She did, though, say that there should certainly be allowed $103,000 for health insurance, that that was an appropriate amount.

Now, so that you have as much data as possible, Comair had her -- and I believe this came out, this information had been obtained. I think maybe this came out by cross-examination, that she was asked whether she had given any consideration to what a manager of the type that Mr. Talley said Mr. Woodward possibly would have been, how much a manager would have earned.

And she said yes, she did, she had looked into that, and she had Department of Labor statistics. And the numbers that you will recall she gave you, she gave you two, for two different categories. One of them was $61,000 a year, and another one was $59,000 per year.

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Of course, if you choose to do so, you can take either one of those numbers or you could take $50,000 and multiply it by 21.71 years and come up with a number.

Now, she also did this, though. She used the $80,000 number just to see where that would come out. Although they didn't agree with the $80,000, she used the $80,000. And if you use that on the 21.71 life expectancy, you get right around $2 million.

She used it on the $70,000 number. And if you use that for the 21.71 years you got $1.8 million, roughly.

So what we, Comair, wanted you to have was as much information as you can on this subject, and I would suggest to you that it has been given to you.

Now, we did question the witnesses about the type of work that Mr. Woodward did, where he worked, number of employers that he had, how many jobs did he have over a period of time, about gaps in the employment between one job and another.

The hourly wages that he was paid by the hour, if you remember the last employer mentioned, he said first $17 an hour and then it had been raised to $18. The $48,000 number, though, was based not only on wages, hourly wages, but also on overtime. But this was information that Comair believed you needed in order to make the calculations that should be made in order for you to be fair and reasonable in making an award.

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A suggestion. Having heard all of these numbers, is a number between $1 million and $1.5 million unreasonable? I submit to you that, based upon the information that you have, upon the fact that Mr. Woodward worked at a job that was dependent on the economy, that it was necessary, obviously, for him to move from job to job, based upon the economic situation, that that would be a fair and reasonable range.

But that's your job. You are the one to make that determination.

Now, I'm going to move into the other claim of Ms. Hebert on behalf of Mr. Woodward's estate, and that has to do, really, with the question of was there pain and suffering by Mr. Woodward.

If there was, then it is your responsibility to fix a reasonable amount for pain and suffering. If there was not, then of course there should be no award for it.

I submit to you that the issue in the case is pretty well resolved by the answer to one question: How hard did the airplane hit the ground at the bank? I submit to you that the answer to that question will certainly help you in deciding whether Mr. Woodward suffered pain.

It's obvious that Professor Kennedy, who was called by the suing parties, and Dr. Mercaldi, who was called by Comair, disagree. If you recall, Professor Kennedy's testimony gives you the impression that it was a slide in;

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whereas, Dr. Mercaldi testifies there was a crash into the bank.

I would like to ask, Jessica, if you would, to show Defendant's Exhibit 51-1.

If you look at 51-1 --

MR. JOHNSON: May I stand here just a second, your Honor?

THE COURT: Yes, you may.

MR. JOHNSON: If you look at 51-1, then you see the trees and the direction that the plane was going and you actually can see the scarred earth area. And I submit to you that you can see a bank where it goes down and then where it comes up. And I submit to you that is the bank that the plane crashed into.

So that is what the plane hit. It hit the bank. This was a plane that weighed nearly 50,000 pounds, with the passengers and luggage therein. 49,000, plus.

We know from the testimony of the witnesses that it was traveling at a speed of 136 miles per hour. That's what Professor Kennedy said. But I believe it's either Dr. Mercaldi or Dr. Raddin that put the speed at 161 miles per hour. It's a difference. But either way, over 200 feet per second when this plane was up in the air.

And the testimony by Dr. Raddin was that it came down for a distance of 36 feet. So how hard did this airplane hit

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that bank?

Show us Defendant's Exhibit 48-1.

There is the cockpit, the front of the plane. Look at the front of that airplane. I submit to you that is evidence as to the force of the fall and the speed and the weight and the crash.

Talking about preponderance of the evidence, we believe that the evidence shows that the suing party failed to prove by a preponderance of the evidence that he glided to the ground. We submit the proof shows that came about as a result of a crash.

Why is this important? It's important because this evidence shows that Bryan Woodward either more likely died as a result of that crash or became unconscious when the crash occurred.

You will remember Dr. Raddin. Dr. Raddin mentioned he had worked on the Dale Ernhardt investigation. But he told you about the falling of the plane and the effect that it would have had on Mr. Woodward. He told you about falling off a six-story building or an eight-story building, the effect that it would have had upon Mr. Woodward in that plane.

And he told you that Mr. Woodward would have been thrown forward and to the left, because if you remember the testimony the left wing was down, and he was -- he was -- he

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would have been thrown in that direction. And, in fact, that's the way his body was found in the plane.

And he said that he believed his head had struck something, which caused the C-3 fracture that was found by the officials of Kentucky who performed the autopsy on Mr. Woodward.

He told you about it appears that he still had the seatbelt on, and he gave you an explanation. But I submit to you that's probably not of overwhelming importance in the case, whether he did or did not have a seatbelt on, because from the berm that you heard that Flight 5191 struck as it took off at the under of Runway 26 until this crash took less than five seconds.

So the seatbelt matter may not be one of great importance, but Dr. Raddin did say that he believed the markings on there indicate that he still had his seatbelt on. And Dr. Raddin said that Mr. Woodward would not be conscious and that there was an absence of evidence of consciousness.

Now, Dr. Raddin and Dr. Burton, witnesses for the suing party, they said that in view of the fact that there was some carbon monoxide found in the body of Mr. Woodward that he obviously had taken some breaths -- and I believe both of them used the term, "perhaps two breaths in a fraction of a second" -- in that superheated air and debris in the plane at that time which would have brought about death.

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Now, we're talking about pain and suffering. Preimpact fear is not a compensable item. This is suffering, conscious bodily and mental pain.

We submit to you that if he was not conscious after the impact and after taking in a couple of breaths died shortly thereafter, then he's not entitled -- his estate is not entitled to damages for pain and suffering.

But you may say, because you are the judges of the facts, you may say, "Wait a minute. Perhaps by a preponderance they met the burden that for a fraction of a second he was conscious and took a couple of breaths and died." If you do, then I suggest that no more than $100,000 would be an appropriate number for damages as being fair and reasonable under those circumstances.

But at the same time, I submit to you that based upon the evidence there was a failure to meet that preponderance.

The last thing I want to talk to you about is the love, the loss of affection and companionship of Lauren Hebert and Mattie-Kay Hebert until they reach the age of 18.

Lauren has already reached that age. It was just a little over two years between the time of Mr. Woodward's death and when she reached 18. And Mattie-Kay, something just a little over six years.

And certainly, as I mentioned before, one has to be sympathetic to the young women. One has to recognize that

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they have suffered the loss of their father. Those of you that have suffered the loss of a spouse, no one needs -- or of a parent, no -- you don't need to be told about the pain you suffer. Or even a close friend. We continue to suffer the pain. And we continue to do that, really, the rest of our life. Even when we think of the good memories that our parents left us, we always suffer sorrow when we think of those, because you never get over missing them.

However, what the law says is until these young women are 18 then they're entitled to be compensated for the loss of affection and companionship. How do you do that? I wish I could give you some kind of a standard, but I know of none.

Looking at first Mattie-Kay, she was an attractive -- I would call her cute -- young woman. Well dressed. Smartly dressed, which I submit to you shows she is coping with the situation.

Because she is attractive, she appears attractive, and she wanted to appear attractive. And that's great. And I submit to you that that shows that she's coping with the problem.

She was an extremely bright student before the accident, and she is still a bright student.

I submit to you she will do all right in life.

Lauren has a different personality. We all saw that. She's strong-willed, confident, somewhat of a dominant

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personality. She lectured all of us here in the courtroom, and in a very intelligent way.

She's very intelligent. One can see that.

And I submit to you she's coped -- has coped with the problem. She is attending Louisiana State University by correspondence, continuing to make good grades.

And one of the most important things I think you can consider, they're not on medication, they're not in therapy. But that doesn't mean they didn't suffer. Of course, they did. And they're entitled to some compensation, and Comair wants you to be fair and reasonable in fixing it.

A suggestion for Lauren, $75,000 to $100,000. To Mattie-Kay, $150,000 to $200,000.

Well, you've been most patient in listening to the proof, and I appreciate you listening to me. I ask you to do right and do justice, both to the suing parties and to Comair. I have complete confidence that you will. Thank you.

Thank you, your Honor.

THE COURT: Thank you, Mr. Johnson.

Mr. Rapoport.

MR. RAPOPORT: Yes, your Honor. We need a moment to transition to PowerPoint and get some things from in back.

THE COURT: All right.

MR. RAPOPORT: We will be ready in just a moment. Thank you for your indulgence.

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Pardon my back.

Before I set that up so you won't be able to see it, the good news. It goes faster when it's set up right.

May it please the Court, your Honor.

THE COURT: Mr. Rapoport.

MR. RAPOPORT: Counsel for Comair. My good colleagues, who I didn't properly introduce to begin with. My partners, Michael Teich and Paul Richter. Our able legal assistant, Kristin Sanders, who I thank for their help throughout.

I found a while ago that I prefer not to speak from notes, but I also don't want to waste your time. Lately, I've taken to just putting my notes down in a form that you can see them, too. I have got a bit of a PowerPoint presentation here that you can see on your laps that will run through, and I hope to review with you this case and talk about it.

And if I can get the machinery working right, it is going to respond to my commands.

My first topic, gentlemen, are your two jobs as jurors. That may surprise you to hear reference to two jobs. Your first job is to decide the issues that Judge Forester gives you in the verdict forms individually. And I want you to realize your second job is to explain your reasons for your decisions to your fellow jurors as you deliberate over what's fair and appropriate in this case, so I'm going to try to

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give you information that will help you in performing both of your jobs.

We're constantly referred to by the attorneys for Comair as "the suing parties." I'm going to talk a little bit more about the bias that they are trying to get into play when they keep saying that, but I will accept the label, for the most part.

So if, indeed, my clients are the suing parties, then I remind you they wish this never happened and would prefer never to have had a lawsuit.

The question that's fair is, why are they suing? Now, his Honor told you -- and I'm not going to switch these boards out. These boards that I put up here will just be here through the statements, but we'll talk about them first.

Judge Forester told you right at the beginning of jury selection, and I have every reason to believe he will repeat in the jury instructions, this legal principle: "Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the responsible party. In this case, the plaintiffs are entitled to damages from Comair to compensate them."

We should not lose sight of the fact that just because the evidence of what these people did wrong to cause that crash has not been received or reviewed, let us not lose

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sight of the fact that this is a wrongful death case. It was wrongful, because it was their fault.

They left out a few details, but one thing you know is that our clients are legally entitled to damages. They have the absolute legal right to be the suing parties in this case.

The other reason we are suing is that Comair has failed to accept full accountability for what it has done wrong.

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MR. RAPOPORT: The second reason we are suing is because Comair has failed to accept full accountability for what it has done wrong and the harm that it has caused. We are not seeking your sympathy. We are seeking your empathy. We are here to collect a debt.

Here are a few big-picture thoughts to get us started. Number one, Bryan Woodward was about to enter the prime of his life, including his prime earnings years.

Number two, Bryan Woodward's body gives us the best evidence of how he suffered.

And number three, Bryan was among the best of fathers.

This is the truth of this case.

The first issue that the Court is going to ask you to decide is what I put down here. First, you should determine from the evidence a sum of money that will fairly compensate

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Bryan Keith Woodward's estate for the destruction of his power to earn money.

His estate. His estate. They keep saying "Ms. Hebert." By the way, by the way, it's Ms. Hebert, they keep saying Ms. Hebert, because he wants you to think that this isn't the children's money. It is the children's money, and the Court will manage the fund for the children, I assure you.

They want you to lowball. But your charge -- and the way this works, gentlemen, is the Court -- and I think he's already told you, will give you the instructions on the law immediately after these closing statements are done.

So don't take my word for the law. You don't have to take my word for the evidence. I'm relying on law and I'm relying on evidence, and I'm going to show it to you in detail in this presentation.

Your charge is you must award full, just, and reasonable compensation. What does that mean? What does that not mean? Full, just, and reasonable compensation does not mean cheap, and it does not mean stingy. It does not mean lowballing the losses that we have in this case.

How do you figure out what is full, just, and reasonable compensation? I've brought here -- you can see the board that says, "To fairly compensate" -- I call it a board, but it's on TV.

It says, "To fairly compensate." That is your call to

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action. Let me show you what I mean. The first issue says to compensate, compensate the estate for the destruction of the power to earn.

Now, you have the Lady of Justice. And guaranteed, everybody has seen the Lady of Justice. She's probably in the room somewhere, certainly in the building. It's one of the great symbols of justice, and it's worthy to look at one of the great symbols of justice to try to understand what is just in a particular case.

Everything on the Lady counts. So, for example, the blindfold is the idea of blind justice, and the idea of blind justice incorporates the thought that justice must be given without prejudice and free of outside considerations.

What's an outside consideration? Something that doesn't belong on the scales. Well, how do you know what belongs on the scales? You know because Judge Forester is going to tell you, and he's already told us, which is why I can say it with such great confidence. We know what's going to be on the scales.

And it's your job to use your power. That's why the Lady of Justice has a sword, because you are the conscience of the community and because you are given vast powers. And you are to use these powers by weighing the appropriate things and not allowing anybody to put something inappropriate on this scale and have it weighed.

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That's no more appropriate than somebody putting their finger on the scale when meat is being weighed to raise the price. Not a bit. No extra things. So much roast beef, so much a pound. That's how the scale works. It doesn't matter about other things, whether people like or don't like the roast beef. It's so much per pound, and that's how you weigh it. And you need to do the same kind of thing.

There are typical examples of some inappropriate, outside considerations that can get going in a case like this. Things like, "The money won't do any good." Like "A large verdict will drive up prices." Like "I'm afraid of what my neighbors might think if I sign a large verdict." Like "People should pay for their own problems." Like "I have seen worse things than happened to this family." Like "There should be a limit on damages, no matter how bad they are."

I will talk about the last one in a second. These are examples, and I can come up with a hundred others of things that some people in your deliberation might put on the scale. But they don't belong there. It would be ignoring the instructions of the Court to put those things on the scale that don't belong.

I'm going to show what does belong on the scale in just a few minutes. But before doing that this last point, also not on the scale, is any argument that someone says, "That claim was not proved beyond a reasonable doubt."

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Now, we have heard this -- we hear this all the time, beyond a reasonable doubt. We all watch TV and have been raised to some extent on TV, our generation. We have heard "beyond a reasonable doubt," "beyond a reasonable doubt," and we can recite it in our sleep.

We believe, by the way, that we have proved almost everything here beyond a reasonable doubt, but that's beside the point. We're not required to do that. This is a case where we only have to prove it's more probably true than not true. A 51 percent probability is more than is necessary.

This is the language that I believe the Court will include in the instructions. The preponderance of the evidence means such evidence as when considered and compared to that opposed to it has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so. That's the governing legal standard in this case.

So we get to the first issue. You will remember, I can pop around to see things. The first issue right from the instructions, first, you should determine from the evidence the sum of money that will fairly compensate Bryan Keith Woodward's estate for the power of his -- for the destruction

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of his power to earn money.

So we get back to the Lady of Justice. On the one side of the scale is the destruction of Bryan Woodward's power to earn money. On the other side of the scale is the amount of money that will equalize that harm. This is the idea of compensate. It means to balance. That's what it means.

If something weighs so much, an amount of money needs to be put in so that it balances, it's equal. That's what the thing is. Equal to what? The destruction of Bryan Woodward's total lifetime power to earn money. That's what that element of damages is.

Now, here's some evidence, just to point to bits and pieces. You will be happy to know I'm not going to sit here and regurgitate everything you heard in three days. You're intelligent people, and you heard all the testimony. I know you remember it or -- you know, the parts you focus on. We are all different people. We all hear different things when we all talk about it.

But here is an important piece of testimony from Dr. Baldwin. "Peak earnings periods will generally be in the 40s and 50s, although in an individual that wants to keep working, particularly if they are up in the management level, then obviously in their 60s it can even be higher yet. So all of those, certainly Bryan had not reached that period of time where for most people they are going to earn at their

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peak levels."

This man was a worker, and a talented worker. He was a skilled tradesman. He was not only skilled in his home field of electrical work, but he was also skilled in virtually all things mechanical. He was a guy -- we all know people like this. He is the guy who can get the tough-to-start engines to start; he knows how to pull them, how to fix them, how to maintain them. He knew how to build houses. This guy was a worker, and he had not hit his stride.

And what do these people who killed him want you to do? They want you to take the worst assumptions. They want you to take the idea that at 39 years old he had peaked, that he will never make more than that, that everything that he had made was fully documented.

They want you to make the worst assumptions when it comes to valuing their destruction through their negligence of his power to earn money. Don't accept the bait.

Dr. Baldwin gave you this detailed schedule and his best estimate, and that best estimate was $2,900,420. Look at these people. Even in describing it they forget the $420, because there's no principle behind what they are talking about. Their principle is, "Save us money."

Our principle is, "Pay for the harm that you caused through your fault."

Now, more testimony. Question: "So the notion that this

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figure, $2,900,420, represents the maximum or the best-case scenario that Bryan Woodward could achieve in earning in his life is not true?" Dr. Baldwin explained: "No, it's not what I would call the absolute maximum. It's just the maximum that I used in my table. But yes, there could be numbers higher than that, sure."

And he's showing you that the $2,900,420 is using benefits and earnings combined of about $96,000. The table shows it in the two columns. Certainly, you can award more. We are not making that suggestion to you. We are asking that you provide full, fair, and appropriate compensation.

We have taken this man's real-world life and real earning potential. In truth, many, many people work long beyond 70. My own father is an example at 83. Mr. Johnson is 77, and he just made a closing argument in a major plane crash case. There are many, many examples of people who go far beyond a work life expectancy.

And you know what? Whether Bryan Woodward decided to retire, if they hadn't killed him, or whether he decided to work until the day that he died, or something in between, that was his choice. But the element of damage is the destruction of his power to earn money. He had the power to earn money, however he chose to use it.

So you have the discretion to award more than we are suggesting. We believe that to award less than $2,900,420

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would not be fair, would not be reasonable, would not be appropriate, and would not be just. It would freeze Bryan in the history instead of recognizing the reality that he was 39 years old and coming into the prime of his life.

And even -- even Dr. Hudgins, we picked this little bit of testimony here. That's their expert. "Were you asked to try to determine what Bryan Woodward's power to earn money would have been, had he not been killed?" "Yes."

"Isn't it fair to say that if he had remained healthy and continued working to age 70 and beyond that he, by definition, would have kept his power to earn money beyond age 70?" She answered: "Yes, I agree that we can all keep indefinitely, until we die, our power to earn money, yes, although most labor statistics show our power to earn money does decrease as we get older."

And a question: "Would you agree that when he was killed his power to earn money for the rest of his life was destroyed?" She answered, "Yes."

She never gave a number that actually represented her opinion about the value of the destruction of this good man's power to earn money. And it seems to me that that's probably the most straightforward issue in this case, and we suggest a minimum of $2,900,420 is the fair value for the destruction of Bryan Woodward's power to earn money.

And as a reminder on this board, I put the thought out

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there, you may have somebody who says to you, "Well, that's too much money. I think it should be $700,000. Or I think this should be some guessed number with no guidance of $1 million to $1.5 million," as if you are just sort of picking guesses.

If somebody is arguing like that, I would suggest that you answer by saying that Bryan Woodward was entering his peak earning years.

Next, the second issue. Whatever physical or mental suffering you believe from the evidence Bryan Woodward sustained as a direct result of the accident. That is what is on the one side of the scale, and the amount of money that will equalize that harm is what is on the other side of the scale. And no other outside considerations are appropriate.

Now, I'm going to review some evidence that came in early in the case. You may remember that Dr. Tracey Corey, Kentucky's lead medical examiner out of Louisville, couldn't come to court in person, but she testified by video deposition. She supervised all of the autopsies in this case. And here are a few things that she had to say.

Quote: "I have no physical evidence of any injury that would have -- that I could say that would have made him unconscious. I can't say that he was unconscious at all until he actually died throughout the crash."

That's what she said. Now, here is a copy of the

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findings on the autopsy, which is Plaintiffs' 12 in evidence. The autopsy established blunt force and thermal injuries sustained in airplane crash with fire. Fracture of the cervical spine with soft tissue hemorrhage. Soot deposition in the airways. Blood carboxyhemoglobin level of 13 percent. Perimortem thermal injuries. That doesn't mean after death, by the way. Perimortem is during death. Pulmonary edema, the reaction in the lungs.

And Dr. Burton, who I'm sure you will remember, said various things during his deposition. But here he summarized them out for us, but it's testimony worth remembering.

"He doesn't have a broken rib. He doesn't have a ruptured diaphragm. He doesn't have a bruised lung. He doesn't have a bruised brain. He doesn't have a broken jaw. He doesn't have a broken pelvis. His liver is intact. His kidneys aren't injured. His intestines aren't injured. Nothing is injured. No forceful injury occurred to his body, except maybe a fracture of some type to his third cervical vertebra. No skull fracture, nothing like that. He had soot in his lungs, he had fluid in his lungs, and his body is 95 percent burned except for a small area that is spared from the waistband band of his pants. He had a brown belt on, still identifiable. Blue jeans still identifiable, Wrangler blue jeans. A burned-up shirt and a sock on one foot that was still identifiable, and some underwear that was described

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as gray Fruit of the Loom underwear."

So this man, who is burned all over, has no broken arms, no broken legs, and no broken pelvis. He has primarily burn injuries, and that is what caused him to die.

I'm sorry to have to bring evidence like this to you. I really am. This man died a horrific death, and I wish none of us had to review these circumstances.

Dr. Corey, quote: "What this tells me is that he was alive and breathing at the time of the fire, and I know that for two reasons. The CO level -- the carbon monoxide level -- and the physical evidence of soot in his airways."

Dr. Corey went on: You can't figure out a time interval unless you would know the density of the smoke that the person was inhaling, you know, because you could inhale a very dense -- very dense smoke that had a lot of CO in it for a short time and come up with the same level as if you were inhaling it a little bit over a longer time. And I imagine that would vary somewhat, even depending on where you were in the plane."

The probability is, according to Dr. Burton, that no traumatic injury killed Mr. Woodward. "The consequences of the fire, the heat, and the smoke, and a little contribution from carbon monoxide, caused Mr. Woodward to die sometime between right before the plane hit those two trees and sometime after the plane came to rest and continued to burn.

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That, in my opinion, is what happened to Mr. Woodward. He has primarily burn injuries, and that's what caused him to die."

"I think he is" -- another quote from Dr. Burton: "I think he in the category of passengers that were more likely than not" -- that's our legal standard, by the way -- "more likely than not conscious or partially conscious after the tree strike."

And then he had other things to say. A question: "Do you have an opinion, based on a reasonable degree of medical and scientific certainty, whether about Bryan Woodward's body went through changes like that before the airplane crashed into anything but the gate?" He's talking about here at the bottom it explains the fight-or-flight reflect which causes one peripheral vessels to contract, blood pressure to go up, heart rate to go up, shunting blood to the brain and kidneys. These are physical responses, far from trivial.

He says quite clearly: "Its even been shown that trained fighter pilots and trained astronauts, in situations like that, cannot overcome some of the consequences of the fight-or-flight syndrome. It's almost a certainty that he was going through those things." And the question, as you can see, is before he crashed into anything but the gate; in other words, at the gate or just after the gate.

So there's been a lot of confusion in this trial about

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what that airplane did. I've taken some time to try to clear up the confusion about all of this, because what's known and what's unknown is not nearly as confusing as it seems at first blush.

So a good starting point here, you can see a picture. It's a reminder of the total path. I told you at the start, this plane didn't have -- bless you, your Honor -- that the plane didn't have enough speed to get off the ground and that it took it about six football fields of distance to complete the process of crashing.

And this is just an overview that shows where that happened.

Now, we have selected various bits and pieces of the evidence here to show you. And we're using all evidence from the National Transportation Safety Board official investigation, and little of that has really been featured by the defense in this case.

So here you have a general statement of the overall thing that happened here. The wreckage was strewn in a debris field that started at the airport perimeter fence and continued for approximately 1,450 feet to where the fuselage came to rest. The airplane overran the departure end of the runway by about 300 feet, as evidenced by the main and nose gears ground scars. Additional ground scars -- they think the NTSB is lying about this, and we will show you they are

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not.

Additional ground scars from the left main and nose gears were observed in a horse paddock about 300 feet from where the airplane impacted the trees, beginning about 500 feet from the perimeter fence. Now, these distances are just, you know, general. I put this here mainly for the last sentence, which tells you this was a post-crash fire.

It's interesting, the defense has a certain illusion going on that this hit the ground and/or the trees and everything burst into flames and that flame -- those flames were intense the way they were by the time Officer Jared got there. Well, you know what? Nobody knows that to be true, and I'm going to talk to you exactly about what we know and what we don't know about the movement of that plane, the speed of that plane, the path of that plane, when the fire erupted, what fed it, and the like.

The National Transportation Safety Board doesn't do what the defense tried to do, because you can't. You can't, because you don't have enough data. Six football fields of action. For three football fields, you have Flight Data Recorder and Cockpit Voice Recorder. For the back half, you don't.

And there are people who absolutely ignore that they were slowing the plane down. The facts that I am going to show you will demonstrate how unrealistic their crash scenario is,

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because of the plane moving too fast because they disregarded that the throttles were brought back because the flight crew, before they crashed into the first row of 13 trees, saw it coming. And you can see right on the Flight Data Recorder, and I'll show it to you, that they pulled the throttles back. That slows the airplane down.

So we don't know exactly, was this 9 seconds, 12, or 20 that it actually took to come to a full rest? Nobody knows that for sure. And the reason is, what were the speeds? Some assumptions have been made, but nobody knows. And what was the onset of the fire, what triggered it?

For example, they give you the bull -- forgive me for saying that. But don't you think the central fuel tank is full? I mean, you have been hearing about this fire and how it erupted and how intense, how the tree hit and it ripped right through the central fuel tank? Don't you have at least a mind picture that it was full? The fact is that it was empty, which I will also show you.

I picked a few other things. I don't expect you to see that, other than it's an introduction to the evidence. For those of you that are technically minded and want to look at this -- I will suggest to you folks it's up to you how much you want to look at this evidence or don't want to look at the evidence.

This is the wreckage diagram. It shows the whole scene

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of what happened. It shows the fact that the airplane was hardly ever off the ground. They keep saying 36 feet off the ground. The truth is, the Flight Data Recorder and the NTSB found that it was never more than 20 feet.

And the reality of this is, it didn't have the speed to fly. It was largely near the ground doing what it was doing. It sometimes hit the ground and left scar marks, and they want to ignore the scar marks because they want the whole thing going faster because they want to give this image of the big bang theory; big bang, everybody is dead.

You know, think about it. Their contention is, it didn't hurt. Seriously, their contention is it didn't hurt. Their contention is ridiculous on its face.

So these, I just showed you how you can have close-ups, the wreckage diagrams have close-ups. You can see it as Plaintiffs' 9. You have to look at the plaintiffs' exhibits if you want to see what the National Transportation Safety Board had to say about anything. You won't find, to the best of my knowledge, a single defense exhibit from the National Transportation Safety Board, whereas most of ours are.

Okay. So here you have the close-up. If you look really close you can see the ground scar, which lines up perfectly with the runway and the other tire tracks coming off the runway.

And here are just some reminder pictures. It comes off

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the runway, it's on the ground, it leaves tracks. Gets up on the berm, which you can see there, crashes through the fence, and does damage to the fence and certainly did some damage to the airplane.

And then you get out here beyond that, these are the left main gear and the nose gear tire marks that absolutely are tire marks that the NTSB said were tire marks.

I will never forget that moment in the trial when Mr. Green stepped up and suggested in a question as if there were two groups of the NTSB that were in disagreement about whether these were tire marks or not. That is 100 percent complete nonsense. There were not disagreements among any groups at the NTSB. The NTSB found and labeled this for what it is. They don't want it to be that, because they need the plane flying in order to speed the plane up for their big bang bull theory.

Now, here is some of what the Safety Board documented. "Continuing west between the airport perimeter fence and the first tree strike, the debris field containing" – it just goes on with technical here. I'm going to time manage, and I'm pointing out to you here Plaintiffs' Exhibit 48. You will find, if you wanted, all that you need, all really that exists about what the airplane did in the NTSB materials.

Another drawing by another NTSB group showing the same thing. The pink lines in the middle are why it makes it into

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this presentation. Those are the ground and tire marks that the airline that made them tells you it wasn't made.

You know, they rely on -- they rely on a Flight Data Recorder which records the altitude in a couple of different parameters. You do have the charts from the Flight Data Recorder, but don't be confused by that.

The Flight Data Recorder is tracking parameters of the plane, but there are all sorts of tolerances in these devices. They are not perfect. These devices are not made to track what a crashing plane is doing that never got more than 20 feet above the ground, the way the Safety Board documented it.

So the Safety Board had no problem squaring the physical evidence of tracks on the ground with what the Flight Data Recorder had to say.

If they actually have a disagreement, these people employ people that are experts in the Flight Data Recorder. They don't want to march one in here, because they know that 20 to 30 feet are within the tolerance of the specs.

So the best evidence is the picture. The second-best evidence is multiple investigators, more qualified than anybody the airline brought to you. They were sitting on committees that the airline had members of. You know what I'm saying? Their own people, every cover that you see that shows committee membership, you are going to see a Comair

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member on the committee. You are not going to see dissenting papers on any of this. They are technical people dealing with the government who will tell one thing. They will tell you something else to try to hold the damages down.

Here is some interesting data at Plaintiffs' Exhibit 46, at the bottom. Just in case you get curious about speeds you might wonder, well, you know, how much speed would this need to get off the ground? They give you two different points down there. VR is what you are interested in. VR, velocity to rotate. I think you all know what rotating is. That's when do you bring the nose up to try to take off.

So the VR, this thing weighs between 49,000 and 50,000 pounds, so they give you both numbers. VR is between 139 knots and 142 knots, a speed that the airplane never achieved.

And why did it never achieve it? Because the runway wasn't long enough because it was the fault, negligence of this company, who seeks to avoid its accountability.

Okay. So this is another exhibit, in case you want to see what the flight crew was saying at the end there as they realized what was happening and tried to save the day. This is the piece of data that I told you about that documents that the throttle is coming down. You'll find it in Plaintiffs' Exhibit 45, Pages 10-5, 10-6, and Plot 8. At the very end, you can see at the bottom the graph that the

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throttle comes up for takeoff and holds it for a number of seconds, and a couple of seconds before we lose the data the throttle clearly is coming down. And lest you have any doubt about that, the two pieces of text above show that the throttles are coming down.

The way the jet engines work, they spool down, so if somebody was to pull the throttle back completely what is probably what happened, the beginning of the spool-down is recorded. Then it crashes into trees.

By the way, that did the frontal damage that they are insisting happened at the bank? This thing crashed into 13 trees before it ended up in the final skid. The 13 trees pounded the front of the plane and took out the Cockpit Voice Recorder and took out the Flight Data Recorder.

There is the start of the 13 trees, trees 1, 2, and 3. And then you can see in this picture the pounding the trees took, which pounded the airplane. But the airplane kept going.

All right. So there are more technical data here. It's at 48. I'm going to run through that, the final rest positions. This gets to the whole what could fuel the tank.

If you look at this, you will see that the center fuel tank was empty. That the right wing was separated and wasn't dumping fuel. That the left wing was sort of nearby, and that probably accounts for the fire that started to the left,

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probably toward the back by the wing and built forward. Nobody knows how long it took to get forward.

Here is the impact that really lays out what the problem is with their arguments, that the impact is showing a sliding-in sort of impact. You are not looking at a giant nose-in crash there. The airplane doesn't show a giant nose-in crash, either.

Here you have with the wings showing Bryan's seat and the trees. I don't see them at all on the version, but those trees missed Bryan by a seat. That's really the bottom line. If you actually look at Exhibit 41, you will see the trees marked on there and you will see that they missed him by a seat.

And here we have the fuel data that I promised you, Plaintiffs' Exhibit 46, Plot No. 16. At the bottom it shows the left tank, the right tank, it shows how many pounds were in the left and right. It shows that the center tank was empty. That's the line at the bottom that is on zero, if you look at the blown-up model. At the very end, as it started sloshing around a little bit of fuel, whatever was residual in there got near the sensor and it came up just a touch, but you can see it's at empty.

This document shows where the wings were. You can find it at Exhibit 49.

All right, I will try to wrap this issue up. Officer

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Jared was on-scene for seven or eight after -- he was on-scene about seven or eight minutes after the crash. He saw an intact fuselage on fire. The fire was fairly intense, but he still was able to see the general area around 5-D, because the fire was actually less intense there than further back.

He noted that some of the people were in their seats and some were not. Clear evidence of conscious pain and suffering. And as I mentioned, he could visibly see what was going on.

I should add that in calculating damages for the conscious pain and suffering, proof of damages for physical pain and emotional suffering need not be made with exact or mathematical precision. The Court will be instructing you about that when we get to this issue.

How much money? We are making the suggestion of between $3 million and $6 million for the conscious pain and suffering that Bryan Woodward experienced in that crash. And the reason for the range is, there is uncertainty about the duration.

The damages -- let me explain a few things to you about the scales and how you work the damages.

There are some losses in life that are far greater than others. So, for example, somebody may be harmed through somebody else's fault and they may have, you know, a fracture

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to a toe or they may have a fracture to an ankle, and they may survive that without huge change in their life circumstances. That may be the kind of thing that would be measured on a severity scale in the tens of thousands of dollars, and then depending on the duration of the suffering. These are the two things when you think about damages you weigh together, severity and duration.

At the other end of the extreme, there are certain kinds of losses that are so horrible and so horrific that the amount of damages that's appropriate can be $3 million or more.

This is that kind of thing, because this reaches the highest scale of human suffering. There is nothing worse. Mercifully, by any way you cut it, the duration was short. But was the short duration a matter of seconds or minutes? You can weigh the evidence, including the central fuel tank was empty, and other evidence. You can consider this yourself, or you can consider it in light of expert testimony, or any other way you want to.

There is a reasonable probability that he suffered for a matter of minutes. If you believe that to be true, I would ask you to make an award at the higher end of the range than I would have suggested. I believe that that is a fair, reasonable, and appropriate award of damages in this case.

Let me move forward, because the hour is late. I will do

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my best to finish this.
Judge, do you happen to remember what time I started?
THE COURT: Yes, 10:56.
MR. RAPOPORT: Okay. Well, then I can promise you that I will be done speaking about 11:56. And I may even be done a little sooner than that, if I can.
But let me move over to the other questions. The next issue to be decided here, the third issue, is the value of Mattie-Kay Hebert's loss of affection and companionship, which includes her loss of love, care, and protection that she would have derived from her father from the time of the crash until she reaches 18 years of age, a period of 6.23 years.
The question submitted is: "What amount of money will equalize that harm?" I submit to you that Mattie-Kay's loss is the largest loss in the case due to the fact that she was only 11 when her father was killed and also because of the 6.23-year duration of this most horrible loss.
A few reminders of who Bryan Woodward was. I think that you've learned what a good person he was, what a good name, what a good nature, what a good work ethic, what a good family man. And what a great father. What an absolutely great father. I am a father, and I try to be a good one, but I've learned a great deal by learning about Bryan Woodward's life and Bryan Woodward's value as a father.

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He was always there, and his family was what he was all about. His whole family, especially those -- those wonderful girls who had a great childhood, to a point.
The point being when one was 11 and one was 15, and their whole life was rocked and their whole life was shaken, and they began to experience the loss of affection and the loss of companionship that has changed them.
Please bear in mind that proof of damages for loss of affection and companionship need not be made exactly or with mathematical precision.
We're making the suggestion to you for this loss that the amount of money that will equalize that harm is $3 million per year for the loss that she has experienced. In her case, a total of $18.69 million.
Some people may respond to that by saying, "That's a lot of money." But I answer back and urge you, too, this is a lot of loss. This is not a trivial matter. This is a negligence case. This is a case about wrongful conduct. This is a case about losses that no children should ever know. This is a case about children who wake up in the middle of the night, not only crying but crying because of the horrid image of their poor father burning alive and breathing in that airplane, something that would scar anybody.
And the unbelievable gall of this airline, marching a

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psychiatrist in here who had never even met the girls, knows the first thing about them, and talked about whether they do or don't reexperience or imagine or think or get possessed by this.
This is a dysfunction home there. I hope -- I wish they would get help. With your verdict, you're here to help what you can help, heal what you can heal, and pay for what can't be helped or healed. The right verdict can restore Bryan Woodward's good name and can encourage, I think -- I hope -- this poor family, these three women, the young women and an older woman, to get the help that they need.
The next issue, Lauren's loss of affection and companionship, which includes love, care, and protection that she would have derived from her father from August 27th of '06, until she reached 18. That says 6.05, but it's 2.05 years. In Lauren's case she was 15, soon to be 16, and it was 2.05 years.
The amount of money that will equalize that loss, it is my thought that Lauren's is the second-largest loss in the case, due to the fact that she was only 15 when her father was killed and also because of the 2.05-year duration of the loss, which I got correct here in this board.
You know, you remember the movie and I know you have seen pictures before. This is a happy, healthy family.
By the way, the defense brought up smokers a bunch of

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times. Bryan was not a smoker. They are trying somehow -- I don't really know why they kept bringing up smokers, but Bryan was not a smoker. That autopsy not only showed nothing was broken, but it showed him to be a healthy, strong, 39 year old with absolutely nothing wrong with him. Which, by the way, probably accounts for why he suffered perhaps more than some others, because he was in great shape.
This is just a repeat of the picture we have had throughout as our theme photo, because that was taken a very short time before this good man found himself on the wrong airplane.
So here is the suggestion. You know, the form and the blind lady. The amount of money that we are suggesting will equalize Lauren's harm, also $3 million per year of loss for a total in her case of $6.15 million.
I want to repeat something I said earlier. We're not seeking sympathy, we're seeking empathy. And we are here to collect a debt. Please remember and please answer anyone who argues the other way. Bryan Woodward was about to enter the prime of his life, including his prime earning years. Bryan Woodward's body gives us the best evidence of how he suffered. And Bryan was among the best of fathers.
Thank you for your time and attention. This case is now in your hands.
THE COURT: This is a fairly short set of instructions,

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so I think I could finish in 10 or 15 minutes. Did anyone need to have a break before?
(Whereupon, the Court instructs the jury.)
THE COURT: So, members of the jury, those are your instructions. And the instructions that I and Judge Caldwell have been giving to you over the course of the trial not to talk about the case are withdrawn. You are now instructed to report to the jury room to deliberate on your verdict. And you will have these instructions. You will have the exhibits to go back with you the jury room.
In order to save time, Uncle Sam will buy your lunch. You will be given a menu, and the court security officer will get your lunch for you and bring it to you. And you may begin your deliberations. Your lunch should be here in about 30 minutes.
Anything else, counsel?
MR. RAPOPORT: Nothing from us, your Honor.
MR. JOHNSON: No, your Honor.
MR. GREEN: No, your Honor.
THE COURT: Very good. So, Mr. Marshal, will you send the jury to the jury room, please, sir.
(Jury leaves the courtroom at 12:07 p.m.)
THE COURT: All right. Mr. Marshal, will you recess court while we await the verdict of the jury. Counsel, if you went to leave the courthouse, that's fine. Just leave the Clerk

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a phone number where you can be reached.
(Recess taken from 12:08 p.m. to 5:13 p.m.)
THE COURT: Counsel, I have a note from the jury that it has reached a verdict.
Anything before I have the jury brought in?
MR. RAPOPORT: Nothing from us, your Honor.
MR. GREEN: No, sir.
THE COURT: All right. Mr. Marshal.
(Jury enters the courtroom at 5:13 p.m.)
THE COURT: No. 110, you have been elected foreperson of the jury. Is that correct?
THE FOREPERSON: Yes, sir.
THE COURT: Has the jury reached a verdict?
THE FOREPERSON: Yes, sir, your Honor.
THE COURT: All right. Will you hand the verdict to the Marshal, please.
All right. Madam Clerk, will you publish the verdict of the jury, please.
THE CLERK: Yes, your Honor. Verdict Form A. We, the jury, find the following money damages will fairly and reasonably compensate the Estate of Bryan Woodward for one, the destruction of Bryan Keith Woodward's power to earn money. $1,350,000.
Two, Bryan Keith Woodward's physical pain and mental suffering, if any. $750,000. Signed by the foreperson,

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dated December 7th, 2009.
Verdict Form B. We, the jury, find the following money damages will fairly and reasonably compensate Mattie-Kay Hebert for the loss of affection and companionship from her father from the day of his death through her 18th birthday. $3 million.
Signed by the foreperson, dated December 7, 2009.
Verdict Form C. We, the jury, find the following money damages will fairly and reasonably compensate Lauren Madison Hebert for the loss of affection and companionship from her father from the date of his death to her 18th birthday. $2 million.
Dated -- signed by the foreperson, dated December 7th, 2009.
THE COURT: Counsel, do you desire to have the jury polled?
MR. GREEN: No, your Honor.
MR. RAPOPORT: No. No, your Honor.
THE COURT: All right. Judgment will be entered in accordance with the verdict of the jury.
Members of the jury, thank you so very much for your service. You were very attentive, and I'm impressed with the job that you did and will excuse you now. Thank you.
(Jury leaves the courtroom at 5:16 p.m.)
THE COURT: All right, counsel. We have another matter

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to be tried, and do you have any preferences? How long will it take you to be ready?
MR. RAPOPORT: I would assume a couple of months, depending on what you have in mind.
THE COURT: All right.
MR. GREEN: That sounds reasonable.
THE COURT: All right. I don't think that we can get to it that soon. I have a rather long criminal case that's set to go, starting about the middle of January. So let's leave that open right now, and then you can confer with regard to that matter and advise the Court when you will be ready to go.
All right. Let me say to the attorneys that you did a really, really fine job in this case. I was impressed with both sides. And it was a tough case. Both of you did a good job -- a great job, I should say.
MR. RAPOPORT: Thank you very much, your Honor.
MR. GREEN: Thank you.
THE COURT: Thank you. Very good.
MR. RAPOPORT: We will talk again soon, I'm sure.
THE COURT: Mr. Marshal, will you recess court, please.
(Proceedings concluded at 5:18 p.m.)
I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Rhonda S.Sansom 12/7/2009

Rhonda S. Sansom, RPR, CRR Date

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