WRONGFUL DEATH SEMINAR

SECTION I - OPENING STATEMENTS - THE LAW

A. Purpose and Standard of Review

Terrance Smith's Trial Handbook for Indiana Lawyers succinctly states the law in opening statements. The purpose of the opening statement is to advise the jury of the facts and issues involved in the case so as to prepare them for evidence which is to be heard. **Trial Handbook for Indiana Lawyers**, Section 10.1, citing Blume v. State, 244 Ind. 121, 189 N.E.2d 568. The cases interpreting his conduct in an opening statement clearly show that both the form and content of an opening statement are within the sound discretion of the Court and only the rare case will lead to reversal based upon alleged errors in the opening statement.

In Schlomer v. State, (Ind. 1991), 580 N.E.2d 950, the prosecutor in his opening statement stated that there would be testimony concerning certain fingerprints from the Department of Correction when the prosecutor knew that there was not going to be any testimony about this issue. Id. At 957. Although the defense moved for a mistrial, the trial court admonished the jury to disregard the statement and the Court of Appeals affirmed the trial court's ruling holding that an admonition is presumed to be sufficient to protect the defendant's rights and remove any prejudice. Id. Given the constitutional implications of denying the defendant this evidence, it is fairly certain that the Court would have rendered the same holding in a civil case. In Montgomery Ward v. Koepke (1992), Ind. App. 585 N.E.2d 683, the trial court sustained an objection during an opening statement when counsel began to tell the jury about the opinion of a physician who was not going to be called as a witness. The Court reiterated that there was no abuse of discretion and that the Court could preclude a party from mentioning facts and opinions when it is made to appear that the

evidence will not be admitted at trial absent serious restriction of the party's ability to state what the evidence will show. Id. at 687. See also, Splunge v. State, (Ind. 1988), 526 N.E.2d 977. A prosecutor stated in opening statement that a co-conspirator would testify in detail about the defendant's crime, but the co-defendant subsequently did not testify; the Court held that there was other evidence in similar nature and thus the trial court did not commit reversible error.) Marshall v. State, (Ind. App. 1986), 493 N.E.2d 1317 (prosecutor's reference to narcotic defendant's suppressed statement during opening arguments not grounds for mistrial and the trial court admonished jury that statements and remarks of counsel were not evidence and similarly instructed jury in preliminary instructions.

Not only does the Court have discretion in defining the parameters in an opening statement, once a party objects to an opening statement and moves for a mistrial, the granting of a mistrial is also within the sound discretion of the trial court and will be reversed only where there is an abuse of discretion. Ramos v. State, (1982) Ind., 433 N.E.2d 757; Abrams v. State, (1980) Ind., 403 N.E.2d 345.

B. Counsel's Remarks Regarding Opinion of the Case.

Although the general opinion is that an attorney cannot comment upon his personal opinion of the case, the case law on this issue is far from clear. For example, in Roller v. State, (Ind. App. 1992), 602 N.E.2d 165, the prosecutor's opening statement included his comment that "All I ask is that you listen to the evidence. I wouldn't be before you if I didn't believe the state could prove its case". Id. at 168. The Court of Appeals, relying upon the Indiana Supreme Court's decision in Merritte v. State (1992), Ind. 438 N.E.2d 754, 756-57, stated that this statement was not improper

because it followed discussion of the evidence the state expected to present and was no more than the statement of a prosecutor's conclusions based upon the evidence. Id. Oller v. State, (Ind. App. 1984), 462 N.E.2d 1227 (prosecutor's remark that "we would not be here today if those [alcohol] test results were under the legal limits" was not ground for mistrial especially where any possible error was cured by Court's subsequent admonition that opening statements are not evidence. See also, Woodford v. State, (1980) Ind. 405 N.E.2d 522; Alderson v. State, (1974) 262 Ind. 345, 316 N.E.2d 367. (Query, how is this different from making argument?)

The only substantive rule for opening statements which inherently impacts the client, is that an attorney's remarks in opening statement are binding on the client and can relieve the opposing party of the burden of proving a particular element of the case. In Maldonado v. Gill, (Ind. App. 1987), 502 N.E.2d 1371, plaintiff was struck by an unknown vehicle but the plaintiff sued a suspected driver. At the close of the evidence, the trial court granted the defendant's Trial Rule 50 motion for judgment on the evidence based upon plaintiff's failure to prove that the defendant was the driver of the care that struck him. On appeal, the Court reviewed the defendant's opening statement noting that "In his opening statement Gill's counsel intimated that Alton was driving the car that struck Domingo . . . from the attorney's remarks, it was clear that Alton was the driver of the car that struck Domingo and it was error for the trial court to rule that he did not sustain the burden of proof of this element of this claim. In Lystarczyk v. Schmitt, (1982) Ind. App., 435 N.E.2d 1011, the Court stated that if an attorney makes a clear and unequivocal admission of fact, he or she has made a judicial admission. Id. at 1014. By contrast, however, a mere outline of anticipated proof is not regarded as a binding admission. Id. at 1014. In Lystarczyk, the attorney commented that the evidence will show that the plaintiffs spent $250.00 but $200.00 of that was unnecessary and

therefore ". . . in short, they have spent $50.00 in the total of all these defects." The Court held that the attorney's statement did not make a clear and unequivocal admission that $50.00 was spent to correct defects to the house stating that this was a mere outline of anticipated proof. Id at 1014. Although it is clear that an unambiguous admission by counsel will be binding upon the client, the converse is not necessarily true. In a recent case, the Court of Appeals rightfully held that the mere fact that a party is willing to stipulate an issue does not preclude the introduction of evidence on that issue so long as the other requirements for admissibility are met. [find citation]

D. Preserving Objections in Opening Statements.

Although it is clear that the chance for reversible error is very remote in the context of opening statement, counsel's failure to raise a timely objection is clearly his waiver. This is especially true when improper exhibits are allegedly used in opening statement. See, Brown v. Terre Haute Regional Hospital (Ind. App.), 1989, 537 N.E.2d 54 (counsel objected to the use of exhibits which allegedly violated motion in limine in opening; the trial court held that since the underlying exhibits were admitted, display during opening statement was not reversible error. Obviously a ruling a motion in limine is not final on the admissibility of the evidence but rather the ruling is simply designed to prevent mention of prejudicial material to the jury before the Court has an opportunity consider its admissibility. Brown v. Terre Haute Regional Hospital, 537 N.E.2d 54, 59; Green v. State (1987), Ind., 515 N.E.2d 1376; Hatcher v. State, (1987), Ind. App., 510 N.E.2d 184.

E. Opening the Door in Opening Statement.

Not only can an opening statement result in binding admissions against the party, an opening statement can also be used to open the door on otherwise foreclosed issues. In Terrell v. State (Ind. App. 1987), the trial court had sustained the defendant's motion in limine and prohibiting the prosecution from mentioning his prior juvenile record. Defendant's counsel subsequently stated in opening that "this man has no record". Id. at 634. The Court of Appeals, although noting that juvenile convictions could not be used that "it would be unconscionable to prevent Terrell's attorney to state to the jury that his client had no record and them permit him to prevent disclosure to the jury of a juvenile adjudication of delinquency for nine acts of burglary. The door is opened by Terrell's attorney and it was error to permit the state under those circumstances to reveal Terrell's juvenile record." Id at 635.

F. Loan Receipt Agreements.

A minor mention should be made about loan receipt agreements. In a case where there are multiple defendants such as the one presented in the fact pattern, it may well be the case that the plaintiff will settle out with one party prior to trial for strategic reasons. The most recent case on the admissibility of loan receipt agreements, Barber v. Cox Communications Inc. (Ind. App.), 1994, states that when a loan receipt agreement is executed between a plaintiff and a defendant, and that defendant or its agents or representatives appear at trials and testifies for the plaintiff, the loan receipt agreement is admissible to impeach the defendant's testimony based upon the witnesses' pecuniary interest. Id. At 1256, citing Manns v. State, (1989), Ind. 541 N.E.2d 929, 934. The Barber case appears to expand Manns to include not only circumstances where the Plaintiff calls the settling

defendant's agents or employees but also <u>where the plaintiff elicits favorable testimony from these same individuals during cross-examination</u>. If the defense has good reason to believe that either the plaintiff will be calling the settling defendants employees are will seek to elicit favorable testimony on cross of the same employees, a loan receipt agreement is admissible and could be mentioned in opening statements although certainly the plaintiff will be entitled to a limiting instruction as to the purposes for which this information can be considered.

II. <u>OPENING STATEMENT PRESENTATION</u>

Every attorney understands the purpose of an opening statement. As with many things, however, knowing <u>what</u> to do does not signify knowledge of <u>how</u> to do. I have attached a bibliography of resources which I have found helpful in working on opening statements. Every lawyer understands that an opening statement is not argument, that the function of an opening statement is merely to present evidence rather than to compare the relative weight and quality of the evidence. Unfortunately, there is a perception that presentation is inconsistent with persuasion. Coupled with a this perception are the throw away phrases in opening statement, i.e., What I say is not evidence. (Not only am I repeating what the judge just said, I am underscoring the fact that I am totally insignificant to this trial and implicitly is reaffirming the jury's belief that I am not to be trusted. John Grady's article, "Suggestions For Better Communication With the Jury", in the Litigation Manual notes that there are typically three parts of an opening statement.

(A) PITCH THE PITHY COMMENTS

The first is an apology where the lawyer tells the jury that the case is going to be presented in a disjointed disorganized fashion. Second, a disclaimer that nothing the attorney says is evidence.

Third, a statement of what the evidence will be in the case. Id. at 296-298. Grady concludes that the first two parts are generally unnecessary and serve only to depreciate the lawyer's value in the eyes of the jury. The importance of persuasion in opening statements cannot be underscored. Although there is much debate about whether the jury truly makes up its mind by the end of opening statements 80% of the time, are of the studies that reached this conclusion also found that if a lawyer in his opening statement said that something could be proved and said it boldly and forcefully, the jurors would insist that the lawyer's statement was evidence notwithstanding the absence of the evidence in the trial. The Litigation Manual "The Last 30 Days" by Robert F. Hanley at 348-350 (citing jury studies by Kalvin & Zeisel at the University of Chicago). The research showed that when jurors were asked who gave the evidence, they said they did not remember who said it, but knew that some witness had testified to it. This finding is ironic given that, as discussed supra, the Courts have routinely held that counsel's statement that certain evidence would come in when the evidence did not come in, is not prejudicial error sufficient to support a reversal on appeal. The following are suggested steps in terms of developing and implementing an effective opening statement:

(B) DEVELOP A THEME.

Authors have written hundreds of articles about theme development. An entire day could be spent on the concept of theme development. Theme development also reinforces the importance of the first minute of your opening statement. The jury has heard the plaintiff's view of what the case is about and now you are enforcing the jury to change gears and think about the evidence from a different prospective. Therefore, it is very important to focus the jury back with a sound bite about what the case is about.

(C) TELL A GOOD STORY

A play or movie can be a blockbuster with the best special effects and technology available, but if one leaves the theater without understanding the underlying story, the technical success will be very short-lived. The best story is based upon the best available language which evokes the reader or listener's interest. Although ordinarily the plaintiff has a lot more visceral material to work with than the defense side does, this should not preclude the defense from developing some type of details which to really draw the jury in. For example, situations involving comparative fault.

Compare:

> The evidence will show that John Brown was aware of the danger of grain auger, but negligently placed himself in the wrong position. John Brown was aware of the damage that the four inch spikes on the auger could cause. He had previously seen the auger in use.
>
> That the plaintiff's own negligence caused his injuries. John Brown knew that the four inch spikes on the grain auger could rend his limb in a matter of seconds. John had previously seen a large piece of wood stripped of its bark and reduced to toothpicks in a matter of seconds as a result of having contact with the auger. Notwithstanding this, Mr. Brown began to work while the curving blades circled around him.

(B) USE FAMILIAR CONCEPTS

The marketing experts tell us that you are more likely to persuade people if your message closely resembles the values held by person although a jury may not grasp all nuances of the motorized torgre valve help maintains pressure on the semi-tractor trailer brake, a jury does understand the valve is kind of like a stopper in a tub that lets pressure out when the truck stops. By the same token, a presentation should focus on the bigger pictures, how does this case effect other cases? If a jury understands that this case has a much larger ramifications they are included to think much more carefully about their decision making.

(C) USE

If you know that your judge will allow you to use exhibits in opening statement, they should be used in opening statement. Early on make sure that the judge will allow the use of exhibits. Not only does it break up the monotony of the presentation, it also reinforces the evidence to come. Three principles are critical, however, in the effective use of exhibits. (1) the exhibit must be appealing to a jury. This entails having the right size, an 8" x 11" picture is not going to show up well 25 feet away. Use of different colors, fonts and potential graphics can also liven up an exhibit. (2) Make certain exhibits are going to come into evidence. Nothing is worse than using an exhibit in an opening statement, if the judge even lets you, then to have the exhibit thrown out because you failed to show the foundation, etc. (3) **Make sure the exhibit stands for the proposition you think it stands for.** A few years ago, I was in a jury trial where the plaintiff's attorney presented to the jury in opening statement that a blown up copy of a contract which "clearly required my client to retain certain pieces of property". In fact, the contract did not say this and those were the first words out of my mouth in my opening statement. The plaintiff's attorney apologized numerous time throughout the trial to the jury. Those type of errors are magnified when the exhibits are blown up

and a jury can clearly see that what you say is there in fact is not there. As long as opposing counsel does not object too strongly, it is also permissible to use opposing counsel's exhibits which counsel refer to in their opening statement.

III. THINKING ABOUT DOTY.

In reviewing the fact pattern presented to us by Woody, he suggested that it would be prudent to outline the assumptions made in the case. This seminar is unique in the sense that each participant is taking a chunk out of the trial and working on it generally independent of the other elements. In reviewing this case in connection with the opening statements and other elements of the trial, I've made certain assumptions in my approach: (1) The defense has conceded liability. (2) I have attempted, by motions in limine, to keep out any references about extraneous acts or any elements of damage which are not recoverable under the Indiana Wrongful Death Act. (3) In voir dire, I believe I would have focused in on people don't smoke and any who are opposed to smoking. Also, people who have been associated with the medical profession and also people who are familiar working with numbers or any better employee benefits. One of the underlying themes I would try to be developing in voir dire is that a person's physical condition can have a dramatic effect on the person's life expectancy. Persons who are nonsmokers but knows smokers are very aware that smokers always pay a consistently higher premium for insurance. The purpose of this focus is not to improperly interject insurance questions. They are to find a group of people who understand that a person's life expectancy is dramatically affected by a person's life habits as well as pre-existing conditions. The last assumption is this matter is being tried against a hospital and its physicians or employees and not tried together with an underlying accident case. It is likely that the plaintiff would focus on either one or the other.

(a) Personifying the Defendant

Many articles have been written about the importance of personifying your client, making sure the jury understands that your client is a human being, not a bizarre freak of nature known as a plaintiff or a defendant. For defendants at times, it seems difficult for a jury to get in touch with this issue. Part of this issue can be resolved through voir dire to determine who works for large factories, the jury believes that companies should be treated just as fairly as individuals. The other way is by explaining that a corporation is simply a group of people trying to an honest day's work. For example, a case involving a hospital might try to explain that St. Mary of Little Lamb Hospital is a company which employees 400 people in the local area. The hospital was set up by the county in 1919 to serve the needs of the county annually serves over 5000 patients. Identify person at counsel table as an employee a person who has worked for 30 years at the hospital starting as a nurse and gradually moving up to her current position as chief executive officer of the hospital.

(b) Identifying Parties

In all likelihood, the plaintiff will have already outlined who the parties are. From a defense prospective, it may be important to highlight, for either comparative fault purposes or causation purposes, how co-defendants and/or non-parties fit into the case. This is especially true if you are in a rare case, as in this case, where you concede that liability and the only issue is damages.

(c) Addressing Damages

The general consensus is a defendant should never discuss damages in any great detail if there are any liability issues. The obvious reason is that it is inconsistent to say, "We've done nothing wrong but then in the event we have here's how much is a reasonable amount to take a look at." Discussions about damages always divert the jury's attention away from the main point of

liability issues. Even in cases where you might want to stipulate liability, it would likely be only be in circumstances where there is some collateral advantage for such a stipulation. For example, admitting liability on the condition that the fact the defendant was intoxicated at the time of the accident is out or that the defendant was being pursued by a policeman for a traffic violation or was racing another vehicle at the time. Absent such a stipulation, acceptance of responsibility does not preclude the plaintiff from going into circumstances which could greatly enhance the size of the verdict or subject the defendant to a punitive damage instruction.

(d) Preliminary economic analysis.

We have a rather small set of facts about Mr. Doty's social and work history. In a case where damages is the only issue, it is particularly important to truly analyze the economic data and actively attack the assumptions about the data.

For example, the preliminary report for John Doty assumes an annual income increase of 4.7%. John Doty's income information, assuming everything else is accurate, for a period of 1990 through 1992, shows almost nonexistent change in his salary implying that his employer is not within the norm. Data also assume that fringe benefits account for 20% of wage and salary benefits. It will be important to analyze this employer specifically and how this 20% figure compares to the norm. The facts indicate that replacement health insurance is only $977 per year, very small percentage of salary. One of the key facts which is missing from the analysis is whether Mrs. Doty was acting in the work force. If Ms. Doty active in the work force, cost of replacement health insurance may not be $977 per year. In addition, this figure may include family plan versus an individual plan. Another area to press is the statistical data used by the economist to determine treasury bill yields. The

economist in this case relied upon only two years of data and the fluctuations in treasury security prices over a wide range of data would be necessary to get a better result.

One of the most difficult areas to address is the value of household services. Generally there is no underlying data supporting the hour figures supplied to beneficiaries. In this case, the decedent allegedly spent 100 hours per month working around the house. For a 61 year old man, this is somewhat difficult to believe, but it is crucial to fully explore this issue because in this scenario, loss of household services is the largest single component of damages. In this case, the facts show that Doty was actively employed and did “considerable overtime”. It’s essential to inquire about what the decedent’s future plans were. For example, discovery which reveals that decedent recently mentioned to a co-worker that he planned to move to a condo would undermine the alleged damages claimed by Mr. Doty. That a co-worker said Doty mentioned on several occasions that he planned to retire at age 63 could also have an impact on the amount of damages claimed. Detailed questions need to be asked about the specific services rendered by Doty which would be rendered in the future.

The facts indicate Doty provided a number of services from the house but one wonders about how much of these services were actually one time situations. For example, if Doty had remodeled the house and roofed the house last year, those services would certainly increase the number of hours he was working on the household, but those are essentially one time services. Other types of services are seasonal, such as mowing the lawn. Other categories are ones where the services may not be particular services which only the decedent rendered. Though he apparently did all the driving for the family, including shopping errands and trips to the doctor and the dentist, it would be reasonable to know how many times where this was done as a matter of convenience with Mrs. Doty riding along with Mr. Doty or whether Mrs. Doty simply did not have a driver’s license. Personal

consumption expenditures also seem very low. It might be interesting to compare empirical data versus Mr. Doty's specific data and also what documentation, if any, there is to back up the personal consumption figures. Economic loss is somewhat screwed because the consumption figures net tax dollars whereas the earning capacity dollars are pre-tax dollars. Once tax considerations are factored out, the loss of earning capacity is substantially less.

The last major element of economic damages are out-of-pocket expenses related to medical, funeral and burial expenses. Given the numbers in this case, it would probably be to inappropriate to pick over a lot of these expenses. For discovery purposes, however, you may well want to know whether the funeral expenses were covered by insurance and this case it would also be pertinent to know how much of the medical expenses were related to the initial tort feasor's accident and how much were necessitated by the hospital's alleged negligence. You would also want to know if an insurance company paid for the medical expenses and if they asserted a subrogation lien. All this information could be very helpful. Again, in this case, given the fact that the out-of-pockets are relatively modest, the defense should not be seen to be nitpicking over a lot of these details.

(d) Pointing Out Inaccuracies in Economic Reports

In Macalhaney a wonderful list to cross-examine experts. Many of the ways he suggests are not damning to the expert, but rather simply poke at the expert for minor mistakes with the hope that the cumulative effect of these minor mistakes will be to undermine the expert. For example, if the widow testified that he planned to retire on his 64th birthday and had mentioned it numerous times, if the expert as in this case did an assumption based upon 65 years of age, it would be useful to point this out. Anything that overstates the value of the claim is fair game. Economic report for example shows a 1992 the projected present value of the loss of household services would be $9,856.00. The

1992 figures could be interpreted in one of two ways. (1) As the end of 1992, decedent would have rendered this much in services but for his death; or (2) During a period from his birthday in 1992 until 1993, total value of services would be this amount. The facts tell us that the decedent died on December 10, 1992. The decedent's spouse would have a loss of only approximately three weeks of services in 1992 so the $9,000 figure cannot be right for 1992 based upon that theory. The other theory would be that 1992 refers to the decent's date of birth in 92 until birthday in 93. Even if this is true, such services would be for approximately half the year, not the full year. You could also argue certain services are unnecessary after the death and therefore need not be rendered now. **MANY OF THESE ARGUMENTS HAVE REAL DANGER POTENTIAL. YOU NEVER WANT TO GIVE THE IMPRESSION THAT YOU ARE TRIVIALIZING A PERSON'S DEATH, ESPECIALLY IN A CASE WHERE YOU CONCEDE HIS LIABILITY. ALL OF THE ABOVE MENTIONED POINTS ARE SIMPLY ITEMS TO THINK ABOUT IN PREPARING YOUR OPENING STATEMENT.**

After discussing and thinking about all of these facts, condense them down into several themes you want to present the statements about the type of proof you plan to present. You do not want to discuss all the specifics about economic data, for example. Rather you want to discuss the fact that all economic projections are based upon certain assumptions, and mention several of those assumptions and ask the jury to carefully think about those assumptions and whether they are consistent with our common sense knowledge about those factors. Several years ago, I worked on a wrongful death case in a rural county. The decedent was fortunate enough to have a factory job in an otherwise rural area. Due to the young age of the decedent, an economist had very little economic data to work with, but one of his general assumptions was that apparently his work at the

factory would continue. Unfortunately, four years or so after the decedent died, the plant closed and all the jobs were lost. The economist figures suggested that a person with high school education in this very rural county would be making $45,000.00 a year by time they were 45 or so. In talking to the jurors after the case, our impression was they found this particular finding incredible given their local community and the available job market.

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