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BULLETS, BAD FLORINS, AND OLD BOOTS: A REPORT OF THE INDIANA TRIAL JUDGES SEMINAR ON THE JUDGE'S CONTROL OVER DEMONSTRATIVE EVIDENCE

*Thomas L. Shaffer**

> *What is called "real evidence" — mostly bullets, bad florins, and old boots — is of much value for securing attention. This is true even when these exhibits prove nothing — as is generally the case.*[1]

In the spring of 1963, the Indiana Judges Association, which represents about 100 of the 120 trial judges of Indiana, and the Joint Committee for the Effective Administration of Justice[2] sponsored the first "Indiana Trial Judges Seminar" in Indianapolis.[3] The seminar was divided into five subject areas of practical importance to trial judges, with each discussion led by a team of nationally-recognized experts and supplemented by a teacher of law who acted as reporter.[4]

* B.A., 1958, College of St. Joseph, Albuquerque; LL.B., 1961, Notre Dame Law School; member of the Indiana Bar; Assistant Professor of Law, Notre Dame Law School; Reporter, Indiana Trial Judges Seminar, 1963, sessions on "The Judge's Control Over Demonstrative Evidence."

1 The quotation is from SCINTILLAE JURIS 58 (1877), by way of 4 WIGMORE, EVIDENCE 253 (3d ed. 1940), and is concluded:

> They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that their idol could do nothing for them; but it enabled them easily to realize a power who could. A rusty knife is to an English juryman just what a "scarabaeus" was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the reverence due relics of the holiest martyrs.

See note 33, *infra*.

2 The Committee has sponsored a number of these seminars, with the assistance of a grant from the Kellogg Foundation.

3 Indiana's trial judges are organized on what is probably a typical scale in a state which combines large metropolitan areas with a number of farming counties. The state is divided into judicial circuits, normally coextensive with county boundaries. Each circuit judge has original (constitutional) jurisdiction in criminal, civil, probate and domestic relations cases. Populous counties have additional (legislative) superior courts, which may (as in Marion County) have civil jurisdiction coextensive with the circuit court (with some exceptions). Other superior courts have exclusive jurisdiction in given areas — such as probate and juvenile matters. Three counties (Marion, St. Joseph and Vanderburgh) also have probate courts which remove all probate matters (including adoptions and guardianships) from the circuit court docket. Two counties (Marion and Lake) have criminal courts of unlimited original jurisdiction, and Marion County has a system of six municipal courts of limited jurisdiction; four handle criminal cases and two handle civil cases. This outline does not include justices of the peace, who are apparently not invited to membership in the Association, nor city judges. The state has an intermediate Appellate Court, which normally hears all appeals in civil actions, and a Supreme Court, which hears appeals in criminal and constitutional cases, original actions of prohibition and mandate, and civil appeals on transfer from the Appellate Court.

4 The seminar, "Eliminating Causes of Delay in Jury Cases," was led by Judges Joseph Halpern (Superior Court, New Brunswick, New Jersey) and George B. Richter (District Court, Waukon, Iowa) and reported by the Chief Reporter for the entire seminar, Associate Professor Edward W. Gass of the Indiana University School of Law.

The seminar, "Pattern Jury Instructions," which was an area of intense interest among the planners of the meeting, was led by Judge Robert L. McBride (Court of Common Pleas, Dayton, Ohio) and reported by Professor Marshall J. Jox of the Valparaiso University School of Law. Judge McBride also delivered a luncheon address on pattern jury instructions.

"Procedure in Criminal Cases" was led by Judges James R. Breaky, Jr. (Circuit Court, Ann Arbor, Michigan) and Ivan Lee Holt, Jr. (St. Louis, Missouri) and reported by Professor Lester B. Orfield of the Indiana University School of Law.

"The Trial Judge's Responsibility in Divorce Cases" was led by Judges John

The opportunity to be a reporter on the subject area, "The Judge's Control Over Demonstrative Evidence," proved to be an uncommonly promising occasion for gathering empirical data on the spontaneous attitude of trial judges toward the arsenal of gadgetry that has been assembled by trial lawyers, most of them representing claimants, over the past several years. Because appellate courts show an unusually high amount of respect for trial-judge discretion in admitting demonstrative evidence, the attitudes indicated at the Indianapolis seminar probably have more significance to lawyers than trial-judge attitudes on legal questions which are given full review at the appellate level.

The discussions on demonstrative evidence were led by Judge Spencer A. Gard, who is the district judge in Iola, Kansas, and who is a veteran scholar on evidence,[5] and by Mr. Donald P. Lay,[6] a lawyer representing plaintiffs in personal injury cases and a leader in the nationally-organized claimants' bar. The opportunity was one of comparison — a thoroughly analytical scholar with broad practical experience, a dedicated user of the most modern trial techniques, and five small groups of trial judges who spend a large part of their courtroom time pondering evidence questions—usually, I suspect, with a modicum of appellate law and a lot of common sense.[7]

I

Charts, Graphs and Drawings

Every participating judge had had experience with anatomical charts, drawings and slides. These typically demonstrate the anatomy of a normal human body; they sometimes include charts showing a "normal" injury or a

Casey (St. Louis, Missouri) and Roger Alton Pfaff (Superior Court, Los Angeles, California) and reported by Associate Professor Edwin H. Greenebaum of the Indiana University School of Law.

5 Judge Gard was a Kansas practitioner for 20 years and has been judge of the 37th District Court since 1950. He is a former state representative and state senator. He has been a member of the National Conference of Commissioners on Uniform State Laws since 1947 and was chairman of the Conference committee which drafted the Uniform Rules of Evidence. He is the author of the fifth edition of Jones on Evidence (1958), The Illinois Manual on Evidence (1963), Gard's Kansas Code of Civil Procedure (1963), and a number of articles in periodicals. He is a member of the Board of Directors of the American Judicature Society.

6 B.A., J.D.; member of the Iowa, Nebraska and Wisconsin bars, and veteran of 12 years of practice in all three states. Mr. Lay is presently a partner of Eisenstatt, Lay, Higgins & Miller, Omaha, and an associate member of Phillips, Phillips, Hoffman & Lay, Milwaukee. He is a member of bar associations in all three states and of the Automobile Committee of the American Bar Association. He is the editor of the Nebraska Association of Trial Attorneys News Letter, and a member of the Law-Science Academy and the National Association of Claimant Compensation Attorneys of America and an honorary member of the Iowa Academy of Trial Lawyers. He has served as national vice-president and a member of the Board of Trustees of the Law-Science Academy. He is the author of a number of periodical articles on trial practice and has lectured on the trial of personal injury cases at the State University of Iowa, the University of Texas, the University of Nebraska, and Creighton University, and before the Arkansas, Nebraska and Iowa Bar Associations and the National Association of Claimant Compensation Attorneys of America. He is presently a lecturer on legal medicine at Creighton University.

7 It is not the purpose of this paper, however, to discuss or even cite all of the applicable appellate precedent. Some recent and interesting sources will be noted, and reference to authorities directly mentioned will be made, but the basic approach here is empirical and confined to the attitudes of trial judges.

"normal" operative technique for treatment of injury. Several judges felt that illustration of oral testimony, especially anatomical illustration, was to be dealt with cautiously. In the first place, it underlines one small part of an entire record of testimony. In the second place, it may carry a prejudicial effect which non-evidence should not be allowed to carry. For this reason, one busy circuit judge said he would not allow anatomical models and charts to be presented directly to the jury, but would limit it to the hands (or pointer) of the witness. Another judge explained this attitude by saying that the jury should only examine first hand what it is allowed to weigh in reaching its verdict. The question here was deeper than the issue of what helps the jury; these judges felt that the jury was not entitled to be helped by the independent significance of a demonstrative exhibit when the only proper role of the exhibit was as interpreter of oral testimony.

All the judges agreed that, as a general rule, no exhibit, whether it is evidence or not, should be kept in the visual presence of the jury after it has served its purpose. One judge said that he kept court-owned anatomical charts for the use of his bar, but exacted agreement in advance from lawyers to put the charts away when the medical expert left the stand. Although the majority of judges probably would not interfere on their own motion with abusive exposure of anatomical exhibits, all of the judges indicated that they require removal of the exhibits upon request, and, presumably, the request could be addressed to the court out of the presence of the jury.

Most of the judges felt that textbook charts and drawings need not be identified and received in evidence, unless they are physically marked by one or more witnesses. Certainly court-owned illustrative devices would not be. If the witness indicates injury or treatment on a line drawing or plastic model provided him for that purpose, most participants thought it should at least be marked for identification, and usually should also be received into evidence. Mr. Lay exhibited window-shade-size anatomical line drawings prepared by a commercial publisher for this purpose.

The admission problem may involve any one of two or three separate problems, depending upon what is done with tangible evidence after it is admitted. In the substantial geographical area of Mr. Lay's practice, fully admitted real and documentary evidence is taken to the jury room. Evidence admitted (and identified by exhibit number) "for purposes of illustration only" is not taken to the jury room, but is otherwise treated as if fully admitted. In Kansas, Judge Gard said all exhibits are considered evidence, and may be taken to the jury room, or not, in the trial judge's discretion. In Indiana, by judge-made rule, no real or documentary evidence of any kind is allowed in the jury room.[8] It appears to be the rule in the majority of jurisdictions that the question resides in the discretion of the trial judge, once the evidence has been admitted.[9]

8 Continental Nat. Bank of Indianapolis v. Discount & Deposit State Bank of Kentland, 199 Ind. 290, 157 N.E. 433 (1927); Continental Optical Co. v. Reed, 119 Ind. App. 643, 88 N.E.2d 55 (1949). These cases indicate that pleadings may be taken into the jury room, although the *Continental Optical* opinion states that the Appellate Court frowns on the practice.

9 McCormick, Evidence § 184 (1954).

Logically, there is no need to admit exhibits used "for purposes of illustration only," and many of the judges thought this formality unnecessary. As one judge said, an illustrative exhibit is merely a means of emphasizing or repeating oral testimony, allowable, if at all, only because the complexity of the oral testimony, or the nature of the subject matter of the oral testimony, demands graphic exemplification. In other words, illustrative devices not needed by the jury should not be allowed at all; and devices needed by the jury and used merely to clarify oral testimony are not evidence and need not be treated as if they were.

Mr. Lay repeatedly noted that an alert advocate will not attempt to use demonstrations the jury does not need. Cases of obvious injury, for instance, are more dramatic if the sole evidence seen by the jury is the appearance of the plaintiff. In one case he described an over-prepared demonstration on an arm fracture which apparently convinced the jury that the attorneys for the plaintiff were out to exploit their client's relatively minor injury; the verdict, attributed by Mr. Lay to excessive use of courtroom gadgetry, was for the defendant.

A fair consensus of opinion is that these judges are guided predominantly by what they feel is useful to the jurors. But a basic question of trial conduct is implicit in that sort of standard — how does the judge know in advance what is going to be helpful? One superior court judge put this to Judge Gard, who was a consistent, if subtle, advocate of the is-it-helpful approach, in just those terms. Judge Gard advised his audience to go slowly, and to stand ready to stop a line of testimony or real or documentary evidence at the moment the possibility of its aiding the jury diminishes.

Several judges said abuses in the use of demonstrative evidence are usually attributable to an absence of objection. One instance which was discussed was Mr. Milwid's comment on the celebrated Belli artificial limb tactic.[10] Mr. Milwid said that the artificial limb (kept throughout the trial in butcher paper, on the counsel table, and used, Mr. Milwid said, only in summation) had never been admitted into evidence, or used in witness demonstration. This made Mr. Belli an unsworn witness in his client's behalf. Mr. Lay expressed some doubt as to the accuracy of Mr. Milwid's account; Judge Gard, assuming that Mr. Milwid had the facts straight, said that he would have stopped the argument on his own motion; several of the seminar judges nodded agreement.

Mr. Lay exhibited two sets of illustrative devices he had used in a breach of contract case, to prove loss of income damages. One was a chart demonstration of figures which came from an accountant's testimony, and which was used while he testified. The other was a graph made (by the lawyer and accountant, before trial) to illustrate the effect of this lost income and to compare conditions before and after breach. In the trial, before a federal district court, the chart had been admitted and use of the graph confined to argument. A numerical majority of the participating seminar judges agreed with this dis-

10 Milwid, *The Misuse of Demonstrative Evidence,* 28 INS. COUNSEL J. 435 (1961), commenting on Mr. Belli's conduct in the trial of Jeffers v. Municipal R.R., as that is reported at 2 BELLI, MODERN TRIALS 1404 (1954). Mr. Belli's account is unclear as to whether the artificial limb in butcher paper was admitted into evidence before final argument. Mr. Milwid obviously thought that it was not.

tinction, but a substantial minority would have admitted both and a few would have admitted neither. Their theories:

(a) for admitting both: They are based on figures in evidence, and the expert accountant may legitimately want to comment on both;
(b) for admitting neither: They are both merely a means of allowing the accountant to testify twice and may only be used in argument;
(c) for admitting the chart and excluding the graph: The chart contains only figures in evidence; the graph is merely a lawyer's computation.

Some judges, in reference to these and other illustrative devices, would have been liberal in admission, but would not have allowed their use in argument. This was, though, a distinctly minority opinion.[11]

As a matter distinct from the question of admissibility, some of the participants were keenly interested in incorporating illustrative testimony into the record.[12] Some had even developed the practice of photographing blackboard drawings and incorporating them into the record — this, apparently, on the court's motion. Judge Gard thought this unnecessary, and probably a majority of the participants agreed. The practice is, they thought, only a form of oral testimony and a record is sufficient which indicates that it was used. It is not evidence, but, like a jury view or a gesture, merely illustration.

II

Drawings and Photographs of Treatment

A distinct area of controversy is presented in the drawing or photograph showing operative technique or other treatment. On the one hand, these may only illustrate the appearance or internal condition of a "normal" human body after it has undergone "normal" injury or treatment. On the other hand, they may be photographs (sometimes movies) of one of the parties.

The "normal injury" evidence elicited an immediate and skeptical response from most of the participants, who felt that photographs illustrating injuries to or treatment of a "normal" body were not relevant where the issue was the actual condition of one of the parties. There are, as one seasoned circuit judge remarked, many degrees of herniated discs.[13]

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11 In State v. Vaughan, 184 N.E.2d 143 (Ind. 1962), the court approved the admission of a plat made by the defendant, a layman, accomplished by tracing from an engineer's drawing. The defendant had made notations on his tracing; the engineer was not produced as a witness. The court conceded that the engineer's part of the tracing was hearsay, but held the tracing admissible nonetheless for purposes of demonstrating ownership of the property at issue. The case involved eminent domain; one member of the Indiana Supreme Court dissented, without opinion.

12 There has been at least one case, however, where the matter was not considered distinct and use of a blackboard sketch was not allowed because the sketch was such that it could not be made part of the record. State v. Jones, 51 N.M. 141, 179 P.2d 1001 (1947).

13 *"Canned" Medical Motion Pictures Can Win Cases,* Current Med., Sept. 1962, p. 40, discusses an article by R. Crawford Morris of the Cleveland Bar (Medical Economics, Jan. 15, 1962, pp. 108-10). The article advocated the use of "medical training films" (*i.e.,* films of surgical and other treatment of "normal" injuries) as a "demonstrative aid for the fact-finder." Mr. Morris said:

> In most states, you can introduce such a film as evidence only at the

Where the picture is of the plaintiff, the conceptual problem is similar, that is, the issue is still relevance of the device to an issue in the case (as distinguished, possibly, from competence, which is the issue where a "normal injury" exhibit is presented). Judge Gard suggested that, if the plaintiff was at the time of surgical or orthopedic treatment under a general anesthetic, evidence of professional technique may not be relevant, at least not on the issue of pain and mental suffering. He makes an exception only where some permanent alteration is accomplished during the operation, which permanent alteration can be considered by the jury on the damages issue. (An example, apparently, would be the insertion of an orthopedic nail.) If the anesthetic is local, the ordeal would be relevant to the pain and mental suffering experienced by the plaintiff. Even so, pictures of the operation might be denied admission, and might even be an unwise tactic, if the plaintiff has explained the ordeal orally.

Mr. Lay mentioned a case he had tried where the plaintiff, a woman, required a network of wire support to rebuild the bones of her face; this involved the joint efforts of a plastic surgeon and consulting oculist, and was all performed when the plaintiff was conscious. The consensus was that evidence of treatment in this case would have been relevant.

Evidence demonstrating future care, or a permanent alteration in the plaintiff's anatomy, or evidence showing treatment which caused the plaintiff pain, are all logically distinct from the problem of showing prior treatment of the plaintiff's injury. Mr. Lay mentioned a film prepared for the *Cutter* trial[14] which showed in great detail the daily life of the plaintiff, a child who was required to undergo extensive physical therapy and who had to be given the most elementary physical care. The judges who discussed this case thought the movie admissible, given proper lay and expert foundation testimony.

Whether any chart or model should be allowed is largely a question of whether the jury needs it. One judge suggested that he viewed his role as one of balancing the aid a piece of tangible evidence gives the jury against the dangers of its consuming undue amounts of the court's time and overemphasizing one factual aspect of the case.

A separate question arose in the use of marked illustrations and whether or not both parties should be allowed to mark one party's exhibit. Several, perhaps most, judges allow this, where it will help the jury, on the theory that no party has a proprietary interest in an exhibit which has been admitted. Many judges felt that this should not be allowed; but most, I think, would allow anything short of deliberate tactics of confusion. Mr. Lay suggested that two copies of the same exhibit eliminates this problem; approval of this alternative can,

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> discretion of the trial court. It must be pertinent and accurate. The lawyer introducing a film must first offer the testimony of expert witnesses to establish the film's pertinence.

Mr. Morris admitted that the films, especially color films, "are quite a shock to lay people." In the case he discussed, the court allowed jurors to choose whether or not they would watch the film. All of them chose to watch, while an expert medical witness narrated. The report in Current Med. carries a five-page list of film titles, and three pages of names and addresses of film distributors.

14 Gottsdanker v. Cutter Labs., 6 Cal. Rptr. 320 (1960), discussed at 2 BELLI, MODERN TRIALS 275-89 (Supp. 1958), and 4 BELLI, MODERN TRIALS 242 (1959).

he said, be resolved in a pre-trial conference. But this time-saving suggestion may not meet one participant's remark that differences in factual theory should be made as graphic as possible, and that both parties' marks on a single chart were perhaps better, in some cases, than two charts separately marked.

III

X-RAYS

X-rays posed no problem to any of the participating judges. Mr. Lay displayed transparent negatives of the ordinary type (shown with a lighted box), positive (and sometimes enlarged) prints made from these negatives, and slides for projection. Given proper *medical* foundation,[15] all of the judges considered these admissible in all three forms. Few, if any, judges thought *photographic* expert foundation necessary, if the positive prints or slides were identified as accurate reproductions by the medical expert. Mr. Lay said that he disposes of the need for photographic foundation by offering in pre-trial conference to provide it; he said he has never been asked to provide it.

If either positive print or slide X-ray reproductions are used, Mr. Lay's method is to introduce the original negative as, for instance, "Plaintiff's Exhibit 1," the print or slide as "Plaintiff's Exhibit 1-A." Most of the judges approved of this method; one or two judges questioned whether both negative and reproduction were necessary, and suggested that the duplication might even be cumulative.

IV

PHOTOGRAPHY

Photographs verge closer to what Professor Wigmore called "autoptic proference" than charts and other illustrative devices. A photograph is almost "the thing itself," but not quite, and the "not quite" is what produced discussion among Indiana's trial judges.

Photographs present three issues: (1) Is the photograph relevant? Often photographs are subject to exclusion, either because they do not relate to anything in issue, or because they are cumulative on an issue already proved as well as it can be proved. (2) Is the photograph accurate? This is the most persuasive inquiry to Indiana judges, probably because of appellate literature that tends to reduce photographic issues to accuracy and accuracy alone. (3) Is the photograph inflammatory or unduly prejudicial?[16]

Indiana appellate opinions justified these participating judges in feeling, as most of them felt, that photographs are not inadmissible when they are gruesome.[17] Within that general feeling, however, there were two essentially distinct

15 See WIGMORE, EVIDENCE § 795 (3d ed. 1940); 3 JONES, EVIDENCE § 630 (5th ed. 1958).

16 As to these three, see 3 WIGMORE, EVIDENCE § 792 (3d ed. 1940); 3 JONES, EVIDENCE §§ 625, 627-28, 630 (5th ed. 1958).

17 Wahl v. State, 229 Ind. 521, 98 N.E.2d 671 (1951); Turrell v. State, 221 Ind. 662, 51 N.E.2d 359 (1943); Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941).

approaches. Most of the judges felt that prejudice excited by a photograph must be weighed against the assistance the photograph gives the jury. Two judges were particularly vocal in rejecting the majority's interest-balancing approach. One of these, a metropolitan superior (civil) court judge whose docket is a constant source of pressure and whose background has been principally in the criminal courts, said: "There is no rule which says a trial has to be pleasant." The other, a less-pressed circuit court judge, did not see any reason why a picture of a wound should not come in, particularly since that is what the jury wants to see.[18]

The exclusion of particularly gory pictures can, as several judges suggested, be accomplished on the ground that they are cumulative evidence. One judge mentioned a case where both the plaintiff's legs were amputated; the plaintiff's lawyer wanted what remained of his client's legs displayed to the jury; he had already successfully offered color photographs of the legs. This judge denied the request to exhibit the plaintiff's legs. He said that he would have excluded the photographs, had the order in which the evidence was offered been reversed.[19]

Movies did not present any peculiar problems to these judges, probably because few of them had seen extensive or frequent use of movies. Mr. Lay suggested that most movies are posed, and in that respect the same rigorous standards would be imposed on them that are imposed on still-posed photographs, a subject developed more fully below. Aside from deciding that they are of questionable tactical value, the participating judges professed no difficulty with authenticated defendants' movies to disprove claimed disability by showing what the plaintiff does when he thinks he is unobserved.[20] One or two judges indicated that foundation for movies may require expert photographic testimony. In some cases, a lay witness would be competent to testify as to the accuracy of the movie.[21]

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18 The appellate treatment of the issue, which, more often than not, affirms the admission of gruesome photographs, is usually formulated as permitting anything in evidence by way of photographs which might come into evidence by way of oral testimony. See People v. Sinuzzi, 369 P.2d 427 (Colo. 1962); Dittman, *One Year Review of Evidence,* 11 DENVER L. CENTER J. 156, 157 (1963); note 22, *infra.*

19 See 4 WIGMORE, EVIDENCE § 1157 (3d ed. 1940). Although Dean Wigmore treated photographs and exhibition of wounds separately, stating that the use of photographs did not concern what he called "autoptic proference," *Id.* at § 1156, the seminar participant would appear to have had logic on his side.

20 See 3 WIGMORE, EVIDENCE § 204 (3d ed. 1940).

21 The preparation of movies, from the advocate's point of view, is discussed extensively in HICKAM & SCANLON, PREPARATION FOR TRIAL 167-74 (1963). The authors, both seasoned Indiana trial lawyers, have successfully used movies to disprove disability. They also describe a movie of an out-of-court demonstration they used to effect. The plaintiff contended he had been injured when the bumper of the defendant's car struck one end of a bicycle rack and caused the other end to veer around and hit him. Defense counsel (one or both of the authors) established the exact location of the rack from the plaintiff's discovery deposition. They used the accident scene and the defendant's car and took a 15-minute movie, during which the car was driven against the rack 15 times; the car bumper did not once strike the bicycle rack. In that case, defense counsel took the precaution of giving the plaintiff's lawyer notice in advance of the demonstration. Expert photographic testimony was used to lay a foundation for the movie during trial; the plaintiff's lawyer did not object to its use.

This book discusses a number of similar uses of movies, as well as the preparation and authentication of blow-ups, charts, still photographs and dozens of other demon-

None of these judges were interested in closely examining offered photographs, color or not, on their own motion. On the other hand, either preliminary questions or cross-examination can properly and extensively be addressed to photographs, and all of the judges were aware of the possibilities of photographic distortion — both that peculiar to color (filters, developing techniques) and that common to all photographs (telescopic and wide-angle lenses, under- and over-exposure, distortions caused by the angle used). These judges would probably require that the proponent of photographs produce expert photographic foundation virtually any time the other side of the case asks for it. Mr. Lay suggested that authentication of photographs, to the satisfaction of the attorney resisting admission, is an issue ideally raised and resolved in the pre-trial conference.

One judge mentioned that lawyers in his court use color charts to demonstrate the accuracy of color photographs. The chart is compared with the proferred photograph and apparently points up distortion caused by filters or distorted developing.

After the subject had been extensively discussed, in a private conversation, Judge Gard said that, in his opinion, the color photography issue is not necessarily a question of accuracy at all; it may be a question of impact. Concededly, honest color photography is more accurate than black and white photography. But the readers of newspapers and custodians of family picture albums who sit on juries are accustomed to seeing their photographs in black and white. The measured difference in impact between a black and white picture and a color picture is, he said, the thing the judge should focus upon. If the understanding of jurors is notably advanced by the addition of color, the color picture should be preferred. If color, as such, adds little to the jury's understanding of the facts, a black and white picture should do as well. Several judges indicated much the same analysis by repeatedly observing that accurate, relevant color pictures should be admitted "if they will help the jury."

The difficulty in Judge Gard's analysis is, as he suggested, that a trial judge dealing with courtroom reality may rarely have a choice between color and black and white pictures of the same subject. The issue then is reversed: Is exclusion of the only picture offered, a color picture, justified on the basis of its adverse impact? Since, as Judge Gard said, the trial judge who wants to minimize his error will resolve doubts in favor of admission, the color picture should probably end up in the record if it is accurate, relevant and not conspicuously inflammatory or cumulative. A fair statement of the consensus of these judges is that most pictures which meet these threshold tests should be admitted, and this is a consensus entirely consistent with Indiana's appellate literature on the subject.[22]

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strative devices. It is a joint publication of the American Law Institute and the American Bar Association Joint Committee on Continuing Legal Education, and one of the first in the series' longer, hard-cover publications.

Similar legal issues are implicit in the use of recorded statements. See Lee, *The Use of Recorded Statements and Their Admission into Evidence,* THE BULLETIN — AMERICAN ASS'N OF RAILROAD COUNSEL, Nov. 1962, p. 53.

22 Cleary v. Indiana Beach, Inc., 275 F.2d 543 (7th Cir. 1960), *cert. denied,* 364 U.S. 825 (1960); Midwest Oil Co. v. Storey, 178 N.E.2d 468 (Ind. App. 1961). The latter opin-

The choice between color and black and white is an illustration of something these discussion leaders repeatedly mentioned — the airing and resolution of evidence questions in a pre-trial conference. If photography is raised at that stage of the proceedings, the judge is in a position to require a substitution of color for black and white pictures, something which would cause serious inconvenience if demanded during trial.[23]

Most of the attending judges were skeptical of posed photographs. Several of them said posed photography requires extremely thorough — and I took that to mean virtually impossible — foundation. Reasons for this caution included the thought that a posed picture is a leading question, or a self-serving declaration, but more commonly centered on the conviction that a posed photograph was likely to be inaccurate.[24]

An exception which would generally be permitted is the accurate photograph of an accurate out-of-court demonstration. However, there is a danger in that too, a danger one judge thought was avoided by a liberal use of the statutory power Indiana trial judges have to allow jury views.[25] This judge thought, and no one disagreed, that a jury view of the intersection in which an accident occurred was worth more and risked less than either a photograph of the scene or a photograph (still or movie) of an accident reconstruction at the scene.[26] An admitted additional possibility (which no one had used, apparently) was the accident reconstruction, at the scene, with the jury present.[27]

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ion quoted Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79, 83 (1941) (quoted at 178 N.E.2d at 475):

> A photograph, proved to be a true representation of a person, place or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description.

See also note 18, *supra*. Putting the test in these terms, of course, ignores entirely the issues of impact and prejudicial effect.

23 See Hickam & Scanlon, *supra* note 21, at 187.

24 See 3 WIGMORE, EVIDENCE § 798 (3d ed. 1940); MCCORMICK, EVIDENCE § 181 (1954).

25 IND. ANN. STAT. § 2-2401 (1953) allows jury views in civil cases. IND. ANN. STAT. § 9-1801 (1953) allows jury views in criminal cases, but only with "the consent of all parties."

26 Dean Wigmore considered the rules on demonstrative evidence generally more liberal (and more to his liking) than the rules on other forms of evidence; one exception, which he strongly criticized, was the limitations American courts have placed on the jury view. 1 WIGMORE, EVIDENCE § 8c (3d ed. 1940),

> But for proference out of court, *i.e.*, the jury's view of a place or object irremovable into court, we are mostly laboring under a rule of exclusion which is so unscientific and so unpractical that to call it childish would be unfair to the intelligence of childhood. The still prevailing limitations on juries' views come down to us from the technique of feudalism; England herself has long shaken them off; but (except in a few States) we remain supine. If a sensible man wants to make sure whether a window is broken or a house burned down, he puts on his hat and goes out and sees for himself what the fact is. But our courts seem to regard a jury's view as if it were an act which would expose jurors to an infectious disease or a moral contamination.

Theoretically (*i.e.*, under the applicable statutory provisions), Indiana is among the "few States" where intelligence prevails. However, the comments from Seminar participants indicated that so few judges use the jury view that, in practice, Dean Wigmore's criticism is appropriate.

27 The New Hampshire court distinguished recently between a jury view and an out-of-court experiment in which the jurors are put, as nearly as possible, in the place of a party. Because no testimonial evidence of any kind accompanied this observation, the reviewing court approved it as "in the nature of an observation of physical facts relevant to the issues on trial rather than experiment," *i.e.*, as a jury view in the classical sense. Meyer v. Short, 186 A.2d 146 (N.H. 1962); see 11 DEFENSE L. J. 335 (1961), 12 DEFENSE L. J. 335 (1962), and Morris, *Study Those Photographs,* For the Defense, 1963, p. 14.

A related area of exception is the use of posed photographs to present hypothetical facts to an expert witness. Judge Gard mentioned the reassembly of airplane parts after an accident. Examination of photographs of this sort of reassembly would, he thought, be a proper way to present hypothetical facts to an expert witness on the cause of the accident.

A minority point of view, but one expressed with logic and conviction, was that the issue of posed pictures, as such, is unimportant. Two or three judges thought that if a posed picture is shown to have been based on accurate and relevant data, it should be admitted. By the same token, there are times when a photograph cannot possibly meet the issue, whether it is posed or not. An illustration, from Mr. Lay's repertoire, was a set of photographs taken by opposite sides in a railroad crossing accident case. The issue was the amount of light shed on the crossing by a switch-engine head lamp. The defense had taken a night picture of the crossing which was shown to have been taken with the aid of outside sources of light. The plaintiff's picture was a sea of blackness. As two or three judges noted, the light recorded on film would not be likely to duplicate the effect of light on the human eye (which was the issue in the case), and both photographs should perhaps have been excluded as not only inaccurate (which one of them, at least, was), but irrelevant.

Detail enlargements of unposed photographs have obvious utility in many trials. Mr. Lay had an enlargement in his materials which was used to show that bands of steel were not bolted together, as they should have been, when they fell from the defendant's moving truck and injured the plaintiff. Enlargements of microscopic detail in a products liability case is another example he used. Most of the judges exhibited an instinctive admiration for this sort of close detective work, and would have had no hesitation about admitting it into evidence.[28]

V

Blackboards and the Per Diem Damages Argument

It is probably attributable to the informal parlance of the Bar that the use of blackboards in jury statements and the use of the per diem formula in presenting argument on damages for pain and suffering are often, as they were in this seminar, discussed together. The two issues are logically distinct; the use of blackboards encompasses many more things than pain and suffering damages; and many lawyers present their per diem damages arguments, in the manner recommended by Mr. Lay, on audio-visual pads rather than on blackboards.

The use of the blackboard, in itself, is almost universally acceptable, although one of the participating judges said he did not allow it to any significant extent and another said that blackboards always made him nervous. Many judges would not allow blackboards in opening statements; their feeling was that the Indiana statute on opening statements excludes blackboard illustration when it excludes argument in opening statements. Most of the participants

28 See Hickam & Scanlon, *supra* note 21, at 165.

would not allow damages discusssion, on the blackboard or orally, in the opening statement.

The Indiana Appellate Court has approved the use of the per diem argument on pain and suffering damages.[29] However, most of these participating judges indicated that they make up their own minds on this issue — a manifestation, perhaps, that they realize that the Appellate Court, by holding that use of the formula was not reversible error, did not hold that trial judges must in every case permit it.

There is also a distinction, which most participants recognized, between the advocate who suggests a figure on pain damages to the jury, and the advocate who becomes in effect an unsworn witness on the issue. The latter ploy is objectionable from an evidence point of view, and it is also ethically questionable.[30] One judge suggested that misconduct in presenting the argument is a disappearing problem. He noted that plaintiffs' lawyers in his court, which hears a significant number of personal injury cases, present the argument tactfully and with voluntary and extensive precautions to the jury about its not being evidence.[31]

Blackboard argument is, of course, a broader issue than the per diem damages formula. Mr. Lay's example (done on visual-aid pads in grease pencil) covered charts of injury, treatment, "specials," and less explicit elements of damage, as well as the per diem formula. He felt that his case generally did not suffer by deleting the per diem part of this. The participating judges were generally disposed to permit blackboard argument in the broad sense, with one or two exceptions.

Life expectancy and present worth of future loss are related. Positive law in Indiana does not require that damages for future loss of earnings be reduced to present worth (*i.e.*, reduced to what, prudently invested, will produce the lost income in the future).[32] However, a well-tried case generally involves evidence of present worth — if the law does not require it of the plaintiff, the

29 Southern Indiana Gas & Elec. Co. v. Bone 180, N.E.2d 375 (Ind. 1962); New York Cent. R.R. v. Milhiser, 231 Ind. 180, 106 N.E.2d 453 (1952); Kindler v. Edwards, 126 Ind. App. 261, 130 N.E.2d 491 (1955). The *Southern Indiana* opinion cites a number of decisions from other jurisdictions, which have ruled as the Indiana courts have. Judge Gard's home state, Kansas, recently ruled the other way. Caylor v. Atchison, T.&S.F. R.R., 190 Kan. 261, 374 P.2d 53 (1962), the Kansas court reversing itself on rehearing. See Caylor v. Atchison, T.&S.F.R.R., 189 Kan. 210, 368 P.2d 281 (1962).

30 The Canons of Ethics of the American Bar Association, Canon 15 (West 1957), provide:

> It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

31 Amos A. Bolen, a member of the West Virginia Bar, makes a strong argument against permitting per diem argument in *The Blackboard Jungle of Demonstrative Evidence: View of a Defense Attorney*, 48 VA. L. REV. 913 (1962). His comment, which summarizes recent decisions refusing to allow per diem argument, and which fulsomely endorses Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958), and Crum v. Ward, 122 S.E.2d 18 (W. Va. 1961), turns upon three arguments:

(a) It is impossible to scientifically (or, as he says, "forensically") measure pain and suffering;
(b) Jury argument should be confined to the record;
(c) The device creates "the illusion of certainty where there is in fact only speculation."

The material given the seminar participants contained ample argument for allowing the device.

32 Kindler v. Edwards, 126 Ind. App. 261, 130 N.E.2d 491 (1955), and King's Ind. Billiard Co. v. Winters, 123 Ind. App. 110, 106 N.E.2d 713 (1952), summarize the foundation requirements and instructions necessary for evidence and jury consideration of damages

defendant will provide it. The consensus of the judges was that reduction to present worth was permissible, by either party, but they were divided on (a) whether the basic mathematical formulae for reduction to present worth, and actuarial data on life expectancy, can be developed by testimony or only judicially noticed, and (b) whether, however admitted, this data could be set out on charts used during testimony and argument (or either testimony or argument).

Some judges felt both kinds of mathematical data should be judicially noticed, presented in an instruction and then confined to argument. Some, perhaps most, would allow actuarial testimony, on present worth at least, but would not allow charts during testimony. A third point of view would allow the testimony, and charts during testimony. Mr. Lay recalled a federal decision reversing a verdict obviously based solely on an actuarial chart, and, because of that precedent, in states other than Indiana, would see that the charts stay out of the jury room.

VI

Conclusions

Several issues that can be associated with demonstrative evidence are not amenable to classification-by-exhibit because they enter into virtually every judicial decision on evidence. Judge Gard, for instance, remarked at the beginning of the seminar that errors in dealing with evidence occur most frequently in exclusion, implying that a trial judge had best give admission of evidence the benefit of his doubt. This was an impression based, he said, on a brief study of Indiana appellate precedent on evidence questions. His was apparently the unexpressed impression of most of the participating judges and may explain the attitude the majority had toward pictures, as well as a general tendency to reduce evidence questions to the accuracy of the exhibit, to show less interest in the threshold question of relevance, and almost no interest at all in the largely discretionary question of prejudice, inflammation and what Judge Gard called impact.[33]

The judges were in no agreement on whether purely illustrative devices must be admitted into evidence, an area which concisely illustrates what Judge

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for future loss of earnings, with no mention of a "present worth" requirement; see, *e.g.*, the *Winters* opinion, 106 N.E.2d at 719:

> The jury in assessing damages for loss of earnings . . . may fairly compensate the plaintiff for such loss of earnings as he actually has and will sustain.

This is all that is required, even though the opinion goes on to approve an instruction which acquaints the jury with "the diminished purchasing power of the dollar." The "present worth" requirement is not mentioned in earlier precedent or in secondary authorities; see 9 Indiana Law Encyc. *Damages* §§ 43, 146, 207 (1958), and cases cited, to the effect that juries may award damages for loss of future earnings if they give "proper consideration to the age of the plaintiff and the degree and permanency of the disability." *Id.* at 409-10.

33 Possibly a good example of the inordinate value given "the thing itself" is Dixon v. State, 189 N.E.2d 715 (Ind. 1963), in which the court upheld the admission of a shotgun in a burglary case, the testimonial foundation being that the defendant was apprehended in a house not his own, with the shotgun, which belonged to the householder, in his hand. The court said the shotgun was probative evidence of the defendant's felonious (burglarious) intention.

Gard meant. Some judges follow a general policy of admitting anything which can conveniently be admitted. Many admit any exhibit which counsel resisting the use of the exhibit insists should be admitted. Most of the judges, however, agreed with Judge Gard that most of these illustrative devices are like jury views or chalk sketches — they are not evidence and need not be treated as evidence.

Many judges were wary of sketches and graphs made to illustrate oral expert testimony. One busy superior court judge thought this nothing more than a device for allowing one of many witnesses to testify twice. On this same theory of overemphasis, another judge suggested that the Indiana rule excluding exhibits from the jury room is based on the theory that all evidence should be given an equal amount of weight. Most judges use a balancing process on questions like this. If the exemplification of oral testimony is really needed by the jury, its benefit outweighs the overemphasis it gives, or the fact that it is cumulative.

There is a difference between illustrating testimony and using, during testimony, a computation that is prepared by counsel. If what is presented is computation and nothing more, most of the participants agreed that it should be limited to jury argument.

Most of the participants indicated that they are amenable to a request that they make precautionary instructions on illustrative devices. One judge warned that these must be given in a manner which does not in effect give the exhibit more weight than it would have had without the instruction.

These judges were asked several times whether they, in controlling this evidence, would act on their own motion. Everyone seemed to agree that there is a point where justice requires interference, but most Indiana judges, at least, are conservative. One suggested test is that the judge should interfere if what is happening is grounds for mistrial. Several judges suggested that something short of out-and-out interference may be a means of control, for example, some indication to counsel that an objection would be entertained, a sudden recess, or a conference in chambers.

Indiana's trial judges, with one or two exceptions, make little use of the pre-trial power they have but are not required to exercise.[34] Throughout this

34 IND. SUP. CT. R. 1-4, first effective in 1940, provides:

> In any action except criminal cases, the court may in its discretion and shall upon motion of any party, direct the attorneys for the parties to appear before it for a conference to consider:
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> (a) The simplification and closing of the issues;
> (b) The necessity or desirability of amendments to the pleadings;
> (c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof or the introduction of unnecessary evidence;
> (d) The limitation of the number of expert witnesses;
> (e) Such other matters as may expedite the determination of the action.
>
> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered which limit the issues for trial to those not disposed of by admissions or agreements of counsel; and such orders when entered shall control the subsequent course of the action, unless modified thereafter to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above pro-

seminar, by Judge Gard and Mr. Lay, and by discussion leaders on civil and criminal trials, they were urged to exploit this salutary time saver. There was probably no single question in the demonstrative evidence discussion which could not have been resolved more smoothly in a pre-trial conference than during trial.

It was also obvious that Indiana trial judges are reluctant to use the discretion that is properly theirs in ruling on demonstrative evidence questions — a caution engendered by a feeling that the courts of review do not respect trial judge discretion as much as they might. Judge Gard, however, observed more than once that most trial judges are not aware of the vast amount of discretion they have.[35]

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vided, and may either confine the calendar to jury actions or nonjury actions or extend it to all actions.

35 The judges participating in the seminar had been given the following authorities to consider:

Affelt v. Milwaukee & Suburban Transport Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960); Ratner v. Arrington, 111 So. 2d 82 (Ct. App. Fla. 1959); Kiefer v. State, 239 Ind. 103, 153 N.E.2d 899 (1958); Greene v. State, 223 Ind. 614, 63 N.E.2d 292 (1945). Spangenberg, *The Use of Demonstrative Evidence*, 21 OHIO STATE L. J. 178 (1960). Note, 48 IA. L. REV. 512 (1962).