

Tort Trends
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By Jeffrey J. Kroll

No damage? No expert? No defense!!

In a case of first impression in Illinois, the First District Appellate Court affirmed the trial court's decision granting plaintiff's motion *in limine* to exclude photographs depicting the apparent minimal damage to plaintiff's post-collision vehicle. Furthermore, the court prohibited defendant from arguing, without expert testimony, that any correlation existed between the amount of property damage and the extent of plaintiff's injuries. *Dicosola v. Bowman*, 194 N.E.2d 875, 276 Ill. Dec.625 (1st Dist. 2003). This decision, coupled with another recent Illinois case, potentially prohibits defense attorneys from blindly arguing that no property damage equated with no injuries absent competent expert testimony. At the very least, this decision helps dispel the defense myth that a low-impact collision amounts to no injuries.

In *Dicosola*, plaintiff had been stopped in a parking lot for approximately 20 seconds when defendant drove her vehicle through a parking space and collided with plaintiff's vehicle. At trial, defendant intended to admit photographs depicting minimal damage to plaintiff's vehicle. The trial court rules, absent expert testimony, the evidence was inadmissible to show that any correlation existed between the amount of damage to plaintiff's vehicle and plaintiff's alleged injuries.

The First District Appellate Court recognized that no Illinois case stands for the blanket proposition that photographs showing minimal damage to a vehicle are automatically relevant and must be admitted to show the nature and extent of plaintiff's injuries. In fact, the recent *Dicosola* decision holds the opposite is true. Therefore, the logical conclusion is that a trial court is not required to Arubber stamp@ and admit photographic evidence of minimal damage to a vehicle, solely because a defense attorney alleges it accurately portrays the vehicle.

The *Dicosola* court relied heavily on the supreme court decision of *Voykin v. DeBoer*, 192 Ill. 2d 49, 733 N.E. 2d 1275 (2000). In *Voykin*, the supreme court flatly rejected the argument that Aif a plaintiff has previously suffered an injury to the same part of the body, then that previous injury is automatically relevant to the present injury simply because it affected the same part of the body.@ Id., 192 Ill. 2d at 56, 733 N.E. 2d at 1279. In abrogating the same part of the body rule, the *Voykin* court criticized the automatic relevancy basis of the rule and noted, Arelevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence an a manner properly provable in [a] case.@ Id. (emphasis added). More importantly, the *Voykin* court acknowledged that jurors are not skilled in the practice of medicine. The court appreciated that Awithout question, the human body is complex.@ Id. at 59, 733 N.E. 2d at 1280. Therefore, any opportunity to preclude a jury from speculating about a tenuous stretch in logic will be encouraged.

The First District Appellate Court in *Dicosola* alluded to the fact that prohibiting the use of photographic evidence avoids what can amount to the jury Aplaying doctor.@ The *Dicosola* decision did not hold that expert testimony must always be used for photographic evidence to be

admissible. However, the appellate court ruled that the trial court did not abuse its discretion in requiring expert testimony to show a correlation between the extent of vehicular damage and the extent of plaintiff=s injuries.

This is the first decision from an Illinois court directly addressing this issue. However, other Illinois courts have indirectly addressed the misleading use of photographic evidence in a low-impact collision. In *Martin v. Sally*, 792 N.E. 2d 516, 275 Ill. Dec. 285 (2nd Dist. 2003), the plaintiff filed a motion *in limine*, requesting that the trial court bar defendant from eliciting testimony from his engineering expert that plaintiff could not have been injured in the motor vehicle occurrence due to the minimal impact. Over objection, the trial court allowed the expert to testify.

The expert witness was an accident reconstructionist, a biomechanicist, and a biomedical engineer. Part of his professional experience included the study of how humans sustained injuries in different types of vehicular traumas. The witness opined:

[This accident] could not have aggravated her pre-existing condition because this is a case where the back is cradled and cushioned by the back seat and the foam and the delta v, that is, the speed of impact and the change in velocity of the [plaintiff=s van] is approximately in the range of a person walking briskly. This is not at all a high speed impact. This is very low. Id.

The Second District Appellate Court held that the witness was improperly allowed to testify at trial as he rendered opinions as to individuals in general, which had no relevance to the plaintiff. The fact that other individuals might not suffer injuries in low-impact vehicular crashes had no bearing on whether that particular plaintiff might have suffered injury in the accident. The appellate court held that the trial court should not have allowed the witness to testify that the low-speed impact of the crash could not have injured humans and also erred in allowing the witness to testify that the accident did not exacerbate plaintiff=s previous condition. It should be noted that although the appellate court found error, it was neither reversible nor prejudicial under the limited circumstances of the *Martin* case.

It is this author=s opinion that if the defendant does not have an expert witness to support the claim that the motor vehicle accident did not cause injuries to this plaintiff, any argument or inference by the defense would encourage speculation by the jury. This same issue was addressed in the Delaware Supreme Court. There, the court recognized:

As a general rule, a [defendant] in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of damage to the cars, unless the party can produce competent expert testimony on the issue. Absent such expert testimony, an inference by the jury that minimal damage to the plaintiff=s car translates into minimal personal injuries to the plaintiff would necessarily amount to unguided speculation. *Davis v Maute*, 770 A.2d 36, 40. (Del. Sup. Ct. 2001).

Interestingly, the court in *Davis* further found defense counsel=s characterization of the accident as a fender bending@ was improper. Like the analysis and holding in *Dicosola*, the *Davis* court rejected defendant=s potential use of the photographs to argue that the low impact could not have caused the plaintiff=s injuries. The *Davis* court held, A[W]e can discern no relevancy to the photographs other than to suggest that [plaintiff] could not have sustained serious injuries from an apparently minor accident, and this inference is impermissible... [T]he court should have immediately instructed the jury that there is no evidence of a correlation between the damage shown in the photographs and the severity of [plaintiff=s] personal injuries.@ Id. at 42.

After analyzing all of the evidence at the trial of the low-impact occurrence, the *Davis* court reversed the lower court and concluded that defense counsel=s improper argument and erroneous admission of photographs of [plaintiff=s] car, without a proper limiting instruction, encouraged the jury to speculate that an apparently minor accident could not cause serious personal injuries, to the plaintiff. Id. at 43.

The National Highway Safety Administration agrees with the reasoning of the *Davis* decision. For example, in the question-and-answer portion of its Web site, the following information is provided:

Q: Is there a way to determine how fast a car was going during a rear-end crash based on the damaged bumper(s)?

A: ...Many parameters such as vehicle masses, the pre-impact angles, crush resistance, metallurgical fatigue, etc., affect how the bumpers behave during an impact. Each crash must be analyzed with respect to all of the parameters before an estimate can be made.
<<http://www.nhtsa.dot.gov/cars/problems/studies/Bumper/Index.html>>(question/answer number 11).

Similarly, the case of *Sloan v. Clemmons*, 2001 WL 1735087 (Del. Supr.), an unpublished opinion, cites and relies on this government information. (See Footnote 21 of *Sloan* decision). In *Sloan*, defendant intended to offer photographs of both vehicles involved in a collision which would have depicted minor damage to both vehicles. Defendant proposed to admit the photographs through their orthopedic surgeon expert witness to argue that the accident was a low-impact accident involving minimal trauma, at best. The *Sloan* court concluded that the witness was not qualified to testify regarding the correlation between property damage and impact or property damage and injury. See also *Rizzi v. Mason*, 799 A.2d 1178 (Del. 2002). (the Superior Court of Delaware held that evidence that the damage to plaintiff=s vehicle was inconsistent with her alleged injuries was inadmissible to prove that her actual injuries were less severe than she was claiming).

In *Hastie v. Dohar*, 2002 Ohio 812 (Ohio App. 8th Dist.), an Ohio Court of Appeals recently held that expert testimony was needed to connect any correlation between damage to a vehicle and injuries sustained by a plaintiff. The court also noted that expert testimony is required for the defendant or defense attorney to use pictures displaying low-impact collisions when attempting to

argue that the low impact could not cause the damages complained of. The *Hastie* court announced, "When the defense seeks to minimize the injury to the plaintiff's person by showing minor injury to [the] car, an expert may be required." *Id.*

The recent case law clearly indicates that the trend is to preclude the defense from arguing that the fender-bender could not cause the injuries complained of without adequate expert testimony. This is a logical advancement of the law and this weighing of evidence is desperately needed. This is fair. It is conceivable that a plaintiff could sustain serious physical injury in an occurrence involving only minimal damages to the vehicles. Many factors exist as to why some individuals are more susceptible to injury than others. It should be left to the jury to weigh the damages through competent expert and medical testimony as opposed to speculative conclusions drawn from photographic evidence.

As a result of the *Dicosola* decision, when the defense seeks to minimize the injuries to the plaintiff by showing minor damage to the vehicle, they have the burden of proof and expert testimony is required. Gone are the days of allowing a jury to speculate about some correlation between low impact and the extent of injuries. How does one quantify minimum impact? What variables impact whether an occupant of a vehicle sustained injury when struck from behind at a low speed? These and other questions cannot be answered intelligently without the aid of medical or expert testimony. Delaware paved the way for other jurisdictions to prohibit counsel from arguing that there is a correlation between no injuries and low impact absent expert testimony.