EVIDENTIARY ISSUES FOR THE CLAIMS PROFESSIONAL

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
EVIDENTIARY ISSUES FOR THE CLAIMS PROFESSIONAL

I. PHOTOGRAPHS

Photographs are routinely taken and used in the investigation of claims to document damages, verify points of impact to vehicles, show layouts of scenes, and verify facts and information obtained from drivers and witnesses concerning the accident. For vehicle accidents, photographs can show the severity of impact to the vehicles, assist in estimation of damages, demonstrate scene views of the drivers and witnesses, and show existence and location of skidmarks (if any). In cases involving slip and falls, photos can confirm the condition of the scene or premises, and the existence or non-existence of any defects.

In accidents involving minimal impact with injuries being claimed by the claimant driver or passengers, photos of the vehicles involved showing little or no damage are extremely important and useful in settlement negotiations and the defense of the case at trial. In such cases where injuries are known and claimed, steps should be taken to obtain and preserve the photos of the vehicles. Once obtained, the question still remains if the photos are admissible for use at trial.

The decision to admit photographs is within the discretion of the trial court. To determine admissibility of photos, it must be shown that the photos are relevant to the question at issue. Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. While relevant evidence is admissible, the trial court's decision to admit the photos is based on the determination as to whether or not the nature of the damage to the vehicles and the injuries to the plaintiff are such that a lay person can readily assess their relationship, if any, without expert testimony. The trial court's decision on this issue will not be disturbed or overturned absent an abuse of discretion.

The following cases discuss the factors considered by trial courts in making the determination to admit or exclude photos of vehicles depicting minimal to no damage at trial.

*DiCosola v. Bowman*, 342 Ill. App. 3d 530, 794 N.E.2d 875 (1st Dist. 2003) – The First District Appellate Court ruled that a trial court has the discretion to exclude photographs of minimal vehicle damage and repair bills being offered to show a relationship between the amount of damage and the extent of plaintiff’s injury without expert testimony. The *DiCosola* court stated that no Illinois case stands for the proposition that photos showing minimal damage to a vehicle are automatically relevant and must be admitted to show the nature and extent of plaintiff’s injuries. There is no bright-line rule that photos depicting minimal damage are automatically admissible to prove the extent of plaintiff’s injuries. Expert testimony may be required to admit photos for the purpose of arguing that lack of damage or minimal impact could not have caused the injuries claimed by plaintiff.
The court in Ferro v. Griffiths, 361 Ill. App. 3d 738, 836 N.E.2d 925 (3d Dist. 2005) – The Ferro court followed DiCosola, but upheld the trial court’s admission of photos by stating the trial court did not abuse its discretion in its decision to admit the photos without expert testimony. In Ferro, plaintiff was injured in a rear-end accident while being transported from a hospital after surgery. Plaintiff testified the impact was heavy and caused his body to be thrown forward and strike his chest on the oxygen tank sitting between his legs. There was testimony regarding plaintiff’s susceptibility to injury due to pre-existing conditions and medical testimony that there was no additional bruising to plaintiff’s chest. The court admitted the photographs of minor damage to the vehicles without expert testimony after making the determination the evidence was relevant and admissible, and a lay person could readily assess the relationship without expert testimony. The photos were introduced to show why minimal damage to plaintiff’s vehicle was relevant to the nature and extent of the injuries claimed, the issue in this case.

In another first district case, the Baraniak court held that photos of damage to vehicles in a minimal impact case cannot be admitted to attack plaintiff’s credibility where the photos are being admitted for the purpose of contradicting plaintiff’s testimony regarding the impact and injuries sustained. In this case, there was testimony from four medical experts, but no medical expert rendered any opinion as to the relationship between the damage to the vehicle and plaintiff’s injuries. The photos were not used for the basis of the medical opinions rendered and the photos were not allowed to be used by the defense in cross-examination of the medical experts. The defense used the photos in cross-examination of plaintiff after plaintiff’s testimony that the impact was “hard” and caused plaintiff to flip backwards and strike head on headrest. Admission and use of the photos for the purpose of attacking plaintiff’s credibility is not allowed without accompanying medical testimony as to whether the photos support or contradict plaintiff’s position as to the nature and extent of the injuries claimed.

This court adopted the decisions in DiCosola and Ferro, but held that the trial court did not abuse its discretion by admission of the vehicle photos without expert testimony. The plaintiff in that case claimed that he was rear-ended while stopped by a vehicle traveling at 50 mph. Defendant testified the speed was 1-3 mph at impact. The photographs were relevant as it was clear that plaintiff was not rear-ended at anywhere near the speed claimed and the photographs were relevant to prove that the matter at issue was more or less probable. Plaintiff also objected to admission of the photos as there was no foundation. Plaintiff was shown photos of his vehicle at trial and asked if the photos fairly and accurately depicted the condition of his vehicle after the accident. Plaintiff testified he did not think so, but was impeached by his deposition testimony in which he stated the photos accurately reflected the damages.

This unpublished opinion held that if plaintiff introduces photos of one of the vehicles to support his or her position that the impact was consistent with the injuries sustained and claimed, the defense can introduce photos of the other vehicle or other views of same vehicle to contradict plaintiff’s assertion without accompanying medical expert testimony. While stating photos cannot be admitted solely on the
basis of challenging plaintiff's credibility, the door was opened when plaintiff testified that the impact was at 45-65 mph and used the photos of the damage to the front of defendant’s vehicle in support. Defense was allowed to introduce and use photos of the rear-end damage of plaintiff’s vehicle.

The decision to admit photos is within the discretion of the trial court and is based on whether the nature of the damage to the vehicles and the injuries to the plaintiff are such that a lay person can readily assess their relationship, if any, without expert interpretation. Addressing this issue early can aid in the decision if it will be necessary to obtain expert testimony to insure the admission of the photos in a minimal impact case. Expert testimony is not always necessary for photographs to be admissible, but in order to address this issue, it is imperative that photos documenting the damage (or lack of damage) be obtained and preserved.

Videotapes are admissible on the same basis as photographs and the admission of this evidence is within the discretion of the trial court. A majority of cases now involve automatic cameras or surveillance systems where a party is seeking to admit videotapes, CDs, or DVDs made from the system. In People v Taylor, 2011 IL 110067, 956 N.E.2d 431, the Illinois Supreme Court held that videotape evidence can be admitted under the “silent witness” theory in that a witness need not testify to the accuracy of the video as long as he or she testifies as to the accuracy of the process that produced the video. The Court found that use of the following factors was appropriate in determining the admissibility of a videotape: (1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process.

The Court stated this list of factors was nonexclusive, as some factors may not be relevant while other factors may need to be considered. Each case must be evaluated on its own facts, but the dispositive issue in each case is the accuracy and reliability of the process the produced the recording.

II. PRE-EXISTING INJURIES

Many times, claims for personal injuries involve plaintiffs who may have a history of prior injury or injuries to the same body part. The prior injury may or may not be close in time to the present accident and injuries claimed. The question is, “Can evidence of the pre-existing injury or injuries, whether or not to the same body part, be admitted at trial in defense of the case?” The following cases address what evidence is necessary for admission.

Voykin v. Estate of DeBoer, 192 Ill. 2d 49, 733 N.E.2d 1275 (2000) is the Illinois Supreme Court decision that addressed the admission of prior injuries in personal injury cases and the evidence required. The Court held that if a defendant wished to introduce evidence of a prior injury, whether or not to the same body part, a defendant must present evidence to establish the
relevance of the prior injury. For a prior injury to be relevant to causation, that prior injury must make it less likely that defendant’s actions caused any of plaintiff’s present injuries or an identifiable portion. A defendant must introduce evidence in the form of expert testimony (treating physician or retained expert opinion witness). It was found that juries need assistance in determining whether in fact the prior injury is genuinely causally related to the present or new injury. The Court’s holding requires expert evidence to establish relevance unless the trial court determines a lay person can readily appraise the relationship between the prior and present injuries without expert assistance.

*Voykin* requires evidence of some relationship between the pre-existing injury and the new injury, unless that relationship is “obvious.” Testimony of the treating physician is generally used to accomplish this and obtain the necessary evidence.

*Janky v. Perry*, 343 Ill. App. 3d 230, 797 N.E.2d 1066 (3d Dist. 2003) – While following the decision in *Voykin*, the third district distinguished *Voykin* and allowed introduction of pre-existing injury evidence when plaintiff opened the door on the issue. In this case, plaintiff testified on direct examination regarding the claim for a left shoulder injury as a result of the rear-end accident. There was evidence of prior left shoulder pain and plaintiff claimed an aggravation of pre-existing condition. Defense counsel cross-examined plaintiff as to the nature and extent of the prior shoulder injury, which included questions about prior pain complaints and possible diagnosis of a rotator cuff tear. The evidence deposition of plaintiff’s treating physician provided testimony that the left shoulder condition pre-dated the accident and the opinion that the accident made this condition worse or aggravated it was based on the history given to the physician by plaintiff. The jury decides the credibility of the witnesses including plaintiff. Evidence of the prior injury was admitted as plaintiff introduced the evidence of the prior injury, not defendant.

*Felber v. London*, 346 Ill. App. 3d 188, 803 N.E.2d 1103 (2d Dist. 2004) – This case also used the same rationale and exception as in *Janky* to allow for the introduction of a pre-existing injury without defendant presenting a defense medical expert. While there is need for expert testimony to show the relationship between the effects of a prior injury on the present or current injury, there was extensive testimony from plaintiff and plaintiff’s treating physician as to the extent of the prior injuries, treatment, symptoms, and possible effects of the accident on the prior injuries, which obviated the need for any further expert testimony. This testimony included the nature and extent of the prior injuries, symptoms and treatment, and effect of the collision on the prior injuries. It should be noted that defendant was barred from presenting an independent expert witness, but disclosed and used plaintiff’s treating physician and adopted that physician’s findings and opinions. The trial court did not abuse its discretion in allowing the introduction of the prior injuries based on the testimony presented.

*McKnelly v. Bumgarner*, 2013 IL App (4th) 120928-U – An unpublished case that also utilized the exception cited in *Voykin* that introduction of evidence of prior injuries without medical expert testimony doesn’t apply if plaintiff introduces evidence of prior injuries first. Defendant can
establish medical relevance of prior injuries through the plaintiff’s medical expert and need not call its own expert in order to introduce evidence of prior injuries.

While there is an exception to Voykin that allows introduction of prior injuries or pre-existing injuries, expert medical testimony is needed and necessary to make sure such evidence when relevant is admitted at trial.

III. MEDICAL BILLS

Questions arise as to the amount of plaintiff’s damages whenever there is payment or reduction in the amount of a medical bill incurred for treatment rendered as a result an accident. Liens may be received from medical providers, group health insurance carriers, Medicare/Medicaid, and other sources. The bills may be written off as the services rendered may have been donated. While reduced amounts or lien amounts may be considered in settlement negotiations, these same figures are barred from admission at trial due to application of the collateral source rule. Plaintiffs are currently allowed to submit the full amount of the medical expenses incurred, but must provide proof that the billed amounts were reasonable.

In Peterson v. Lou Bachrodt Chevrolet Co., 76 Ill. 2d 353, 392 N.E.2d 1 (1979), plaintiffs sought to recover the value of medical services, which were rendered free of charge at a Shriner’s Hospital. The Illinois Supreme Court upheld the lower court’s denial of plaintiff’s claim, stating that an individual is not entitled to recover for the value of services obtained without expense, obligation, or liability.

In Arthur v. Catour, 216 Ill. 2d 72, 833 N.E.2d 847 (2005), the Illinois Supreme Court weighed in on the issue of the amount of medical bills the jury is entitled to consider. The question presented was whether a plaintiff in a personal injury suit can present and recover for the full amount of medical bills when the medical provider accepted a reduced or lower amount pursuant to a preferred provider agreement. In this case, plaintiff’s medical bills were $19,355.25 and plaintiff’s group health carrier had paid $13,577.97. While discussing the collateral source rule, the Court held that the plaintiff was entitled to submit the amount of the charge billed at the time the service was rendered and that damages recoverable by plaintiff from a defendant are not decreased by the amount plaintiff received from insurance proceeds, where the defendant did not contribute to the payment of the insurance premiums. There remained a question as to the application of this decision to payments made under a government program such as Medicare/Medicaid.

In Wills v. Foster, 229 Ill. 2d 393, 892 N.E.2d 1018 (2008), the Illinois Supreme Court answered the question and held that plaintiffs are not limited to the amounts paid by Medicare and Medicaid. The Court also overruled its decision in Peterson, stating it was incompatible with the Court’s adoption of a reasonable value approach in determining whether, pursuant to the collateral source rule, a plaintiff was entitled to recover the full billed amount of medical expenses when the bill was settled later for a lesser amount. Plaintiffs must still present evidence to prove the
reasonableness of the charges, but defendants are no longer allowed to introduce evidence that a plaintiff’s bills were settled for a lesser amount. Defendants can challenge or cross-examine plaintiff’s witnesses called to establish reasonableness, or call their own witnesses to provide testimony that the billed amounts do not reflect the reasonable value of the services rendered.

The Court’s finding that a plaintiff’s recovery cannot be limited to the amounts actually paid by another source wholly independent from the tortfeasor does not relieve a plaintiff from providing testimony or evidence of the reasonableness of the charges submitted. Care must be taken in any agreement to stipulate to medical bills in advance of trial as plaintiff could be relieved of presenting evidence of reasonableness by the stipulation. The Court’s finding does not limit or prevent the parties from using a lesser or reduced amount in settlement negotiations or mediation prior to trial.

IV. ALCOHOL CONSUMPTION

Evidence or proof of alcohol consumption for a driver who was involved in an accident is simply the first step. In determining the admissibility of this evidence in a civil case, it must be determined that the consumption or intoxication resulted in impairment of the person’s mental and physical abilities with a corresponding diminution in ability to act with ordinary care.

_Petraski v Thedos_, 382 Ill. App. 3d 22, 887 N.E.2d 24 (1st Dist. 2008) – In this case, a police officer was responding to an emergency call with lights on and deploying the siren on approaching intersections. As the officer approached an intersection, plaintiff was traveling the opposite direction and made a left-hand turn into the officer’s path. Witnesses confirmed the operation of the officer’s lights. The defense expert was prepared to testify that plaintiff’s blood alcohol level was above .08, the presumptive level of intoxication, and that the intoxication impaired plaintiff’s depth perception, peripheral vision, and ability to judge speeds. The expert’s calculation and conversion to determine that figure was by the method generally accepted in the scientific community. Evidence of plaintiff’s intoxication was relevant to the extent that it would affect the care plaintiff would take for her own safety. The trial court’s denial of the admission of the expert’s testimony was an abuse of discretion as this testimony was probative of whether plaintiff was partially at fault for the accident.

In making a determination as to the relevance and admissibility of this evidence, 625 ILCS 5/11-501.2(b) applies equally to civil and criminal cases. This section states that a BAC under .05 yields a presumption of not under the influence; a BAC in the range of .05 to .08 does not give rise to a presumption, but may be considered; and a BAC above .08 gives rise to a presumption of under the influence. In a civil case, the ordinary standards of admissibility apply to a blood alcohol test and courts will consider the relevance, foundation and probative value vs. the prejudicial effect when making a decision as to admissibility. Expert testimony will be required to show impairment.
V. POLICE REPORTS & TRAFFIC CITATIONS

A. Police Reports

*Wilkinson v. Mullen*, 27 Ill. App. 3d 804, 327 N.E.2d 433 (1st Dist. 1975) – As a general rule, police reports are inadmissible as substantive evidence. The reports are considered hearsay and also do not fall under the hearsay exception for business records. The reports can be used to refresh an officer’s recollection and under certain circumstances, can be admitted as past recollection recorded. The prerequisites for admission as past recollection recorded in Illinois are: (1) witness has no recollection of occurrence or event recorded; (2) report fails to refresh witness’s recollection; (3) facts in report must have been recorded at time of occurrence or soon thereafter; (4) truth and accuracy of report when made must be established.

*People v. Andrews*, 101 Ill. App. 3d 808, 428 N.E.2d 1048 (1st Dist. 1981) found that police reports, while not admissible as substantive evidence, can be admitted for impeachment evidence as *past recollection recorded*.

*Loughnane v. Chicago*, 188 Ill. App. 3d 1078, 545 N.E.2d 150 (1st Dist. 1989) found the police report was admissible as past recollection recorded where the report, completed after the plaintiff suffered an injury and was hospitalized, stated that plaintiff slipped on a patch of ice and fell. Plaintiff claimed she had stepped in a hole or defect in the sidewalk and fell, and the cause of plaintiff’s injury was directly at issue.

B. Traffic Citations

It’s well settled law that a plea of guilty can be used in subsequent cases.

*Galvan v. Torres*, 8 Ill. App. 2d 227, 131 N.E.2d 367 (2d Dist. 1956) – A plea of guilty is an admission against interest, which may be received against the person in a subsequent proceeding.

*Wright v. Stokes*, 167 Ill. App. 3d 887, 522 N.E.2d 308 (5th Dist. 1988) – A defendant’s guilty plea is admissible at the time of trial to impeach his testimony.

*Young v. Forgas*, 308 Ill. App. 3d 553, 720 N.E.2d 360 (4th Dist. 1999) – A defendant, who has pled guilty to traffic citation, which is the subject of a lawsuit, can be afforded an opportunity to explain his plea.

*Thurmond v. Monroe*, 235 Ill. App. 3d 281, 601 N.E.2d 1048 (1st Dist. 1992) – A traffic conviction (not plea) is not necessarily admissible as proof of the facts forming the basis for the conviction.

*Batterton v. Thurman*, 105 Ill. App. 3d 798, 434 N.E.2d 1174 (3d Dist. 1982) – A stipulation to the facts leading to supervision in a traffic offense can be used in a later action, if appropriate.
The above contention and line of cases have been cited as recently as 2013 in an unpublished opinion out of the fourth district, which held “[i]n civil cases, Illinois law has long held the use of a guilty plea itself is admissible as an admission against interest in a subsequent civil case.” *People v. Tapp*, 2013 IL App (4th) 100664-U, ¶ 23.
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John practices in the areas of personal injury and property loss defense, workers’ compensation, trucking litigation, toxic tort litigation, and governmental law. John has defended clients in civil matters through trial and at mediations in Central Illinois and has defended clients and employers in workers’ compensation cases at the arbitration level and in appeals before the Illinois Workers’ Compensation Commission and Illinois circuit courts.

John began his legal career with Heyl Royster after a year in private practice in Columbus, Ohio, where he concentrated on personal injury and medical malpractice. Prior to becoming an attorney, John was a Liability Specialist with Country Companies Insurance (now, Country Insurance & Financial Services) for more than 20 years. In that capacity, John handled personal injury claims of all types, making daily decisions on coverage issues, liability and comparative fault, and settlement value, negotiating directly with claimants and attorneys to resolve these claims. John continues to effectively use the knowledge, experience and negotiating skills he gained in his claims and legal careers in the defense of clients. John received his J.D., cum laude, from Capital University Law School and his B.S. in Chemistry from Western Illinois University.

Publications
- “Catastrophic Injury According to the PSEBA (Public Safety Employee Benefit Act),” Heyl Royster Governmental Newsletter (2014)

Professional Associations
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- Sangamon County Bar Association (Memorial Committee)
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