

UPDATES AND DEVELOPMENTS ON DEFENDING LOW-IMPACT ACCIDENT CLAIMS

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I. Introduction

For many years as an insurance defense attorney, I have heard insurers complain about the ever-increasing number of lawsuits, proliferation of attorneys and presentation of questionable claims. In like manner, everyone in the insurance industry knows the payout of indemnity dollars has increased dramatically over the past several decades.

It is easy to point fingers as to who is to blame for these developments. Frequently we accuse overly zealous plaintiffs' attorneys, questionable medical providers, telemarketers, judges unwilling to dismiss frivolous cases and juries for awarding unrealistic damages. In the appropriate case any, or all, of these criticisms may be appropriate. To find the real "culprit", however, regarding the proliferation of insurance claims over the past twenty-five years, we really need look no further than in the mirror.

When I began practice as a young attorney in central Florida in the mid-1980s, the average "nuisance value" for a claim settlement was five hundred dollars. Recently, I had a judge advise me any amount below ten thousand dollars was nothing more than "nuisance value" to the insurance company to be rid of a lawsuit. Although that judge's figure still rings far too high, in this era a "nuisance value" settlement is generally in the range of five thousand dollars (\$5,000.00). No matter the condition of the economy or inflation, such a dramatic increase in only twenty years is unheard of.

The reason this increase has taken place is simply because the insurance industry, for far too many years, was willing to pay questionable and unmeritorious claims simply for "nuisance value" to avoid litigation or settle cases rather than proceeding to trial. A five hundred dollar settlement became a seven hundred fifty dollar settlement, which in turn became a thousand dollar settlement, and the spiral continued, with no end in sight.

Fortunately, our industry began to realize the error of its ways approximately ten years ago and began more aggressively addressing questionable claims and especially those involving minor impacts. The "MIST" (Minor Impact/Soft Tissue) analysis of claims began. The result, in the past ten years or more, has actually been quite dramatic, when viewed statistically, reducing not only the number of claims arising from minor-impact collisions but also driving jury verdicts substantially lower in many jurisdictions for auto-related claims.

In this program, we will not look "backwards", however, but instead look forward to the future for defense activities regarding these claims and recent developments in Ohio, and other jurisdictions, which allow insurers the opportunity to not only thoroughly investigate but even more aggressively defend these types of cases. This is not to say there are not some "road blocks" along the way and issues you must be aware of in handling and defending questionable minor-impact claims. We will address these issues, hopefully providing you with greater insight into how to identify, defend and resolve successfully claims of a questionable nature involving minor-impact collisions.

II. The Need for Individual Analysis

You may think it odd I would begin with this issue in a program focusing on new trends in defending soft-tissue and minimal-impact cases. Nevertheless, I think in any analysis of these types of claims, the most important thing to address at all levels, from the initial claim-handler, through claims-management and even to defense counsel, is the need to individually view and assess each claim.

Some insurers have gotten themselves in trouble by aggressively defending every case where a minimal impact has occurred. The reality is minimal impacts can, and do, cause injury. There are accepted scientific studies showing impacts of less than five miles per hour are capable of inflicting permanent injury.

Something to consider is frequently we in defense of claims, utilize the statistic something as minor as a sneeze or stepping from a curb can cause a disc rupture or herniation. This is one of the longest-used arguments in countering disc-herniation injuries in litigation. If, however, that is true, how can we then turn around and claim no one could ever be injured from a minor-impact rear-end collision?

The reality is stereotyping never has a good result, no matter what its application. Because of this, we must carefully make certain each file is reviewed fairly and impartially. One of the things I have learned in more than ten years of investigating medical and insurance fraud claims is sometimes there are true injuries and logical explanations, even for what appears on the surface to be highly questionable, if not fraudulent, activity. The minute we begin “assuming” every minimal-impact accident claimant is “lying” or simply seeking financial gain, is the day we will all be doing an extreme disservice to our companies and our insureds.

Although you need to train all of your staff personnel to aggressively identify, investigate and defend these types of claims, please remember to always do so with the underlying assumption the claim and injury are valid until the investigation proves otherwise.

III. Jury Trends

If you want to know whether this type of claim investigation is “paying off”, you need look no further than jury verdict analysis.

Even in Cuyahoga County, judges and attorneys have reported a dramatic decrease in the average jury verdict on soft-tissue injury claims in the past decade. I have actually been told by more than a few plaintiffs’ attorneys in northern Ohio they have expanded their advertising and marketing activities into southern Ohio and even begun new areas of practice because of the minimal value of questionable soft-tissue injury claims and the more aggressive stance being taken by insurers in defending those claims.

Like anyone else who has actual experience trying cases before juries, we can all tell our “horror stories” of jury verdicts which defy reason. The reality, however, is the vast majority of jury verdicts are fair and based upon reasoned understanding of the case. In my opinion, this is the reason why aggressive defense of minimal-impact collision claims has been so successful. When jurors see the photographs, hear the testimony, and are allowed to view the damage estimates, it becomes clear to them the injuries are highly questionable and the real motive behind the injury may well be for financial or insurance gain.

Criticize the jury system as we might, our legal system is still the best ever developed in human history. I remain convinced if we give jurors accurate and complete information they will normally reach the correct decision. The results shown throughout the insurance industry in defending these types of cases through successful jury trials demonstrate this is not simply theory but is reality.

IV. Use of Photographic Evidence

There have probably never been any type of litigated files where the old adage, “A photo is worth a thousand words,” is more appropriate than in defending MIST claims. Photographs taken as soon as possible following the accident showing minimal or no damage to either vehicle are frequently the deciding factor juries rely upon when we speak with them years later, following a successful jury verdict.

The important thing is to secure high-quality photographs clearly establishing little or no damage was done to either vehicle. Historically, insurance companies have been notorious for only photographing vehicles where property damage is being claimed. Although this may make perfect sense from a property damage standpoint, it makes absolutely no sense from a bodily injury defense standpoint. Especially in a rear-end collision, frequently the insured vehicle is going to sustain more damage than the claimant’s vehicle. If the claimant’s vehicle has no visible damage but the person submits an injury claim, it is even more important to document the lack of physical damage to their vehicle.

I frequently also receive files where only one or two photographs of the vehicles are provided and those photographs are taken from such a distance or angle as to render their use at trial virtually worthless. Especially in the age of digital photography, there is no justifiable reason why multiple and clear photographs from virtually every angle of both vehicles cannot be secured.

Oftentimes it is also important to photograph portions of the vehicle other than simply the rear bumper. For example, I have had claimants allege damage was actually done to the rear quarter-panel of the vehicle, even though the rear bumper sustained zero damage. Although I question the accuracy of such an allegation, without having a photograph of the side of the vehicle to prove them wrong, this testimony is still going to

be heard by a jury and could be believed. A simple series of photographs showing no damage to the side of the vehicle would have solved this problem fully.

Also consider whether photographic evidence of the undercarriage of the vehicle is warranted. Especially on vehicles with compaction bumpers, sometimes photographs can be taken showing little or no compaction of the shock absorber on the bumper has occurred. As is addressed subsequently in this presentation, one of the things you may want to consider is to have an auto-body specialist train your adjusters on what specific evidence and photographs to consider in defending MIST type of accident claims.

Before leaving the area of photographic evidence, however, I do want to bring one potential problem area to your attention. At least two judges in Cuyahoga County, Ohio, have refused to allow photographs of vehicles into evidence in minor-impact cases without corresponding testimony from a biomechanical engineering expert. We will discuss subsequently in this program the use of biomechanical engineering experts. The first of these decisions was by Judge Nancy Russo, who held the photographs were non-reliable and extremely prejudicial, as injuries could occur even when no visible damage was apparent on the vehicle. Interestingly, my understanding is Judge Russo is a former SIU investigator with Allstate Insurance Company.

Not all judges, even in Cuyahoga County, however, have adopted this same standard. Recently our firm tried a case in Cuyahoga County, and we were advised at the pretrial hearing the judge would not follow the decision of his two colleagues and was fully willing to admit photographic evidence, as long as it was undisputed the photos were taken of the vehicles in question, were taken following the occurrence of the accident and before any repairs to the vehicle were made. The important thing to understand is to make certain you, and your defense counsel, know fully the evidentiary standards of the judge to whom the case you are handling is assigned. You certainly do not want to find out at a final pretrial hearing, or at trial, the judge is striking the photographic evidence, if this is the evidence upon which the majority of your defense has been based.

V. Body Shop Analysis

I personally think this is one of the most overlooked aspects of investigating minor-impact collisions. Let me begin with a “war story.”

Several years ago, I jury-tried a case in Warren County, which was in most respects your “typical” minor-impact collision. It occurred during rush hour, on a Friday night. My client’s BMW had a small dent in the license plate, which may have been there previously from parking lot damage. The plaintiff’s vehicle, at most, had a few scratches on the rear bumper of an older Ford Taurus. The plaintiff’s vehicle had three occupants, a mother, father and teenage son. Interestingly, the parents were State Farm Insurance agents.

What made this case atypical, however, is the primary plaintiff was the female passenger. By the time the case got to trial, she had incurred more than three hundred thousand dollars (\$300,000.00) of medical expenses related to five back surgeries.

We secured a defense verdict on this case. Although I would like to tell you it was based upon “excellent lawyering”, at most I can take only partial credit. The plaintiffs in this case were difficult from the start. Although their Ford Taurus was approximately ten years old and, no doubt, had numerous scratches and other damage to the bumper well before this accident, the very smart claims adjuster who handled this file agreed with their request to have an entirely new bumper put on the rear of the car. This was an unnecessary expenditure by the insurance company of approximately six hundred dollars. What the plaintiffs did not know, however, was the adjuster agreed with the body shop to put a new bumper on the vehicle in exchange for the body shop giving him full possession and control of the bumper taken off the car. This was subsequently held as evidence until the lawsuit was filed. After litigation was instituted, we retained an expert and, on video camera, cut open the bumper, revealing none of the plastic waffle panels inside the bumper were damaged or deflected in any manner. We later played the video tape for the jury during the expert’s trial testimony.

As with any other case, the issue becomes the timeliness of collecting and preserving evidence. If you have a highly questionable claim, determine where the opposing vehicle is going to be repaired or the damage estimate prepared and speak promptly with the person who prepared the estimate or repaired the damage. If physical evidence such as the bumper, bumper shock absorbers or other material is available, secure that evidence for future use at trial.

Keep in mind as well there are multiple types of experts who can testify before a jury. You do not always need a physician or biomechanical engineering expert on every soft-tissue injury case involving a minor impact. Your best-qualified expert may be an auto body repair specialist who can explain to the jury why there is no evidence of any damage done to the vehicle based upon the physical condition of the bumper and the surrounding support system. Recently our firm conducted a trial where we had the body damage specialist testify at trial, and he testified regarding the respective bumper heights of the plaintiff’s and defendant’s vehicles to demonstrate the minor impact which occurred could not in any respect have caused the damage alleged by the plaintiffs.

The important thing about utilizing this type of body damage expert is to make certain you retain someone whose qualifications can withstand cross-examination and who can clearly present their testimony at trial. Much in the same manner as photographic evidence, you may also need to make certain the trial judge to whom your case is assigned will recognize and accept this type of expert witness testimony. It is the duty of your counsel to be able to adequately demonstrate to the court why the expert testimony is directly relevant to the case and why it meets the reliability and verifiability standards of the *Daubert* and *Kumho Tire* decisions from the United States Supreme Court.

VI. Use of Biomechanical Engineering Experts

As noted above, there may be some cases where use of a biomechanical engineering expert is a requirement if you are going to introduce photographic evidence at trial. In other cases, you may voluntarily want to use a biomechanical engineer for purposes of emphasizing to the jury the minimal impact of the collision and the lack of scientific evidence to support any claim of injury.

Biomechanics is generally defined as the analysis of the forces of impact on the human body. Although there are some medical doctors trained in the field of biomechanics, most biomechanical experts have an engineering background, combined with some additional study or degree in human anatomy. The primary scientific foundation of biomechanical engineering is simply the laws of physics. The idea is force is transferred through a vehicle, or some other mechanism, to the human body. The more intricate question then becomes what degree of force is required before any type of injury would reasonably be expected. Obviously, factors such as the physical condition, age and position of the person's body as well as the type of vehicles are all relevant to a biomechanical engineering analysis.

Biomechanical engineers can be extremely effective in testifying to a jury regarding factors such as "G" forces, the transference of energy and the amount of physical impact (translated into miles per hour) which are required before a body can sustain a foreseeable injury. Information regarding the actual movement of the human body, spine and especially the cervical area can all be important factors which can be testified to through biomechanical engineering testimony.

Especially with the advent of computer graphics and animation, the field of biomechanical engineering has become easier to translate to a jury through effective demonstrative exhibits and videos. Fortunately too, the costs for these type of demonstrative presentations has also decreased.

As with any other expert, however, the key to effective use of a biomechanical engineer is not the person who has the best credentials, writes the best report or will handle the case for the lowest fee. All of these may be factors you consider, but to me as a trial attorney, the only important thing beyond the qualifications of the expert is the ability of that expert to effectively and clearly communicate their opinions to a jury. The most credible of experts is of little or no value if they cannot engage with and communicate to the jury the foundations, reasoning and reliability of their opinions.

Deciding which case will merit the use of an expert witness such as a biomechanical engineer is an important analysis for you to consider in conjunction with your defense counsel. You will normally have the "luxury" of being able to retain the services of the biomechanical engineer even years after the occurrence of the accident, provided the initial investigation, photographic evidence, preservation of physical

evidence, if possible, as well as other proper investigation actions were undertaken in the early phases of the claim.

VII. Use of the Seat Belt Defense

Virtually every state has adopted a mandatory seat belt law. In most jurisdictions, the failure to use an available and operable seat belt is also admissible in defense of a personal injury claim arising from an automobile accident.

This was not the case, however, until recently in the state of Ohio. Ohio Revised Code Section 4513.263, however, has been amended to now permit limited use of the seat belt defense in court actions in Ohio. Specifically, the Ohio statute provides as follows:

...The failure of a person to wear all of the available elements of a properly adjusted occupant restraining device...or the failure of a person to ensure that each minor who is a passenger of an automobile being operated by that person is wearing all of the available elements of a properly adjusted occupant restraining device...shall not be considered or used by the trier of fact in a tort action as evidence of negligence or contributory negligence. But, the trier of fact may determine based on evidence admitted consistent with the Ohio Rules of Evidence that the failure contributed to the harm alleged in the tort action and may diminish a recovery of compensatory damages that represent non-economic loss...

As is clearly noted, the important thing to understand is Ohio has adopted a standard where failure to use the seat belt is not a defense of contributory negligence but instead is a reduction of the amount of damages being claimed due to the failure to wear the seat belt. This is more complicated than in many other states. The simple effect of this is the seat belt argument can only be used to offset as a percentage of damage from a claim for pain and suffering or other non-economic damages and cannot be used as a defense to the accident itself or as an offset to damages for medical expenses or verifiable lost wages.

Although the seat belt defense in Ohio is still relatively new, most courts are requiring the defendant establish first evidence the vehicle was equipped with an available and operable seat belt. This can be done in deposition testimony but should also be something which is reflected on the police report and which also should be asked in the initial recorded statement or interview being taken by the insurance company following the accident.

The second thing the defendant must prove is the failure to wear the available and operable seat belt directly caused and contributed to the injuries being claimed. Again, most Ohio courts have not developed definitive rules regarding use of the seat belt defense at this time, however, most courts will in all probability require some type of

expert testimony be utilized to establish the relationship between the injury and the failure to wear an available and operable seat belt. In certain cases, such as facial scarring or a head injury caused by impacting with the windshield, expert testimony may not be required. However, in cases of a more minimal impact nature, in all probability many judges may require you to present some type of expert testimony to establish the failure to wear an available and operable seat belt was directly related to the injuries being claimed.

Expert testimony regarding seat belt issues will predominantly come from biomechanical engineering experts, as noted above. Additionally, however, you may find certain orthopedic surgeons, especially if they have attended continuing medical education programs focused upon seat belt issues, are deemed by courts qualified to give expert testimony regarding the effect of not wearing a seat belt upon injury claims. This is something you, or your defense counsel, will need to address with the appropriate experts at time of retention of their services so you clearly identify the scope of the opinion you are asking them to address in any written report.

VIII. The Ohio Collateral Source Law and *Robinson v. Bates* (2006)

Much in the same manner as Ohio lagged behind many other jurisdictions in adopting a seat belt defense, Ohio courts have also taken a very pro-plaintiff standpoint regarding evidence of collateral sources being admissible at jury trials. Collateral sources are simply allowing the jury to hear information regarding health insurers or other parties actually paying the medical expenses being claimed by the plaintiff, rather than those persons actually having paid those expenses personally.

Through tort reform, which has now been upheld by the Ohio Supreme Court as constitutional, Ohio now has a much more mainstream collateral source rule, allowing this type of information to be presented to a jury.

The most recent Ohio tort reform act, which was upheld by the Ohio Supreme Court, became law on April 7, 2005. At that time, Ohio's collateral source rule was amended to provide:

1. ORC 2315.20 **Evidence of Benefits to Plaintiff from Collateral Sources**

(A) In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death or lost to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or disability payment. However, evidence of the life insurance payment or disability

payment may be introduced if the plaintiff employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.

(B) If the defendant elects to introduce evidence described in Division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

(C) A source of collateral benefits of which evidence is introduced pursuant to Division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against the defendant.

Although not as “pro-defense” as collateral source laws in other states, this 2005 version of Ohio’s collateral source law does permit a jury to hear evidence of benefits being paid by collateral sources. One of the most dramatic effects of this tort reform provision was to force a plaintiff’s counsel to name as involuntary plaintiffs or defendants the health care providers or other subrogated parties who have an interest in the case. As a defense lawyer, I actually welcome this process, as it allows us to present all of the evidence to the jury, including establishing the fact the plaintiff’s medical expenses were paid by insurance, even if a right of subrogation payment does exist. This can only be claimed, however, if the health insurer is a party to the action.

Perhaps more important than the tort reform act, however, was the 2006 decision from the Ohio Supreme Court in the case of *Robinson v. Bates*. This case was decided on December 20, 2006, and arose from an original case in Hamilton County, Ohio. Anyone who is a consumer of medical services with health insurance is well aware of the vast difference between the amount a medical provider bills and the amount actually accepted by that provider from health insurers for payment. This can literally be as dramatic as a ninety percent write-off between the amount billed and the amount actually accepted for payment.

Until the *Robinson* decision, Ohio courts permitted the plaintiff to introduce the amount of medical expenses actually billed, even if the majority of those medical expenses were written off by the health care provider. This meant the plaintiff could claim the full amount of the bill, even though the plaintiff was never personally responsible for anywhere close to the amount shown on the bill and the bill had been paid in full for a much lower amount.

The *Robinson* case dramatically changed Ohio law by holding both the original medical billed amount and the amount accepted as full payment by the health care provider are admissible before a jury to prove the reasonableness of the charges rendered for medical or hospital care. The Court further ruled the difference between the original medical bill and the amount actually accepted as payment in full is not a “benefit” as

defined under Ohio's collateral source rule and accordingly is fully admissible before the jury.

The effect of the *Robinson* case on actual trials is the plaintiff may now introduce into evidence the original amount billed by the medical care provider, and the defendant then has the right to introduce before the jury evidence of the much lower amount which was actually accepted by the medical care provider as payment in full. When presented properly this allows the defense to actually present the "true" cost of the treatment to the jury, for this reason some plaintiff's attorneys will actually take this strategy away from the defense and introduce both sets of medical charges during their case. Regardless, once introduced, it is then up to the jury, after hearing both the original amount and the reduced amount accepted for payment, to determine what is the reasonable cost incurred for medical expenses for the injury being claimed.

Although the initial reaction by many attorneys (both on the plaintiff side and the defense side) was this is a daunting task to present to a jury, in the few cases which have been tried since the *Robinson* decision the vast majority of the juries do seem to trend toward accepting the lower amount actually paid for the benefits, rather than the amount billed by the medical provider. My personal opinion is juries are more inclined to do so because they are well aware, from their own health insurance experience, of the actual amount submitted for payment by medical providers from health insurers being reduced. The net effect of the *Robinson* case is to allow the defense to present evidence to dramatically reduce the amount of medical expenses which were previously claimed by plaintiffs, thereby providing juries the option if they choose of awarding substantially lower damages.

Both the Ohio collateral source law, as amended through tort reform, and the *Robinson v. Bates* case decided by the Ohio Supreme Court, are strong evidence of Ohio's return to a more moderate legislative and judicial standards in the past ten years.

IX. Use of Background and Computer Search Reports

We have never lived in an age where more data has been available regarding individuals and vehicles, than in the current age of the computer search. These can be extremely valuable tools in investigating questionable claims, including minor-impact collisions.

Vehicle information is available from a number of sources regarding the history of a motor vehicle, prior collisions and repairs and other relevant information. Even car dealerships have remarkable information now available regarding service records on many vehicles. Some auto-repair shops have even begun taking digital photographs of vehicles to protect themselves from potential liability when a car is brought in for service. Most states have also updated their title laws in recent years regarding salvage and rebuilt vehicles.

It is now also easier than ever to access information regarding the prior owners of vehicles and question them regarding any preexisting damage or other information which may be relevant to the investigation of the claim. Quite simply, however, you will never gain access to this information, nor learn any of this information, unless you conduct the appropriate searches, locate this information and follow up as necessary.

In like manner, an extensive amount of personal information is also available regarding claimants, witnesses and even medical providers. Information regarding prior claims history, litigation (including prior personal injury lawsuits) and other relevant background information is oftentimes only a computer search away. Do not overlook the internet and other search tools as extremely valuable in developing information on health care providers, expert witnesses and even attorneys. Everything from litigation histories to professional disciplinary actions may all be relevant to defense of a claim or lawsuit.

Although it may not be universally true, our experience has been a number of the individuals involved in making personal injury claims for minor accidents oftentimes do have a prior claim history of auto injuries, premises liability claims or workers compensation claims. In the era of computer records, this information is more accessible than it has ever been at any time in the past to not only investigate claims but also impeach the credibility of a witness, either in deposition, examination under oath, or at trial.

X. Conclusion

Although this program has focused on “new developments” in the investigation of minor-impact collisions, the reality is the best way to investigate these claims, as in any other claim investigation, is simply good old-fashioned hard work. Nevertheless, there are new laws, court decisions and technologies which are available to assist you in the thorough and complete investigation of these type of claims.

It is my hope the time we have spent together today, and these materials, will aid you and your company in investigations of any nature but especially in aggressively and successfully defending the minor-impact collisions in which so many injuries are claimed but remain highly questionable.