SIGNIFICANT CASES AND IPI INSTRUCTIONS

RELATING TO AUTO ACCIDENT LITIGATION

AND SOFT TISSUE INJURY CASES

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EXPERT OPINIONS

Biomechanicist testimony is not admissible on issue of medical causation in minimal impact collision cases.

Martin v. Sally, 341 Ill.App.3d 308, 792 N.E.2d 516, Ill.App. 2 Dist.,2003. July 03, 2003

> Defendant also called Mark Strauss by way of a videotaped evidence deposition. Strauss is an accident reconstructionist **521 ***290 and biomechanicist. His training and professional experience involved the study of how humans may or may not be injured in different types of vehicular accidents. Strauss testified that he reviewed the police report, deposition transcripts, and photographs taken of both vehicles after the accident. He also researched measurements of an exemplar Dodge Caravan such as the one operated by plaintiff, and he testified about studies of whether the human body could be injured in low-speed, rear-end impacts.
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> [5] Expert testimony is admissible at trial when the expert has knowledge or experience not common to a layperson and that knowledge or experience would aid the trier of fact in determining the facts at issue. *In re Detention of Tittlebach*, 324 Ill.App.3d 6, 10, 257 Ill.Dec. 826, 754 N.E.2d 484 (2001); *Augenstein v. Pulley*, 191 Ill.App.3d 664, 681, 138 Ill.Dec. 724, 547 N.E.2d 1345 (1989). The critical issue is whether the expert's legal testimony aids the trier of fact by explaining a factual issue beyond its ordinary knowledge or whether the opinion merely recites a legal conclusion. *Eychaner v. Gross*, 321 Ill.App.3d 759, 779, 254 Ill.Dec. 557, 747 N.E.2d 969 (2001). The admission of expert testimony is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *In re Detention of Tittlebach*, 324 Ill.App.3d at 10, 257 Ill.Dec. 826, 754 N.E.2d 484.
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> [8] Strauss was qualified as an accident reconstructionist, biomechanicist, and biomedical engineer. Part of his professional experience as a biomedical engineer included the study of how humans may be injured in different types of vehicular traumas. Strauss opined that no human could have been injured in the accident. Strauss was also asked "whether the impact or contact between these vehicles would have been sufficient to aggravate any preexisting condition that the plaintiff had in her back such as a protruding disc at the L4–5 level." He believed

that this could not have aggravated her preexisting condition because "this is a case where the back is cradled and cushioned by the seat back 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."

We find that Strauss was improperly allowed to testify because he rendered an opinion as to individuals in general, which had no relevance to plaintiff. That other individuals might not suffer injuries in low-impact vehicular crashes has no bearing on whether this particular plaintiff might have suffered injury in this particular crash.

In a medical malpractice case, testimony from a Biomedical engineer on the causes of shoulder dystocia during childbirth can meet the FRYE test for expert testimony.

Ruffin ex rel. Sanders v. Boler, 384 Ill.App.3d 7, 890 N.E.2d 1174, Ill.App. 1 Dist.,2008. June 25, 2008

Before expert testimony will be admitted at trial, the proponent of the evidence must persuade the trial court to make three preliminary determinations: (1) the witness may be of assistance to the trier of fact; (2) the witness is qualified to ***265 **1184 give the testimony sought; and, (3) the testimony sought is supported by adequate facts, data, or opinions. M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 702.1, at 610 (7th ed.1999); see *Snelson v. Kamm*, 204 Ill.2d 1, 24, 272 Ill.Dec. 610, 787 N.E.2d 796 (2003) ("[e]xpert testimony is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence"). Where the expert testimony concerns a novel scientific methodology, the proponent must show the methodology upon which the proposed evidence is based meets the standard enunciated in *Frye:* general acceptance in the relevant scientific community. *In re Commitment of Simons*, 213 Ill.2d 523, 529–30, 290 Ill.Dec. 610, 821 N.E.2d 1184 (2004). The trial court's determination to admit expert testimony is reviewed for an abuse of discretion. *In re Commitment of Simons*, 213 Ill.2d at 530–31, 290 Ill.Dec. 610, 821 N.E.2d 1184. The trial court's *Frye* analysis, however, is reviewed *de novo*. *In re Commitment of Simons*, 213 Ill.2d at 531, 290 Ill.Dec. 610, 821 N.E.2d 1184.

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In this case, Dr. Boler argues Judge Morrissey properly allowed Dr. Grimm's testimony because (1) Dr. Grimm was qualified to testify as to a possible cause of Tanisha's injury, and (2) Dr. Grimm satisfied *Frye* because her methodology and conclusions derived therefrom are generally accepted within the scientific community.

A. *Need for a Medical Expert on Causation*

Independent of the *Frye*-related issues, the plaintiffs contend Dr. Grimm should have been barred from testifying as to causation because the question before the jury requires an assessment of the causation evidence to "a reasonable degree of medical certainty" and Dr. Grimm is not a medical doctor. The plaintiffs contend that the expert in a medical malpractice case "must be a licensed member of the school of medicine about which he seeks to render an opinion, and the expert must show she is familiar with the methods, procedures and treatments ordinarily observed by other physicians, in either the defendant [']s community or a similar community."

[7] This "same school of medicine" rule was first announced in *Dolan v. Galluzzo*, 77 Ill.2d 279, 285, 32 Ill.Dec. 900, 396 N.E.2d 13 (1979): "[I]n order to testify as an expert on the standard of care in a given school of medicine, the witness must be licensed therein." The plaintiffs, however, read this rule too broadly. The restriction as to who may serve as an expert applies to testimony " *concerning the standard of care.*" (Emphasis added.) *Greenberg v. Michael Reese Hospital* 83 Ill.2d 282, 291–92, 47 Ill.Dec. 385, 415 N.E.2d 390 (1980), citing *Dolan v. Galluzzo*, 77 Ill.2d 279, 283, 32 Ill.Dec. 900, 396 N.E.2d 13 (1979).

In *Greenberg*, it was the defendant hospital that took the position the plaintiffs take in this case. The defendant hospital argued that allowing the plaintiffs to withstand the hospital's motion for summary judgment with a counteraffidavit by a "health physicist," who gave an opinion as to the standard of care and its deviation, "contravenes this court's holding in *Dolan v. Galluzzo*, 77 Ill.2d 279, 32 Ill.Dec. 900, 396 N.E.2d 13 (1979)." *Greenberg*, 83 Ill.2d at 291, 47 Ill.Dec. 385, 415 N.E.2d 390. The defendant hospital argued "that inasmuch as [the health physicist] is not a practitioner of any school of medicine he should not be permitted to testify concerning conduct which involves a medical judgment." *Greenberg*, 83 Ill.2d at 292, 47 Ill.Dec. 385, 415 N.E.2d 390. The high ***266 **1185 court determined " that the rule of *Dolan* is inapplicable to the facts of this case," as the claim against the defendant hospital was one of institutional negligence as recognized by *Darling v. Charleston Community Memorial Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965). *Greenberg*, 83 Ill.2d at 293, 47 Ill.Dec. 385, 415 N.E.2d 390.

While this case involves professional negligence, we likewise conclude the *Dolan* rule is inapplicable to the facts of this case. Our *20 reason is simple: Dr. Grimm's testimony did not concern the standard of care applicable to Dr. Boler; it was not offered to explain a medical judgment. Dr. Grimm's testimony goes solely to an independent cause defense.

An expert witness can rely on police reports, photographs, and vehicle damage to form causation opinions.

[11] Federal Rule 703 provides that the facts or data upon which an expert bases an opinion need not be admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed.R.Evid. 703 (quoted in *Wilson*, 84 Ill.2d at 193, 49 Ill.Dec. 308, 417 N.E.2d 1322). Citing *Dugan v. Weber*, 175 Ill.App.3d 1088, 125 Ill.Dec. 598, 530 N.E.2d 1007 (1988), and *393 *People v. Ward*, 61 Ill.2d 559, 338 N.E.2d 171 (1975), as well as *Wilson*, plaintiff argues that this Rule 703 language, when applied to physicians, refers only to reports made and utilized during the course of the physician's *medical practice*, and not reports formed for litigation purposes. Plaintiff asserts that Dr. Glantz, a neurologist, would not utilize or rely on police reports as part of his medical practice, and it was thus error to allow him to rely on ***744 **51 the police report in his testimony in this case.

We do not interpret Rule 703, as adopted by *Wilson*, so narrowly. Instead, we agree with the trial court that the testimony in question here was allowable under Illinois Pattern Jury Instructions, Civil, No. 2.04 (2005) (hereinafter, IPI Civil (2005) No. 2.04), which is based, in part, on *Wilson*, and which was given to the jury in this case. In instructing the jury pursuant to IPI Civil (2005) No. 2.04, the judge stated:

"I have allowed witnesses to testify in part to records that have not been admitted in evidence. This testimony was allowed for a limited purpose. It was allowed so that the witness may tell you what he relied on to form his opinions. The material being referred to is not evidence in this case and may not be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, you will give the opinions testified to by the witnesses."

[12] Plaintiff next argues the trial court erred in allowing Dr. Glantz to rely on photographs of the two vehicles in opining that because there was minimal damage to the vehicles, there was minimal force, and therefore less likelihood of significant injury. Plaintiff points to the following colloquy between defense counsel and Dr. Glantz:

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Plaintiff argues there was no indication that Dr. Glantz had the education, training, experience, knowledge, or qualifications to opine that, based on the minimal ***745 **52 damage shown in photographs [FN8] of the vehicles, the force of impact was minimal and the likelihood of significant injury therefore was low.

FN8. The photographs of the vehicles were introduced into evidence by plaintiff during her case in chief.

In *Fronabarger v. Burns*, 385 Ill.App.3d 560, 324 Ill.Dec. 410, 895 N.E.2d 1125 (2008), the court rejected a similar argument in a case involving a traffic accident where the plaintiff complained of lower-back pain after her vehicle was rear-ended by the defendant's vehicle. The defendant's expert witness, a board certified neurologist with experience treating auto accident patients, relied in part on photos of the vehicles in forming an opinion of the injuries sustained by the plaintiff in the accident. The neurologist testified that the photos were significant because they showed no damage, and the photos were evidence of the amount of force, if any, sustained in the car accident. The neurologist stated: "[I]f the vehicle doesn't sustain any evidence of an impact, then it's not likely that the people in the vehicle are going to have significant evidence of an impact." (Internal quotation marks omitted.) *Id.* at 563, 324 Ill.Dec. 410, 895 N.E.2d 1125. The court held the neurologist could rely in part on the photographs in forming her opinion regarding plaintiff's injuries. In reaching this conclusion, the court noted: " 'Illinois case law is replete with physicians who have testified, based on observation and experience, regarding their opinion of whether a claimant was injured.' " *Id.* at 566, 324 Ill.Dec. 410, 895 N.E.2d 1125 (quoting *Jackson v. Seib*, 372 Ill.App.3d 1061, 1073, 310 Ill.Dec. 502, 866 N.E.2d 663 (2007)).

Here, Dr. Glantz, a board-certified neurologist with experience treating auto accident patients, testified that he relied, in part, on the *395 photographs showing little or no vehicle damage in forming his opinion as to the injuries sustained by plaintiff in the accident. Dr. Glantz testified, similar to the neurologist in *Fronabarger*, that "with minimal accidental injury to the motor vehicle and therefore minimal force it's not likely that there was any significant injury that was suffered to an individual with minimal force of that kind."

The trial court properly allowed Dr. Glantz to opine that, based in part on the photographs of the vehicles involved in the accident, the force of impact was minimal and the likelihood of significant injury therefore was low.

While a police officer's testimony about evidence from the scene of an accident is admissible, his reconstruction opinion about the speed of vehicles is not.

Watkins v. Schmitt, 172 Ill.2d 193, 665 N.E.2d 1379, Ill.,1996. April 30, 1996

[4] We first address the issue of whether the trial court erred in barring Officer Jansky from testifying as plaintiff's accident reconstruction expert at trial. Plaintiff argues that the trial court improperly barred Jansky's expert testimony and that his testimony raised a genuine issue of material fact as to Schmitt's speed. Plaintiff urges this court to follow the trend among appellate districts which recognizes

eyewitness testimony as just one factor in the determination of whether accident reconstruction testimony should be admitted. See *Augenstein v. Pulley*, 191 Ill.App.3d 664, 681, 138 Ill.Dec. 724, 547 N.E.2d 1345 (1989). Plaintiff further argues that several appellate cases measure the admissibility of expert testimony by the standard of whether the evidence will aid the jurors' understanding of the facts. See *Augenstein*, 191 Ill.App.3d at 680-81, 138 Ill.Dec. 724, 547 N.E.2d 1345; *Ketchum v. Dura-Bond Concrete, Inc.*, 179 Ill.App.3d 820, 831, 128 Ill.Dec. 759, 534 N.E.2d 1364 (1989). Plaintiff contends that Officer Jansky's calculations of speed would aid a jury's understanding of what factors contributed to the accident in this case. Plaintiff further claims that the notion that an eyewitness can estimate speed more accurately than an accident reconstruction expert is a dubious one, especially in light of the "smooth power of modern automobiles." Thus, plaintiff concludes that under this modern trend, Officer Jansky's calculations of speed were admissible.

[5] In response, defendants argue that estimates of automobile speed have traditionally been considered a matter of common observation rather than expert opinion. Defendants note that this court addressed the admissibility of an accident reconstructionist's speed calculations in *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill.2d 353, 359, 29 Ill.Dec. 444, 392 N.E.2d 1 (1979), and held that "the speed of an *205 automobile is not a matter beyond the ken of the average juror." *Peterson*, 76 Ill.2d at 359, 29 Ill.Dec. 444, 392 N.E.2d 1. Defendants further point out that the court in *Peterson* reasoned that jurors can draw their own conclusions on the basis of eyewitness testimony as to speed and, thus, testimony of speed calculations should not be admitted. *Peterson*, 76 Ill.2d at 359, 29 Ill.Dec. 444, 392 N.E.2d 1.

This court very recently addressed issues concerning expert reconstruction testimony and whether such testimony may be admitted when there is also eyewitness testimony in *Zavala v. Powermatic, Inc.*, 167 Ill.2d 542, 546, 212 Ill.Dec. 889, 658 N.E.2d 371 (1995). In *Zavala*, plaintiff, the only eyewitness, lost two fingers in a drill press accident and claimed that her fingers were cut and not pulled off. Defendant's reconstruction expert, Dr. Caulfield, testified that the only way the accident could have occurred was if the glove plaintiff wore became caught up in the reamer, a piece of equipment located in the drill press which plaintiff operated. *Zavala*, 167 Ill.2d at 543-44, 212 Ill.Dec. 889, 658 N.E.2d 371. Thus, Dr. Caulfield concluded that plaintiff's fingers were pulled, and not cut, because the reamer "presented only an entanglement, not a cutting, hazard." *Zavala*, 167 Ill.2d at 544, 212 Ill.Dec. 889, 658 N.E.2d 371.

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The expert testimony at issue in this case is distinguishable from the testimony admitted in *Zavala*. The expert in *Zavala* was able to determine that because a reamer spins at a high velocity and has no cutting surface it could not cut but could only pull off a user's fingers. Unlike estimating the speed of a car, this is not the type of knowledge that a lay person could obtain after watching a drill press in

operation. This type of analysis requires knowledge of the mechanics of a reamer and an application of scientific principles to determine that it could only cause certain types of injuries to its users. In contrast, any lay person with a reasonable opportunity to observe and ordinary experience with moving vehicles can estimate the speed of a car. Unlike *Zavala,* in this case a jury would be presented with sufficient evidence, through eyewitness testimony, to make its own factual determinations.

A plaintiff's testimony alone is sufficient to raise a question for jury on issue of causation.

Geers v. Brichta, 248 Ill.App.3d 398, 618 N.E.2d 531, Ill.App. 1 Dist.,1993.

June 07, 1993

Defendants initially contend that the jury's verdict in plaintiff's favor is against the manifest weight of the evidence. Defendants argue that the plaintiff failed to establish a causal connection between the collision in 1983 and plaintiff's present medical condition.

It is the jury's function to determine the preponderance of the evidence, and a reviewing court will reverse only if that determination is against the manifest weight of the evidence. (*Pharr v. Chicago Transit Authority* (1991), 220 Ill.App.3d 509, 163 Ill.Dec. 211, 581 N.E.2d 162.) A jury's verdict will not be set aside merely because the jury could have drawn different inferences and conclusions from conflicting testimony. *Friedland v. Allis Chalmers Co.* (1987), 159 Ill.App.3d 1, 9, 110 Ill.Dec. 879, 885, 511 N.E.2d 1199, 1205.

[2] Liability in a personal injury action cannot be based on speculation or conjecture and the burden is on the plaintiff to produce evidence, either direct or circumstantial to show not only that injuries exist, but also that they were the result of the occurrence at issue. (*Mesick v. Johnson* (1986), 141 Ill.App.3d 195, 204, 95 Ill.Dec. 547, 554, 490 N.E.2d 20, 27.) However, the plaintiff is not required to prove the case beyond a reasonable doubt or negate entirely that defendant's conduct was not the cause of the injury. (*Mesick*, 141 Ill.App.3d at 204, 95 Ill.Dec. 547, 490 N.E.2d 20.) There is no *407 requirement that a plaintiff produce medical testimony concerning the nature and consequences of injuries she sustained. Rather, the plaintiff's testimony alone is sufficient to raise a question for the jury on the issue of causation. *Mesick*, 141 Ill.App.3d at 205, 95 Ill.Dec. 547, 490 N.E.2d 20.

[4] Considering plaintiff's evidence in its entirety, the jury in the present case reasonably could have concluded that plaintiff's condition was caused by the 1983 **538 ***947 collision. Specifically, plaintiff testified that prior to April 15, 1983, she was in "fine physical condition" and had no physical complaints.

However, upon impact of the collision on that day, she felt her neck snap. Beginning that night and up through the date of trial, plaintiff experienced severe neck pain. Plaintiff's testimony was corroborated by the testimony of her son, Michael Geers, who stated that plaintiff did not suffer from any pain prior to the collision, and by Drs. Ajmere and Smith, who treated plaintiff for her severe neck pain.

PHOTOGRAPHIC EVIDENCE

Expert foundation IS required.

DiCosola v. Bowman, 342 Ill.App.3d 530, 794 N.E.2d 875, Ill.App. 1 Dist.,2003.

July 11, 2003 (

[3] The trial court granted plaintiff's motion *in limine* to exclude the photographs because they were irrelevant to any issues before the court in this case. "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." *Wojcik v. City of Chicago*, 299 Ill.App.3d 964, 971, 234 Ill.Dec. 137, 702 N.E.2d 303, 309 (1998). The trial court is "vested with broad discretion to grant a motion *in limine* 'as part of its inherent power to admit or exclude evidence.' [Citation.]" *Hawkes v. Casino Queen, Inc.*, 336 Ill.App.3d 994, 1005, 271 Ill.Dec. 575, 785 N.E.2d 507, 516 (2003). A reviewing *536 court will not disturb the trial court's decision to grant a motion *in limine* absent a clear abuse of discretion. *Hawkes*, 336 Ill.App.3d at 1005, 271 Ill.Dec. 575, 785 N.E.2d at 516. In determining whether there has been an abuse of discretion, this court may not substitute its judgment for that of the trial court, or even determine whether the trial court exercised its discretion wisely. **880 ***630 *Simmons v. Garces*, 198 Ill.2d 541, 568, 261 Ill.Dec. 471, 763 N.E.2d 720, 737 (2002). A reviewing court may find an abuse of discretion only where "no reasonable person would take the position adopted by the trial court." *Taxman v. First Illinois Bank of Evanston*, 336 Ill.App.3d 92, 97, 270 Ill.Dec. 244, 782 N.E.2d 803, 807 (2002). Applying that standard to the instant case, we conclude that the trial court did not abuse its discretion in granting plaintiff's motions *in limine* to (1) exclude evidence as to the dollar amount of property damage to plaintiff's or defendant's vehicle and (2) exclude testimony or photographs regarding the damage to the vehicles.

Moreover, the trial court's decision is consistent with the Illinois Supreme Court in the case of *Voykin v. DeBoer*, 192 Ill.2d 49, 248 Ill.Dec. 277, 733 N.E.2d 1275 (2000). In *Voykin*, our supreme court rejected the evidentiary rule known as "the same part of the body rule," which had essentially provided as follows: "[I]f 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." *Voykin*, 192 Ill.2d at 57, 248 Ill.Dec. 277, 733 N.E.2d at 1279. The *Voykin* court described the same part of the body rule as "nothing more than a bright-line relevancy standard." *Voykin*, 192 Ill.2d at 57, 248 Ill.Dec. 277, 733 N.E.2d at 1279. In abrogating the same part of the body rule, the *Voykin* court criticized this automatic relevancy basis of the rule. As the court explained " ' "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." ' [Citation.]" *Voykin*, 192 Ill.2d at 57, 248 Ill.Dec. 277, 733 N.E.2d at 1279. The *Voykin* court instead decided that for evidence of a plaintiff's prior injury to be admissible, the prior injury must make the existence of a fact that is of consequence more or less probable. *Voykin*, 192 Ill.2d at 56-57, 248 Ill.Dec. 277, 733 N.E.2d at 1279.

More importantly, the *Voykin* court pointed out that "jurors are not skilled in the practice of medicine." *Voykin*, 192 Ill.2d at 58-59, 248 Ill.Dec. 277, 733 N.E.2d at 1279. As the court explained:

"Without question, the human body is complex. * * * In most cases, the connection between the parts of the body and past and current injuries is a subject that is beyond the ken of the average layperson. Because of this complexity, we do not believe that, in normal circumstances, a lay juror can effectively or accurately assess the *537 relationship between a prior injury and a current injury without expert assistance. Consequently, we conclude that, if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the 'same part of the body' or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence. *This rule applies unless the trial court, in its discretion, determines that the natures of the prior and current injuries are such that a lay person can readily appraise the relationship, if any, between those injuries without expert assistance.*" (Emphasis added.) *Voykin*, 192 Ill.2d at 59, 248 Ill.Dec. 277, 733 N.E.2d at 1280.

This court has explained that the rationale for requiring a defendant to introduce this expert testimony is "to avoid what amount[s] to the jury forming medical opinions." *Hawkes v. Casino Queen, Inc.*, 336 Ill.App.3d at 1008, 271 Ill.Dec. 575, 785 N.E.2d at 518 (2003).

The same principles apply to the relationship between damage to a plaintiff's **881 ***631 vehicle and the nature and extent of a plaintiff's personal injuries. Nonetheless, contrary to the dissent's assertion, we are not creating a bright-line rule, we are rejecting a bright-line rule.

Expert testimony IS NOT required.

Ferro v. Griffiths, 361 Ill.App.3d 738, 836 N.E.2d 925, Ill.App. 3 Dist.,2005.

October 05, 2005

Ferro claims that it was improper and highly prejudicial to allow defendant to offer into evidence photographs that showed little damage to either vehicle. He argues that expert testimony is required to show a correlation between lack of damage to the vehicles and injury to plaintiff, citing the recent case of *DiCosola v. Bowman*, 342 Ill.App.3d 530, 276 Ill.Dec. 625, 794 N.E.2d 875 (2003).

[2] It is within the discretion of the trial court to decide whether evidence is relevant and admissible. *City of Rockford v. Elliott*, 308 Ill.App.3d 735, 242 Ill.Dec. 436, 721 N.E.2d 715 (1999). "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." *DiCosola*, 342 Ill.App.3d 530, 535, 276 Ill.Dec. 625, 794 N.E.2d 875, 879 (citing *Wojcik v. City of Chicago*, 299 Ill.App.3d 964, 234 Ill.Dec. 137, 702 N.E.2d 303 (1998)).

[4] When the trial court makes a decision to admit pictures, it has to determine whether the photographs make the resulting injury to the plaintiff more or less probable. The court must determine whether the nature of the damage to the vehicles and the injury to the plaintiff are such that a lay person can readily assess their relationship, if any, without expert interpretation. See *Voykin v. DeBoer*, 192 Ill.2d 49, 248 Ill.Dec. 277, 733 N.E.2d 1275 (2000). A reviewing court will not disturb the trial court's decision absent a clear abuse of that discretion. *DiCosola*, 342 Ill.App.3d 530, 276 Ill.Dec. 625, 794 N.E.2d 875. An abuse of discretion occurs only where no reasonable person would take the position adopted by the trial court. *Taxman v. First Illinois Bank of Evanston*, 336 Ill.App.3d 92, 270 Ill.Dec. 244, 782 N.E.2d 803 (2002).

In *DiCosola*, the trial court found that, absent expert testimony, the defendant could not admit photographs of the damage to the vehicles merely to argue that there was a relationship between the amount of property damage and the nature and extent of plaintiff's injury. Based on that decision, the court granted plaintiff's motion *in limine* to exclude the photographs of the vehicles.

*743 On review, the appellate court noted that the decision to admit the photographs was within the trial court's discretion. The court held that the trial judge did not abuse its discretion in requiring expert testimony to relate the extent of the vehicular damage to the extent of plaintiff's **930 ***199 injuries. The court rejected both the notion that such pictures must always be allowed or, on the other hand, that expert testimony is always necessary for the photographs to be admissible. *DiCosola*, 342 Ill.App.3d 530, 537, 276 Ill.Dec. 625, 794 N.E.2d 875, 881.

We agree with *DiCosola.* In any given case, expert testimony may be required to show a proper correlation between the extent of the vehicular damage and the nature and extent of plaintiff's injury. However, we refuse to adopt a rigid rule that proscribes the admission of pictures without an expert. The critical question in admitting these photographs is whether the jury can properly relate the vehicular damage depicted in the pictures to the injury without the aid of an expert. This is an evidentiary question that the trial judge must resolve.

While this case is close, we cannot say that the trial court abused its discretion by admitting the photographs without expert testimony. The pictures were introduced to show why minimal damage to plaintiff's vehicle was relevant to the nature and extent of plaintiff's injuries. Ferro testified that the impact to the van was "very heavy," causing his body to move back and forth and hit the oxygen tank. Dr. Cusick testified that Ferro did not have any additional bruising to his chest after the accident. The photographs depicted the physical damage to both vehicles as a result of the accident. Under these facts, the trial judge could properly have found that the pictures, by themselves, were relevant to prove the matter at issue was "more or less probable." See *Wojcik*, 299 Ill.App.3d at 971, 234 Ill.Dec. 137, 702 N.E.2d at 309.

The latest word.

Fronabarger v. Burns, 385 Ill.App.3d 560, 895 N.E.2d 1125, Ill.App. 5 Dist.,2008. September 29, 2008

[6] The plaintiff argues that absent expert testimony on the correlation between vehicular damage and plaintiff's injuries, photographs of the parties' damaged vehicles is inadmissible, citing *Baraniak v. Kurby*, 371 Ill.App.3d 310, 318, 308 Ill.Dec. 949, 862 N.E.2d 1152 (2007). The appellate court has rejected the notion that these photographs are always admissible or that expert testimony is always necessary. *Jackson*, 372 Ill.App.3d at 1070, 310 Ill.Dec. 502, 866 N.E.2d 663; *DiCosola*, 342 Ill.App.3d at 537, 276 Ill.Dec. 625, 794 N.E.2d 875; *Ferro*, 361 Ill.App.3d at 743, 297 Ill.Dec. 194, 836 N.E.2d 925. The court in *Ferro* stated that a trial court has to determine "whether the photographs make the resulting injury to the plaintiff more or less *565 probable" and "whether the nature of the damage to the vehicles and the injury to the plaintiff are such that a lay person can readily assess their relationship, if any, without expert interpretation." *Ferro*, 361 Ill.App.3d at 742, 297 Ill.Dec. 194, 836 N.E.2d 925. This is an ***415 **1130 evidentiary question that is left to the discretion of the trial court. *Ferro*, 361 Ill.App.3d at 742, 297 Ill.Dec. 194, 836 N.E.2d 925.

In this case, we cannot say that the trial court abused its discretion by admitting the photographs without expert testimony. Upon a review of the pictures and the record of the proceedings, we find that a jury could assess the relationship between the damage to the vehicles and the injury to the plaintiff without the aid

of an expert. The photographs were introduced to show why minimal damage to the vehicles was relevant to the nature and extent of the plaintiff's injuries. In this case, the plaintiff sought chiropractic treatment for an entire year for her lower back pain, while she was still able to participate in her bowling league three nights a week. The photographs depicted relatively minor damage to the plaintiff's vehicle and no damage to the defendant's vehicle. The trial court could properly have found that the photographs were relevant to prove that the plaintiff's injury was more probable or less probable. Accordingly, the trial court did not abuse its discretion.

[7] The remaining two arguments in the plaintiff's brief can be combined into one argument that the trial court erred in admitting Pentella's testimony showing a correlation between the photographs and the plaintiff's injuries. The plaintiff argues that the trial court should not have allowed the defendant's expert to testify that "if the vehicle doesn't sustain any evidence of an impact, then it's not likely that the people in the vehicle are going to have significant evidence of an impact." The plaintiff argues that the defendant failed to lay a foundation because Pentella was not qualified to give testimony regarding the damage to vehicles correlating with the injury to the plaintiff.

[8] An expert opinion is admissible if "the expert is qualified by knowledge, skill, experience, training, or education in a field that has 'at least a modicum of reliability,' and if the testimony would aid the jury in understanding the evidence." *Hiscott v. Peters*, 324 Ill.App.3d 114, 122, 257 Ill.Dec. 847, 754 N.E.2d 839 (2001) (quoting *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill.App.3d 789, 799, 242 Ill.Dec. 335, 721 N.E.2d 614 (1999)). The admission of expert testimony requires the proponent to lay an adequate foundation establishing that the information on which the expert bases her opinion is reliable. *Hiscott*, 324 Ill.App.3d at 122, 257 Ill.Dec. 847, 754 N.E.2d 839. If a proper foundation has been laid, the expert's testimony is admissible, but the weight to be assigned to that testimony is for the jury to determine. *Wiegman*, 308 Ill.App.3d at 799, 242 Ill.Dec. 335, 721 N.E.2d 614. The admission of expert testimony is *566 within the discretion of the trial court and will not be reversed unless the trial court abused its discretion. *Martin v. Sally*, 341 Ill.App.3d 308, 315, 275 Ill.Dec. 285, 792 N.E.2d 516 (2003).

In this case, the defendant laid a proper foundation for Pentella's expert testimony. Pentella is a graduate of Ohio State University, School of Medicine, and she is board-certified in both pain medicine and neurology. She testified that as a neurologist she has experience in treating patients injured in automobile accidents. She also testified that she had reviewed the plaintiff's medical records and the vehicle photographs and that she had performed an independent medical examination on the plaintiff. Pentella based her testimony on her observation and experience as a doctor who treats patients injured in automobile accidents. "Illinois case law is replete with physicians who have testified, based on observation and experience, regarding their opinion of whether a claimant was injured." ***416 **1131 *Jackson v. Seib*, 372 Ill.App.3d 1061, 1073, 310 Ill.Dec. 502, 866 N.E.2d 663 (2007).

The plaintiff relies on *Martin v. Sally*, 341 Ill.App.3d 308, 275 Ill.Dec. 285, 792 N.E.2d 516 (2003), in which the appellate court held that an accident reconstructionist's testimony based on generalities and not the specific facts lacked foundation. In *Martin*, the expert failed to consider the plaintiff's weight, height, and age. The expert also failed to consider how extensive the plaintiff's preexisting injuries were or whether the plaintiff wore a seat belt. In this case, however, when determining the severity of the plaintiff's preexisting degenerative conditions, Pentella considered the plaintiff's weight and age. Pentella also testified that the seat belt worn by the plaintiff probably reduced the chances of the plaintiff injuring her lower back. Further, in *Martin*, while the court found error, it did not find that the error was prejudicial or that the result of the trial was materially affected. *Martin*, 341 Ill.App.3d at 316, 275 Ill.Dec. 285, 792 N.E.2d 516. The testimony of the accident reconstructionist did not affect the outcome of the trial because the testimony of the other expert witnesses supported the jury's verdict. *Martin*, 341 Ill.App.3d at 316, 275 Ill.Dec. 285, 792 N.E.2d 516. In that case, Dr. Delheimer, a neurosurgeon, examined the plaintiff and reviewed the medical records. He believed that the plaintiff's surgery had no causal relationship to the automobile accident. Delheimer based his belief, in part, on the lack of damages to the vehicles, as shown by the photographs. In this case, Pentella based her opinions regarding the plaintiff's injury on her examination of the plaintiff, her review of the records, and in part, on the lack of damage to the vehicles as depicted in the photographs. The trial court did not abuse its discretion in allowing Pentella's testimony regarding the damages done to the vehicles, as depicted in the photographs, and the plaintiff's corresponding injury.

PRIOR INJURIES

A defendant must prove relevance of prior injuries with expert testimony.

Voykin v. Estate of DeBoer, 192 Ill.2d 49, 733 N.E.2d 1275, Ill.,2000. July 06, 2000

[8] The question remains, however, whether expert testimony is necessary to determine whether the prior injury is relevant to the current injury. In a similar context, namely, medical malpractice cases, this court has recognized that expert testimony is normally necessary "because jurors are not skilled in the practice of *59 medicine and would find it difficult without the help of medical evidence to determine any lack of necessary scientific skill on the part of the physician." *Walski v. Tiesenga*, 72 Ill.2d 249, 256, 21 Ill.Dec. 201, 381 N.E.2d 279 (1978). Nevertheless, expert testimony is not required in medical malpractice actions if "the physician's conduct is so grossly negligent or the treatment so common that a layman could readily appraise it." *Walski*, 72 Ill.2d at 256, 21 Ill.Dec. 201, 381 N.E.2d 279.

[9] We believe that similar considerations should govern here. Without question, the human body is complex. A prior foot injury could be causally related to a current back injury, yet a prior injury to the same part of the back may not affect a current back injury. In most cases, the connection between the parts of the body and past and current injuries is a subject that is beyond the ken of the average layperson. Because of this complexity, we do not believe that, in normal circumstances, a lay juror can effectively or accurately assess the relationship between a prior injury and a current injury without expert assistance. Consequently, we conclude that, if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the "same part of the body" or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence. This rule applies unless the trial court, in its discretion, determines that the natures of the prior and current injuries are such that a lay person can readily appraise the relationship, if any, between those injuries without expert assistance.

The relationship between current and prior injuries can be established with the plaintiffs testimony or with a treating physician.

Felber v. London, 346 Ill.App.3d 188, 803 N.E.2d 1103, Ill.App. 2 Dist.,2004.

January 30, 2004

Our review of the record leads us to conclude that the evidence in this case is such that the jurors could readily appraise the relationship between the injuries of which Felber complained after the collision and her preexisting injuries without additional expert assistance; thus, the trial court did not abuse its discretion in allowing London to introduce evidence of Felber's preexisting injuries. Unlike the evidence in *Voykin*, there was specific testimony, from both Felber and Dr. Feeley, regarding the extent of Felber's preexisting injuries and symptoms and the treatments she received in the months, even days, before the collision. Both Felber and Dr. Feeley were specifically questioned about Felber's condition after the collision, and Dr. Feeley testified about the possible effects of the collision on Felber's preexisting condition. This is precisely the type of testimony that obviates the need for additional expert testimony. Unlike the evidence in *Voykin*, the nature of Felber's prior condition and its possible relationship to her current claim were clearly established. The jury was free to make its own determination, in light of both parties' description of the collision, whether the collision caused, or contributed to, Felber's current condition. We find no abuse of discretion in the trial court's admission of testimony regarding Felber's prior injuries.

The plaintiff can open the door to evidence of a prior injury.

Janky v. Perry, 343 Ill.App.3d 230, 797 N.E.2d 1066, Ill.App. 3 Dist.,2003.

September 25, 2003

> In this case, Janky argues that the trial court erred, under the rule of *Voykin*, by allowing Perry's attorney to question Janky concerning previously seeking medical attention for her shoulder pain without having first introduced expert testimony concerning causation. We disagree.
>
> The rule of *Voykin* applies when a defendant seeks to introduce evidence of a prior injury to the same part of the body. However, in this case, the plaintiff, rather than the defendant, first introduced evidence of a prior injury to the same part of Janky's body. The first time Janky's lawyer asked Janky about her previous shoulder pain, Janky said that it was more of a pain in the area of her neck. The second time Janky's attorney asked about her previous shoulder pain, Janky said that she had previously experienced the pain, but infrequently.
>
> *235 The subject of Janky's previous shoulder pain having been raised on direct examination, Perry's attorney then pursued the matter on cross examination. Later in the proceeding, Janky introduced Morgan's testimony that Janky previously had **1070 ***152 sought medical attention for her shoulder and neck pain. Morgan also stated his medical opinion that her shoulder condition predated the car accident.
>
> Because Janky's attorney opened the door on the subject of her preexisting injury and later introduced testimony from her treating physician concerning this injury, we find the holding of *Voykin* to be inapplicable to the present case. Thus, the trial court did not abuse its discretion by allowing Perry's attorney to question Janky concerning previously seeking medical attention for her shoulder.

MINIMAL IMPACT LAW IN A NUTSHELL

Ford v. Grizzle, 398 Ill.App.3d 639, 924 N.E.2d 531, Ill.App. 5 Dist.,2010.

February 17, 2010

> A prior injury or preexisting condition may be relevant to the issue of a plaintiff's damages in a personal injury action. *Lagestee v. Days Inn Management Co.*, 303 Ill.App.3d 935, 944, 237 Ill.Dec. 284, 709 N.E.2d 270 (1999). Evidence of prior injuries may be relevant to negate causation, to negate or reduce damages, or for impeachment. *Voykin*, 192 Ill.2d at 57, 248 Ill.Dec. 277, 733 N.E.2d 1275. If a defendant wishes to introduce evidence of a prior injury, the defendant must

introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence, unless the trial court determines that a layperson can readily appraise the relationship between those injuries. *Voykin*, 192 Ill.2d at 59, 248 Ill.Dec. 277, 733 N.E.2d 1275.

[7] Before evidence of prior injuries may be admitted at a trial, the defendant must first present medical or other competent evidence to establish a causal connection between the evidence offered and the complained-of injury. *Lagestee*, 303 Ill.App.3d at 944, 946-47, 237 Ill.Dec. 284, 709 N.E.2d 270. For a prior injury to be relevant to causation, the injury must make it less likely that the defendant's actions caused any of the plaintiff's injuries or an identifiable portion thereof. *Voykin*, 192 Ill.2d at 58, 248 Ill.Dec. 277, 733 N.E.2d 1275. Further, even if the prior injury does not negate causation, it could still be *647 relevant to the issue of damages if it could establish that the plaintiff had a preexisting condition for which the defendant is not liable, thus reducing damages. *Voykin*, 192 Ill.2d at 58, 248 Ill.Dec. 277, 733 N.E.2d 1275. Finally, prior injuries can be relevant to impeachment in that a plaintiff may be examined with respect to his failure to disclose to his physician that he had previously suffered an injury to the same part of the body. *Voykin*, 192 Ill.2d at 58, 248 Ill.Dec. 277, 733 N.E.2d 1275.

In this case, we cannot say that the trial court abused its discretion by admitting evidence of the plaintiff's prior accidents ***334 **540 and injuries. at the triaL, dR. walsH, dR. spargO, dR. jenkinS, dR. pentella, and Dr. Margolis all testified to some degree that the prior injuries were relevant to the current injuries and that the plaintiff had suffered from a preexisting chronic pain-causing condition in his neck prior to the July 2002 accident. Further, the plaintiff was still being treated for his earlier accidents on the day of the July 2002 accident. The plaintiff testified that some of his treatment after the July 2002 accident was also related to the two earlier accidents, that some of the medical bills which he submitted to the jury were not solely related to the July 2002 accident, and that he had failed to inform some of his doctors of earlier accidents when he sought treatment for the July 2002 accident. Thus, we find that the trial court did not abuse its discretion in allowing evidence of the plaintiff's prior accidents and injuries.

[9] The plaintiff's second argument on appeal is that the trial court erred in denying the plaintiff's motion *in limine* concerning the amount of damage to the plaintiff's vehicle, photographs of the plaintiff's vehicle, and any argument regarding minimal impact. Specifically, the plaintiff argues that introducing the photos of the plaintiff's vehicle was highly prejudicial and that no expert testified about the photos or the impact of the vehicle.

We review a trial court's denial of a motion *in limine* under an abuse-of-discretion standard. *Baraniak v. Kurby*, 371 Ill.App.3d 310, 317, 308 Ill.Dec. 949, 862 N.E.2d 1152 (2007). Recently, this court has had two opportunities to rule on the admissibility of automobile accident photographs in negligence cases, first in the case of *Jackson v. Seib*, 372 Ill.App.3d 1061, 310 Ill.Dec. 502, 866 N.E.2d 663 (2007), and most recently in *Fronabarger v. Burns*, 385 Ill.App.3d 560, 324 Ill.Dec. 410, 895 N.E.2d 1125 (2008). Initially, we recognize that it is the function of the trial court to determine the admissibility and relevance of evidence, and its

ruling will not be disturbed absent an abuse of discretion. *Jackson*, 372 Ill.App.3d at 1070, 310 Ill.Dec. 502, 866 N.E.2d 663. An abuse of discretion occurs when no reasonable person would take the position adopted by the trial court. *Fronabarger*, 385 Ill.App.3d at 564, 324 Ill.Dec. 410, 895 N.E.2d 1125.

*648 Evidence is deemed relevant if it 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. *Fronabarger*, 385 Ill.App.3d at 564, 324 Ill.Dec. 410, 895 N.E.2d 1125. The plaintiff argues that absent expert testimony on the correlation between vehicular damage and the plaintiff's injuries, photographs of the parties' damaged vehicles are inadmissible at the trial; the plaintiff cites *Baraniak v. Kurby*, 371 Ill.App.3d 310, 308 Ill.Dec. 949, 862 N.E.2d 1152 (2007), *Ferro v. Griffiths*, 361 Ill.App.3d 738, 297 Ill.Dec. 194, 836 N.E.2d 925 (2005), and *DiCosola v. Bowman*, 342 Ill.App.3d 530, 276 Ill.Dec. 625, 794 N.E.2d 875 (2003). We have declined to accept a rigid rule that photographs are always admissible or that expert testimony is always necessary for those photographs to be admissible. *Fronabarger*, 385 Ill.App.3d at 564, 324 Ill.Dec. 410, 895 N.E.2d 1125. The critical question in admitting those photographs into evidence is whether the jury can properly relate the vehicular damage depicted in the photos to the injury without the aid of an expert. *Jackson*, 372 Ill.App.3d at 1070, 310 Ill.Dec. 502, 866 N.E.2d 663. This question is an evidentiary question left to the discretion of the trial court. *Fronabarger*, 385 Ill.App.3d at 565, 324 Ill.Dec. 410, 895 N.E.2d 1125.

In this case, we cannot say that the trial court abused its discretion by admitting ***335 **541 the photographs without expert testimony. Upon a review of the photographs and the record of the proceedings, we find that a jury could assess the relationship between the damage to the vehicles and the plaintiff's injuries without the aid of an expert. The photographs depicted some damage to the defendant's vehicle and no damage to the plaintiff's vehicle. The photographs were introduced to show why minimal damage to the vehicles was relevant to the nature and extent of the plaintiff's injuries, as stated by both Dr. Pentella and Dr. Jenkins at the trial. The trial court could have properly found that the photographs were relevant to prove that the plaintiff's injury was more or less probable. Therefore, the trial court did not abuse its discretion.

[10] Further, the plaintiff asserts that Dr. Pentella's testimony regarding minimal impact should have been excluded as highly prejudicial. The plaintiff argues that Dr. Pentella gave contradicting testimony and that she did not analyze the impact on the defendant's vehicle as a result of the collision. The plaintiff argues that, therefore, the defendant did not lay a proper foundation to admit Dr. Pentella's testimony.

[11] The decision whether to admit expert testimony is within the sound discretion of the trial court, and a ruling will not be reversed absent an abuse of discretion. *Fronabarger*, 385 Ill.App.3d at 565-66, 324 Ill.Dec. 410, 895 N.E.2d 1125. An expert's opinion is admissible if the expert is qualified by knowledge, skill, experience, training, or education in a reliable field and if the testimony would aid the jury in understanding the evidence. *649 *Fronabarger*, 385

Ill.App.3d at 565, 324 Ill.Dec. 410, 895 N.E.2d 1125. The admission of expert testimony requires the proponent to lay an adequate foundation establishing that the information on which the expert bases her opinion is reliable. *Fronabarger*, 385 Ill.App.3d at 565, 324 Ill.Dec. 410, 895 N.E.2d 1125. Once a proper foundation has been laid, the expert's testimony is admissible, but the weight to be assigned to that testimony is for the jury to decide. *Fronabarger*, 385 Ill.App.3d at 565, 324 Ill.Dec. 410, 895 N.E.2d 1125.

Just as in *Fronabarger*, we find that the defendant laid a proper foundation for Dr. Pentella's expert testimony. Dr. Pentella testified regarding her qualifications at the trial, including her education, observations, and experiences as a physician. See *Fronabarger*, 385 Ill.App.3d at 566, 324 Ill.Dec. 410, 895 N.E.2d 1125. Dr. Pentella based her opinions regarding the plaintiff's injuries on her physical examination of the plaintiff, her review of the plaintiff's medical records, and the lack of damage to the plaintiff's vehicle, as depicted in the photographs. Therefore, we find that the trial court did not abuse its discretion in allowing Dr. Pentella's testimony.

Illinois Pattern Jury Instructions-Civil 2011 Edition (West)

ILLINOIS SUPREME COURT COMMITTEE ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES

15.01 Proximate Cause--Definition

When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]

Instruction and Comment revised September 2009.

Notes on Use

This instruction in its entirety should be used when there is evidence of a concurring or contributing cause to the injury or death. In cases where there is no evidence that the conduct of any person other than a single defendant was a concurring or contributing cause, the short version without the bracketed material may be used.

Comment

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From these authorities, it may be concluded that (1) it will rarely be error to give the long form of the instruction, and (2) the short form may now be restricted to those cases where the evidence shows that the sole cause of the plaintiff's injury (other than the plaintiff's predisposition) was the conduct of a single defendant and there is no evidence that the plaintiff's conduct was a contributing cause.

12.04 Concurrent Negligence Other Than Defendant's

More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.

[However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.]

Notes on Use

This instruction should be used only where negligence of a person who is not a party to the suit may have concurred or contributed to cause the occurrence. This instruction may not be used where the third person was acting as the agent of the defendant or the plaintiff. Where two or more defendants are sued and one or more may be liable and others not liable, use IPI 41.03.

The second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was the conduct of a third person.

12.05 Negligence--Intervention of Outside Agency

If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may also have been a cause of the injury.

[However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.]

(FJL NOTE:A pre-existing condition of plaintiff may be the sole proximate cause of an injury as contemplated by IPI 12.05; Robinson v. Boffa, 930 N.E.2d 1087 (1St D. 2010))

30.21 Measure of Damages--Personal Injury--Aggravation of Pre-Existing Condition--No Limitations

If you decide for the plaintiff on the question of liability, you may not deny or limit the plaintiff's right to damages resulting from this occurrence because any injury resulted from [an aggravation of a pre-existing condition] [or] [a pre-existing condition which rendered the plaintiff more susceptible to injury].

Notes on Use

In FELA cases, IPI 160.27 should be used.

Comment

See IPI 30.03.

In *Balestri v. Terminal Freight Co-op. Ass'n,* 76 Ill.2d 451, 394 N.E.2d 391, 31 Ill.Dec. 189 (1979), *cert. denied,* 444 U.S. 1018, 100 S.Ct. 671, 62 L.Ed.2d 648 (1980), the court held it was reversible error to refuse an instruction that the plaintiff's right to recover damages for his or her injuries and disability is not barred or limited by the fact that they arose out of an aggravation of a pre-existing condition which

made the plaintiff more susceptible to injury. *See also Pozzie v. Mike Smith, Inc.*, 33 Ill.App.3d 343, 337 N.E.2d 450 (1st Dist.1975).

3.03 Insurance/Benefits

Whether a party is insured or not insured has no bearing on any issue that you must decide. You must refrain from any inference, speculation, or discussion about insurance.

If you find for the plaintiff, you shall not speculate about or consider any possible sources of benefits the plaintiff may have received or might receive. After you have returned your verdict, the court will make whatever adjustments are necessary in this regard.

Instruction, Notes and Comment revised October 2007.

Notes on Use

The Committee believes that this instruction should be given in all cases where insurance could play a role in the decision of the jury. With the wide prevalence of liability insurance, medical insurance or government benefits such as Medicaid or Medicare, many jurors question the role of insurance in contested accident, medical negligence or other cases. This phenomenon has been demonstrated by the Arizona Jury Project, and is well-known to judges and practitioners on an anecdotal basis. *See* Diamond et al., "Jury Ruminations on Forbidden Topics," 87 Va. L. Rev. 1857 (2001).

The failure to give the former 30.22 was held to be reversible error in *Baraniak v. Kurby*, 371 Ill.App.3d 310 (1st Dist. 2007).

Comment

This instruction combines the former 3.03 and 30.22. In a case where there is no mention of insurance throughout the trial, the giving of 3.03 was held not to be an abuse of discretion as the instruction accurately reflects Illinois law. See Auten v. Franklin, 404 Ill.App.3d 1130, 942 N.E.2d 500, 347 Ill.Dec. 297 (4th Dist. 2010).

Comment revised December 2011.

30.04.04 Increased Risk of Harm--Calculation

To compute damages for increased risk of future [specific condition] [harm] only, you must multiply the total compensation to which the plaintiff would be entitled if [specific condition] were certain to occur by the proven probability that [specific condition] will in fact occur.

[You do not reduce future damages by this formula if those damages are more [likely than not] [probably true than not true] to occur.]

Notes on Use

This instruction should be given whenever IPI 30.04.03 is given.

Neither this instruction nor IPI 30.04.03 should be given unless the plaintiff claims damages that are less than 50% certain to occur.

A plaintiff is entitled to all future damages proven more likely than not to occur. It has never been plaintiff's burden to establish future damages with 100% certainty to recover full compensation for those damages. Reducing damages for future losses, where the likelihood of occurrence is greater than 50%, is not permissible, and these two instructions should not be used in such a case. If the plaintiff seeks compensation

for future damages established by less than a 50% certainty, then IPI 30.04.03 and IPI 30.04.04 should be given.

Westlaw and West's Illinois Pattern Jury Instructions provided the source for the citations used above.