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## PRIOR INJURIES

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## PRIOR INJURIES

### INTRODUCTION

Plaintiffs and Plaintiffs' attorneys in personal injury cases are frequently confronted with two problems associated with the Plaintiffs' history of pre-existing conditions or prior injuries. The first of these is whether or not the law allows admission of prior injuries into evidence. The second issue is how a jury should be instructed on the question of a Plaintiffs' pre-existing injury once that evidence has been admitted.

### I. ADMISSIBILITY OF EVIDENCE OF PRIOR INJURIES

Courts have traditionally recognized that prior injuries or pre-existing conditions may be relevant to the issues of causation and damages in a personal injury action. Wilson v. Granite City Steel Division of National Steel Corp., 226 Ill.App.3d 96, 109, 168 Ill.Dec. 260, 589 N.E.2d 660 (1992). Courts have acknowledged, however, that for evidence of prior injuries to be admissible, a threshold level of relevance was necessary, and the Defendant had to show a causal connection between the evidence offered and the claimed injury. Carston v. McCray, 157 Ill.App.3d 1, 8, 109 Ill.Dec. 364, 509 N.E.2d 1376 (1987).

The Appellate Court developed a doctrine to set the limits for that threshold. The "same part of the body rule" permitted a Defendant to introduce evidence that the Plaintiff had previously suffered injuries similar to those at issue. Under the "same part of the body rule", evidence of a prior injury was admissible without any showing that it was causally related to the present injury, as long as both the past and present injuries affected the same part of the body. (See Brown v. Baker, 284 Ill.App.3d 401, 404, 219 Ill.Dec. 754, 672 N.E.2d 69 (1996)). If, however, the injury was not to the same part of the body, in order for that evidence to be admissible the Defendant had to demonstrate a causal connection between the current injury and the prior injury. Bailey v. Wilson, 299 Ill.App.3d 297, 303, 233 Ill.Dec. 405, 700 N.E.2d 1113 (1998).

Although the Supreme Court never addressed the "same part of the body rule", Appellate Courts across the State universally applied that rule. However, in 1996 the Fifth District decided the case of Brown v. Baker, 284 Ill.App. 3d 401, 219 Ill.Dec. 754, 672 N.E.2d 69 (1996). The Brown Court reasoned that the "same part of the body" rule invited a jury to speculate on issues of causal connection. The Court concluded that if the prior injury had long since healed and has shown no recurrent symptoms, a Defendant should not be permitted to introduce evidence of the prior injury without establishing causation through competent testimony.

Subsequently, the First District Appellate Court made a more general statement about the rules of admissibility: "Absent competent and relevant evidence of a causal connection between the pre-existing condition and the injury complained

of, evidence of the pre-existing condition is inadmissible." Cancio v. White, 297 Ill.App.3d 422, 430, 232 Ill.Dec. 7, 697 N.E.2d 749 (1998).

The rule was further refined by the Appellate Court for the First District in Lagestee v. Days Inn Management Company, 303 Ill.App.3d 935, 709 N.E.2d 270, 237 Ill.Dec. 284 (1990):

> After a careful review of Brown and Cancio, we hold that the Defendant is required to present medical or other competent evidence of a causal or relevancy connection between Plaintiff's prior injury, prior accident, or pre-existing condition and the injury at issue as a pre-requisite of admissibility...
>
> Defendant may not always need to present medical expert testimony for admissibility purposes. The exact evidence Defendant will need to produce to establish the relevancy or causal connection may, for example, depend on the nature, extent, duration and treatment of the prior injuries, prior accidents or pre-existing conditions and the injuries for which Plaintiff is seeking damages. (303 Ill.App.3d at 946-7)

Notwithstanding the decisions in Brown, Cancio and Lagestee, the Fourth District reconsidered and reaffirmed the "same part of the body rule" in Bailey v. Wilson, 299 Ill.App.3d 297, 303, 233 Ill.Dec. 405, 700 N.E.2d 1113 (1998). The Bailey Court held that "As long as there is some evidence of the nature, extent, duration, or treatment of the previous injury, an independent showing of causation is unnecessary."

The Supreme Court finally addressed the issue and the inconsistency between the Appellate Districts in Voikin v. Estate of Deboer, 192 Ill.2d 49, 733 N.E.2d 1275, 248 Ill.Dec. 277 (2000). In that case, approximately five years before the accident the Plaintiff suffered a injury to the same part of the body. The Trial Court allowed the evidence based on the "same part of the body rule." The Appellate Court reversed the decision, following the Brown and Cancio Courts. The Supreme Court granted leave to appeal and for the first time addressed the foundational requirements to establish proof of a prior injury:

> For evidence of a prior injury to be admissible at trial, that evidence must be relevant. The evidence of the prior injury must make the existence of a fact that is of consequence either more or less probable. In cases such as the one before this Court, the Defendant seeks to introduce evidence of the prior injury for one of three purposes: (1) To negate causation; (2) To negate or reduce damages; or (3) As impeachment.

With respect to causation, evidence of a previous injury is relevant only if it tends to negate causation or injuries. It is well-settled that a Defendant need not be the only cause to be held liable for an injury; rather, it is sufficient that the Defendant is a cause....Moreover, a Defendant is not relieved of liability simply because the only injuries suffered by a Plaintiff is an aggravation of a previous injury....But, for a prior injury to be relevant to causation, the injury must make is less likely that the Defendant's actions caused any of the Plaintiff's injuries or an identifiable portion thereof.

Even if the prior injury does not negate causation, it may still be relevant to the question of damages. For example, the prior injury may be relevant to establish that the Plaintiff had a pre-existing condition for which the Defendant is not liable and that the Defendant is liable only for the portion of damages that aggravated or increased the Plaintiff's injuries.

Additionally, a prior injury may be relevant as impeachment. For example, a Plaintiff may be examined with respect to his failure to disclose to his physicians that he had previously suffered an injury to the same part of the body.

* * *

...[W]e 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 nature of the prior and current injuries are such that a layperson can readily appraise the relationship, if any, between those injuries without expert assistance.

* * *

This evidence (in the present case) does not come close to demonstrating what the Plaintiff's "neck problems" were, when he suffered them, or when he last suffered from symptoms. Nothing about the evidence presented by the Defendant has any tendency to make it less likely that the Defendant caused Plaintiff's neck

injuries or that the Defendant caused Plaintiff to suffer damages. (192 Ill.2d at 57-59)

The Supreme Court's holding in Voikin was well-explained and applied in the case of Maffett v. Bliss, 329 Ill.App.3d 562, 771 N.E.2d 445, 264 Ill.Dec. 741 (2002). In that case, the Appellate Court for the Fourth District determined that the Supreme Court's decision in Voikin requires exclusion of evidence of prior injuries if: (1) the evidence of the pre-existing health condition did not specifically establish what the problem actually was; and (2) the evidence of pre-existing condition did not demonstrate (a) when the Plaintiff suffered these problems, (b) the exact nature and extent of those problems, or (c) how those problems affect the current condition.

The Appellate Court for the Third District again addressed the kind of foundational evidence necessary to admit evidence of a prior injury. In Caliban v. Patel, 322 Ill.App.3d 251, 750 N.E.2d 734, 255 Ill.Dec. 817 (2001), one of the Plaintiff's physicians testified that he saw the Plaintiff two times after a 1989 accident. He then saw the Plaintiff again following a 1992 accident. That doctor did not know whether the Plaintiff had any symptoms associated with his earlier back condition in the interim, and testified that the 1992 symptoms were "distinctly different" from prior symptoms. The Court held that that testimony did not meet the foundational requirements of Voikin.

In summary, Voikin and the Appellate Court cases which have interpreted it appear to clearly hold that before introducing evidence of a prior injury or pre-existing condition, the proponent must (1) establish exactly what the pre-existing problems were and when the Plaintiff suffered from them; and (2) the evidence must have some tendency to make it less likely that the Defendant caused the Plaintiff's neck injury or that the Defendant caused the Plaintiff to suffer damages.

## II. JURY INSTRUCTIONS

Once evidence of a pre-existing condition or prior injury has been admitted into evidence, litigants face the issue of proper instruction of the jury. The Illinois Appellate Court is divided on the question of appropriate jury instructions to be used in this circumstance.

In Illinois, aggravation of a pre-existing condition is considered to be a separate element of damages. See Kravcik v. Golub and Co., Inc., 286 Ill.App.3d 406, 221 Ill.Dec. 865, 676 N.E.2d 668 (1st D. 1997).

In cases involving pre-existing conditions, the majority view of the law in Illinois requires the use of both IPI 30.03 and IPI 30.21 (Podoba v. Pyramid Electric Inc., 281 Ill.App.3d 545, 217 Ill.Dec. 374, 667 N.E.2d 167 (5th D. 1996); Ficken v.

Alton and S. Ry. Co., 255 Ill.App.3d 1047, 193 Ill.Dec. 51, 625 N.E.2d 1172 (1993).

IPI 30.03 is part of a series of instruction intended to inform the jury as to the appropriate elements of damage in an appropriate case. If the case involves evidence of a pre-existing condition, then IPI 30.03 should be used in conjunction with, and as one of the elements included in, IPI 30.01. A reference to IPI 30.01 and the notes on use thereof is explanatory. IPI 30.03 includes as a specific element of damages the following:

> The aggravation of any pre-existing ailment or condition.

IPI 30.21 also addresses the question of a Plaintiff's pre-existing condition and provides as follows:

> 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.]

In Podoba v. Pyramid Electric, Inc., 281 Ill.App.3d 545, 667 N.E.2d 167, 217 Ill.Dec. 374, (5th D. 1996), the Court held that use of a defendant's instruction which purported to advise a jury to award damages only for the exacerbation and not for the underlying pre-existing condition was reversible error. The Court went on to state as follows:

> A tort feasor is liable for injuries he causes, including the aggravation of a pre-existing ailment or condition. Balestri v. Terminal Freight Cooperative Ass'n, 76 Ill.2d 451, 31 Ill.Dec. 189, 394 N.E.2d 391 (1979). When IPI Civil 3rd No. 30.03 is given, regarding compensation for the aggravation of any pre-existing ailment or condition, the accompanying Notes on Use for IPI Civil 3rd No. 30.03 direct that IPI Civil 3rd No. 30.21 also be given. (IPI Civil 3rd No. 30.03, Notes on Use, at 136.) IPI Civil 3rd No. 30.21 provides as follows:
>
> > "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].
>
> The combination of IPI Civil 3rd No. 30.03 and IPI Civil 3rd No. 30.21 correctly sets forth the law that a tort feasor is liable for injuries he causes, including the aggravation of a pre-existing condition, and adequately instructs "the jury that the damages assessed should not be reduced because the disability was due in part to pre-existing condition or for the reason that plaintiff, because of a pre-existing condition, was more susceptible to injury than an individual would have been without the pre-existing condition." (Balestri, 5th D.) (281 Ill.App.3d 550-1)

In Kravcik v. Golub and Co., Inc., 286 Ill.App.3d 406, 676 N.E.2d 668, 221 Ill.Dec. 685 (1st D. 1996), the Court also held that "if (IPI 30.03) is given, IPI Civil 3rd 30.21 should also be given." (286 Ill.App.3d at 411)

In Lay v. Knapp, 93 Ill.App.3d 855, 417 N.E.2d 1099, 49 Ill.Dec. 272 (3rd D. 1981), the Third District held that IPI Civil 30.03 - the damage element instruction - "did not adequately instruct the jury and was properly subject to amplification." The Court approved an instruction substantively the same as what is now IPI 30.29.

It should be noted that the Supreme Court has recently addressed the use of IPI 30.21 in Shelf v. Northeast Illinois Regional Community Railroad Corp., 201 Ill.2d 260, 775 N.E.2d 964, 266 Ill.Dec. 892 (2002). In that case the Court concludes that while IPI 30.21 correctly states the law as it applies in Illinois, that instruction should be not included in FELA cases. The Shelf case, however, presents an excellent discussion of jury instructions relating to pre-existing conditions.

See also Schiff v. Friberg, 331 Ill.App.3d 643, 771 N.E.2d 517, 264 Ill.Dec. 813 (1st D. 2002) (IPI 30.21 correctly instructs a jury regarding pre-existing injuries or pre-existing conditions and fairly and accurately states the applicable law.)

Additionally, although one Appellate Court (Smith v. City of Evanston, 260 Ill.App.3d 925, 197 Ill.Dec. 810, 631 N.E.2d 1269 (1994) has held that aggravation of a pre-existing condition should not constitute a separate element of damages, numerous subsequent Appellate Court decisions have held that the Smith case was an aberration and that the law in Illinois requires that IPI 30.03 and 30.21 correctly state the law to the jury in Illinois. For an excellent discussion of Illinois law, look to the Federal Court: Reed v. Union Pacific Railroad Co., 185 Fed.3d 712 (7th Cir. 1999).

Unfortunately, a recent decision by the Illinois Appellate Court for the Fourth District has lent even more confusion to the status of the law. In Boehm v. Ramey, the Appellate Court for the Fourth District stated as follows:

> B. When IPI Civil No. 30.21 is Given, IPI Civil No. 30.03 Should Not Be Given
>
> Relying on Smith v. City of Evanston, 260 Ill.App.3d 925, 935- 36, 197 Ill.Dec. 810, 631 N.E.2d 1269, 1277 (1994), defendant also argues "aggravation of a preexisting condition" should not be treated as a separate element of damages because it duplicated or overlapped other elements of damages, namely, "loss of a normal life," "pain and suffering," and loss of earnings, and the jury should not have been instructed it could compensate plaintiff separately for aggravation. We agree with Smith. An award of damages for aggravation of a preexisting condition overlaps with any award obtained for all of the other elements of damages. Stated another way, there is no need for Illinois Pattern Jury Instructions, Civil, No. 30.03 if No. 30.21 is given (Illinois Pattern Jury Instructions, Civil Nos. 30.03, 30.21 (2000)).

The disparity between Appellate Court decisions in this case apparently will go unresolved for the time being. Leave to appeal was not requested from the Boehm decision. When preparing jury instructions for a case involving a plaintiff with a pre-existing condition, great care should be taken in preserving this matter for appeal, as the apparent disparity between Appellate Court decisions may offer a unique window for appeal to the Supreme Court.

While the rationale of the Fourth District in the Boehm case appears to be reasonable, the majority opinion, as well as Supreme Court Rule 239 requiring use of IPI instructions, suggest that both instructions may be appropriate.